

Foundation Certificate Syllabus

English Law FC2 (Law)

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1. Guidance for Candidates

The Patent Examination Board is an examination agency which has been accredited by IPReg to offer an examination only route for the Foundation Level Qualifications for patent attorneys. FC1 UK Patent Law is one of five examinations within the PEB Foundation Certificate. Together, the five examinations of the PEB Foundation Certificate:

- a) provide a structure which is benchmarked within the QAA Frameworks for Higher Education Qualifications of UK Degree-Awarding Bodies (2014) as being at Level 6 – a professional graduate-level certificate;
- b) develop understanding of the intellectual property law and professional ethics subjects set out in Schedule A of the IPReg Accreditation Handbook and the professional ethics applicable to IP practitioners: IPReg's Overarching Principles and Code of Conduct; standards of care and duties to clients, conflicts of interest, client confidentiality, financial activity, professional integrity;
- c) equip candidates with the transferable skills set out in Schedule B of the IPReg Accreditation Handbook

You should refer to the Qualifying Examination Foundation Certificate Programme Specification for full information on the Foundation Certificate including:

- QAA Credits of study
- QAA Level 6 Benchmarking
- IPReg Intellectual Property Law and Professional Ethics subjects
- IPReg General Transferable Skills
- Meeting the Minimum Competence Standard required for a Pass in the Foundation examinations.

The Foundation Certificate is structured to be equivalent to 60 QAA credits (where one credit is 10 hours of study). Each Foundation Certificate examination equates to 12 credits of study. You should, therefore, expect to spend around 120 hours of study in preparation for this examination.

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2. The Syllabus

Summary

To be successful in this examination, you will need to:

- demonstrate an understanding and appreciation of all the topics listed in Schedule A of the IPReg Accreditation Handbook relating to the Fundamentals of the English Legal system and Professional Ethics applicable to IP practitioners.
- demonstrate an understanding and appreciation of the following patent and trade mark law topics listed in Schedule A of the IPReg Accreditation Handbook: intellectual property transfer, commercialisation and licensing (including negotiation, international perspective, jurisdiction, arbitration), legal protection of trade secrets and confidential information, evidence, role of searching and other evidence.
- demonstrate that you have acquired the transferable skills set out in Schedule B of the IPReg Accreditation Handbook. Candidates should refer to Transferable Skills for more information but in summary, the transferable skills may be demonstrated by being able to recall the relevant principles, laws and rules, and/or apply them to one or more given scenario(s).

The **Content** states the topics which are covered and gives the related IPReg topics in brackets.

The **Learning Outcomes** describe, in detail, what you will have to demonstrate in the examination to show that you have the required knowledge and transferable skills.

Where appropriate the Learning Outcomes include additional notes to assist candidates including:

- the definitions and/or information that a candidate is expected to know, for example:
 - Outline the general principles for the level of damages awards including:
 - contract (to put the claimant in the position as if the contract had been fulfilled)
 - tort (to put the claimant back in the position if the tort had not been committed)
- an outline of the additional sub-topics, for example:
 - Define the elements necessary for the formation of a valid contract:
 - offer, including:
 - unilateral offer
 - communication of the offer
 - comparison with Invitation to Treat
 - termination of offer.

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Amendments to this syllabus made since the previous published version are indicated by **highlighted** text.

