

Introduction

The overall format of this year's exam remained the same, with Part A questions assessing broad knowledge of the syllabus, and four problem questions in Part B requiring more applied knowledge. As usual, one of the problem questions assessed primarily candidates' understanding of absolute grounds, and one required a demonstration of the technique for dealing with relative grounds. As with most previous examinations, there was also a passing-off problem question.

Candidates overall did well this year, with a mean mark of 59% (up from last year) and a highest mark of 82%. The overall pass rate was 86% (one of the higher pass rates in recent years). However, behind these figures, a few candidates passed only "by the skin of their teeth". The remaining candidates were awarded marks in the 30%-45% range and appeared to have been poorly prepared for the examination.

The mean marks for all questions can be found below the feedback on individual questions.

Questions

Part A

Question number	Comments on questions
Question 1	This was a straightforward question requiring knowledge of the requirements for the protection of Well Known Marks, similar to last year's question. Many candidates achieved full marks.
Question 2	This was a simple question about eligibility to use the Madrid Protocol and many candidates achieved full marks.
Question 3	This question was about "use" declarations. Candidates struggled with this question, with the main weaknesses being: (1) lack of knowledge about the offices in which the Madrid Protocol-related documents should be filed; (2) overlooking "subsequent designations" in the Madrid Protocol; and (3) not accurately stating the "starting point" from which USPTO time limits are measured.
Question 4	This question was also about time limits, requiring knowledge of Art 139 EUTMR. Many candidates did not recall all the "starting points" from which the three-month conversion period is measured.
Question 5	This question related to the consequences of Brexit. The relevant policy is referenced in the syllabus. About half the candidates answered correctly, but others drew the wrong conclusion.

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Question 6	This was a straightforward question about amendments. It generally caused no problems, and appropriate “off-syllabus” answers were accepted.
Question 7	This was a question about priority, similar to last year’s. Most candidates handled it well this year, the primary point being that only the first filing of a trade mark attracts priority.
Question 8	This question was about assents. The majority of candidates understood what an assent was, while the remainder did not properly distinguish assents from assignments.
Question 9	This question required recall of part of section 15 of the Act on remedies. Surprisingly, the large majority of candidates answered it incorrectly. Statute strictly limits the circumstances in which destruction of infringing goods is available as a remedy.

Part B

Question number	Comments on question
Question 10	Almost every candidate took this year’s (primarily) “absolute grounds” question, which required the usual task of running through ss1 and 3 of the Trade Marks Act, including the Sieckmann criteria, in relation to a “non-standard” trade mark. Generally, this was answered well. As with all “non-standard” trade marks, the main point was that these are not necessarily perceived as trade marks and so lack inherent distinctive character. As in past years, weaker candidates confused being “capable of distinguishing” with being “devoid of distinctive character”. A number of candidates were rather over-zealous in applying the “deception” criteria. Candidates should not waste time recalling the <i>Windsurfing</i> criteria for acquired distinctiveness, in circumstances where trade marks have not yet been put on the market. This year, a relative grounds aspect was introduced (copyright in the music) in part (d). Unfortunately, many candidates missed this. Others identified the risk of copyright infringement, but believed it was an absolute ground objection.
Question 11	As always, candidates were awarded high marks in the “relative grounds” question, with weaker candidates also achieving good marks.

	However, it was disappointing to see that, for a second year in a row, many candidates failed to compare the goods as listed on the register. Rather, they applied irrelevant facts, namely the distribution channels used in practice by the respective parties (boutiques versus “pound stores”). They did this not only in their SOG analysis but also in their LOC analysis. Indeed, a surprising number of otherwise stronger candidates approached the SOG analysis correctly, but relied on these irrelevant facts in their LOC analysis.
Question 12	Passing-off problem questions are included most (but not all) years, and this one focussed on the topic of “non-standard” signs, namely a feature of a 3D product. Most FC5 question papers include one question about product or packaging design, in order to reflect the links between trade mark law and design law. Two-thirds of candidates attempted this question; however, this was the least well-answered Part B question, and weaker candidates did particularly poorly. Candidates could present a reasonable answer using the “classic trinity” plus some relevant analysis. However, higher marks could have been achieved for better knowledge of: (a) how overseas-based traders are treated when it comes to the subsidence of goodwill in the UK; and (2) some of the specific case law that relates passing off with 3D shapes, in particular the classic case <i>Dolly Blue</i>, and/or the detail within the <i>Jiff Lemon</i> judgment that addresses this issue. Furthermore, many candidates did not pick up on the hint that the pegs might serve a functional purpose and so were not capricious. More generally candidates were too ready to conclude that because there had been blatant copying, a misrepresentation would necessarily occur. On the plus side, candidates were more successful at distinguishing/compartimentalising goodwill from misrepresentation, and discussing customer recognition of the sign as part of the latter. Finally, a few candidates suggested destruction of infringing goods as a potential remedy. Strictly, and unlike with statutory trade mark infringement, this is not a remedy available to a court when exercising – as with passing off – solely its common law/equitable jurisdiction (unless offered as a voluntarily undertaking in lieu of delivery-up). The question also indicated that events were unfolding rapidly, and so an interim injunction should have been explicitly proposed.

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Question 13	This question looked at what constitutes infringement, plus the application of a number of statutory defences such as exhaustion and the “own name” defence. Generally, it was answered very well – far better than the passing-off question – albeit only a third of candidates opted for this question. The main overlooked issue was that, unlike with patents, use of a branded product for one’s own use falls outside the statutory list of infringing acts. It also does not constitute use in the course of “trade”.
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Mean Marks by Question

FC5	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Q8	Q9	Q10	Q11	Q12	Q13	Total
Mark available	2	3	10	6	4	6	3	4	2	20	20	20	20	100
Mean mark	1.3	2.3	4.0	2.9	2.1	4.7	2.6	2.6	0.8	11.6	14.7	9.0	11.9	59.1