	Content	Learning Outcomes
1	The characteristics of the English legal system (Differences between common and civil law, sources of law, fundamentals of the judicial system including the IPEC and other courts, commercialisation and licensing (including negotiation, international perspective, jurisdiction, arbitration))	a) Outline the structure of the courts in England, including County Courts, the Divisions of the High Court, the Appeal Courts, the Supreme Court, and the relationship of the Intellectual property office tribunals (Appointed Person, decisions of Comptroller, Copyright Tribunal) to these courts b) Outline who makes decisions in these courts c) Describe where the Intellectual Property Enterprise Court (“IPEC”) sits within the court structure d) Define tribunal jurisdiction including which courts have civil or criminal jurisdiction, jurisdiction based on subject matter, costs, damages claimed, nature of claim and other factors e) Describe the routes and main grounds for appealing through the English Courts f) Define the basic concepts of judicial precedent: <i>stare decisis</i>, <i>ratio decidendi</i>, <i>obiter dicta</i>, <i>res judicata</i> and when they might arise g) Define the relevant tribunal and authority for obtaining judicial review as the only route of appeal from the Appointed Person h) Outline the procedure and main grounds for seeking judicial review i) Differentiate between the grounds for successfully obtaining a change of a decision by judicial review and the leave required for a judicial review to be conducted j) Describe and compare the main sources of UK law relevant to intellectual property and how these may be applied directly by a UK court: • statute • secondary legislation • decisions of the Court of Justice of the European Union and the General Court on the interpretation of trade mark, design and copyright law, taken prior to 31 December 2020 (the end of the Brexit Transition period) particularly in the context of trademark, design and copyright law • international convention • custom and precedent

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		k) Describe the roles played by registered patent attorneys, registered trade mark attorneys, solicitors, barristers and judges, including their rights of audience in which courts, and authorisations under the Legal Services Act 2007 l) Define the reasons for and applicability of legal professional privilege and litigation privilege to communications, with particular reference as to how this applies to registered patent attorneys m) Outline the different options for parties to resolve disputes with or without recourse to commencing (or continuing) court procedures and the nature of the final decisions for such options, distinguishing between Litigation and Alternative Dispute Resolution (“ADR”) and the consequences of failing to attempt use of ADR n) Describe and compare different types of ADR, including: • mediation: ○ use of a non-lawyer or non-specialist go-between (“mediator”) ○ without prejudice settlement discussions ○ decisions are non-binding unless a settlement contract/deed is signed ○ commonly parties may include a term on mediation into a commercial contract as a first method of resolving disputes though courts will not force parties to mediate • arbitration: ○ likely to be a binding decision ○ subject to the parties’ choice of rules or the unreasonableness of a decision, a court is reluctant to interfere with a decision on arbitration • opinions of the UKIPO: ○ the UKIPO issues an opinion at an early stage of proceedings (in IP matters) ○ non-binding decision ○ the parties are free to ignore the decision o) Differentiate between Civil Code and Common Law court systems at a general level only, including: • evidence, and especially oral evidence, role of hearings, costs-shifting • the adversarial nature of Common Law systems in contrast to the inquisitorial system p) Apply (a) to (o) to a scenario

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2	Law of court procedure (Fundamentals of the judicial system including the IPEC and other courts)	a) Explain the law of court procedure in the IPEC b) Outline the stages of IPEC court actions by reference to the Civil Procedure Rules (CPR) (detailed procedural knowledge is not required unless otherwise stated in syllabus): • the over-riding objective and the obligations it imposes (CPR Rule 1.1), including how a decision may be taken as a result of these obligations • compare the small claims and multi-track jurisdictions of the IPEC • the applicability of pre-action protocols to IP disputes, (including the Pre-Action Protocol in IP Cases) and sanctions for non-compliance • issue of claims and how proceedings can be served (CPR Rule 6.1-6) • full pleading of each party's case with sufficient evidence to found a complaint • judge's discretion is required to permit any further evidence, arguments or disclosure and is discussed at the Case Management Conference (CMC) • disclosure of each party's relevant documents, the general rule in CPR Rule 31 (detailed rules need not be learnt) and how this differs in the IPEC, obligations on the professional representative and litigant • rounds of evidence exchange in the form of witness statements • the exchange of expert evidence, the role and obligations of an expert witness (CPR Rule 35) • trial on liability • trial to last a maximum of 2 days, other hearings can be replaced by reviews of the papers c) Outline how the IPEC exercises a case management role both formally at Case Management Hearings (after pleadings or otherwise) and Pre-Trial Reviews (prior to trial) as well as at all times and hearings d) With reference to section 1 "The characteristics of the English legal system", identify how all decisions of the IPEC: interim, case management and final decisions on liability, can be appealed e) Outline how and why cases may be transferred between the Patents Court and the IPEC based on complexity and on applicable principles based on jurisdiction f) Outline the advantages/disadvantages of the IPEC over the Patents Court, including: • IPEC procedure is quicker (time limit on diarizing of trial) • less complex rules of procedure before IPEC, especially disclosure

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		• less expensive before IPEC, for example because decisions can be made without hearings • recoverable costs are capped at £50,000 for the trial on liability, £25,000 for the trial on quantum of damages (including an outline of the breakdown of scale costs for particular stages) g) Define Part 36 CPR 'Offers to Settle' and the phrases 'without prejudice' and 'without prejudice save as to costs'; including the strategic use of such rules and rules relating to their use (detail of CPR Rule 36 is required). h) Define the standard of proof and the burden of proof • in civil and criminal proceedings as a general rule for claimants/prosecution and as applied to proving a statutory or common law defence • in relation to a civil claim for fraud or fraudulent misrepresentation. i) Describe how this burden may shift onto the defendant in • a claim to copying (copyright, design right) once a claimant has demonstrated sufficient similarity between the works or designs that the defendant must show that copying has not taken place • in a claim for infringement of a process patent where the same product is obtained by a defendant, the defendant must show that a non-infringing process is used j) Apply (a) to (i) to a scenario
3	Remedies available in IP-related civil legal proceedings (Differences between common and civil law; patent law - remedies)	a) Define and differentiate between the available interim remedies in IP cases and the principles used by the Court in assessing whether to grant these interim remedies: • interim orders restraining infringement of IP rights until trial (interim injunctions and <i>American Cyanamid</i> principles) including distinguishing between very urgent ex parte applications and inter partes hearings (CPR Rule 25.1-3, PD 25A) • search and seizure orders (old <i>Anton-Piller</i> orders) (CPR Rule 25.1-3, PD 25A) b) Identify the circumstances when it might be appropriate to seek these interim remedies c) Describe the obligations on the claimant when obtaining such relief, including: • undertakings in damages • undertakings to commence proceedings • full disclosure (especially where application is ex parte) d) Describe the remedies available to a successful claimant in IP-related legal proceedings, including:

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		• injunction • damages/account of profits • aggravated or elevated damages • delivery up/destruction • advertisement of judgment e) Distinguish between legal and equitable remedies, including: • the basic principles of why an equitable remedy may be refused f) Distinguish between civil and criminal remedies, particularly the compensatory only nature of civil remedies taking into account the court's general power for uplift under The Intellectual Property (Enforcement etc) Regulations 2006 in IP cases and additional damages for flagrant infringement in copyright cases under <u>Copyright, Designs and Patents Act (CPDA) 1988 – Section 97</u> g) Outline the general principles for the level of damages awards, including: • contract (to put the claimant in the position as if the contract had been fulfilled) • tort (to put the claimant back in the position if the tort had not been committed) • expectations on a claimant to mitigate his loss, how it could be achieved and the effect of his not doing so h) Outline the general principles for the level of damages awards in IP infringement claims, including: • the situation where there is no market created by the claimant • the willing licensor-licensee approach or • where there is a market ○ the stolen sales ○ lost profits on claimant's sales ○ reasonable royalty on sales not made i) Explain the split between the trial on quantum or damages and on liability prevalent in intellectual property cases j) Apply (a) to (i) to a scenario

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4	Evidence in IP-related legal proceedings (Patent law – remedies; trade mark law - role of searching and other evidence)	a) Define and differentiate between the different types of evidence: • evidence of fact and evidence of opinion • hearsay evidence (in the context of civil proceedings only) • expert evidence b) Describe when a court may permit evidence obtained in market surveys to be admitted to support of cases in passing off or trade mark infringement, outline the so-called “Whitford guidelines” and describe what should be information should be brought before the court when seeking permission to call witnesses who responded to a survey or other experiment (knowledge of the law of passing off or trade marks is not required except in so far as to appreciate that such evidence may be required) • confusion • reputation c) Define the rules of admissibility of evidence of fact, evidence of opinion and hearsay evidence in civil proceedings (CPR Rules 32.2, 35) d) With reference to section 2 “The Law of Court Procedure”, outline the role of experts in court (CPR Rule 35), when such evidence is applicable and the implications on cost e) Describe the different methods of giving evidence in IP cases: • affidavit (CPR Rule 32.15 & 32.16) • witness statement, statements of truth and how one is drafted (CPR Rule 32, (PD 18.2), (PD 20.1 & 2)) • physical exhibits • oral testimony • live video (CPR Rule 32.3) • telephone (CPR Rule 6.2 & 6.9) • depositions (CPR Rule 34.8 (1) & (3), 34.9 (1)) • witness summaries f) Define when physical exhibits can be used and how they are admitted as an exhibit to a witness statement g) Define the nature of oral testimony and its relationship to witness statements and/or affidavits h) Apply (a) to (g) to a scenario

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5	The law of contract (Fundamentals of contract law)	a) Define the elements necessary for the formation of a valid contract: • Offer, including: ○ unilateral offer ○ communication of the offer ○ comparison with Invitation to Treat ○ termination of offer • Acceptance, including: ○ its relationship to offer ○ communication of acceptance ○ knowledge of acceptor ○ mode of acceptance ○ revocation of acceptance • Consideration, including: ○ rules (but not Promissory Estoppel) • Intention to Create Legal Relations • Incorporation of terms into the contract b) Differentiate between an invitation to treat, an offer and a counter offer c) Define the following terms: • privity of contract (and describe the circumstances in which this principle can be overcome) • the nature of conditions (i.e. terms going to the heart of a contract) • the nature of warranties (i.e. terms not going to the heart of a contract) • the nature of innominate terms (i.e. terms not defined in the contract) • misrepresentation, its remedies, burden and standard of proof ○ innocent ○ negligent ○ fraudulent d) Compare the effect of breaches of conditions and warranties e) Outline how and in what circumstances the Contracts (Rights of Third Parties Act 1999) alters Privity of contract

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		f) Outline the role of the court in assessing innominate terms g) Describe the remedies available for enforcement of a contract: • damages h) Differentiate between assignment and novation of a contract, including: • restrictions on the ability to assign a copyright licence • how to overcome such a restriction i) Outline the formal requirements for a Deed j) Differentiate between a contract and a Deed, including • the requirement for a Deed in certain transactions such as those conveying real property (detail not required) k) List the five principles for implying terms into a contract as set out in <i>BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 52 ALR 20</i> l) Define an application of the five principles, for example the assignment of copyright by implication as set out in <i>Robin Ray v Classic FM [1998] FSR 622, 624 at para 7</i> m) Apply (a) to (l) to a scenario
6	The law of tort (Fundamentals of the law of tort)	a) Define the elements to establish the tort of negligence: • the duty of care, including: ○ foreseeability of harm to persons (<i>Caparo v Dickman</i> [1990]2 AC 605) ○ proximity ○ assumption of responsibility ○ scope of duty • breach of duty, including: ○ the standard of care and associated factors ○ reasonable foreseeability of the type of harm ○ reasonable care • causation in fact, including: ○ the 'but for' test

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		• causation in law, including: ○ foreseeability ○ remoteness b) Define liability for negligent mis-statement, including: • elements for liability for pure economic loss contrasted with the general rule for negligence (<i>Hedley Byrne v Heller</i> [1964] AC 465) c) Define the tort of malicious falsehood, including: • the elements which need to be dealt with by the Claimant (or by the Defendant) in such a claim • defences • absolute privilege • limitations of qualified privilege defences d) Outline the vicarious liability of employers for negligent acts committed by employees e) Define where joint tortfeasorship in IP claims might arise f) Apply (a) to (e) to a scenario
7	The Law of Property (Patent & trade mark law - Intellectual property transfer)	a) Outline the law of personal property and trusts as it applies to ownership of intellectual property rights, with reference to the statutory definitions of property in: • <u>Patents Act 1977 – Section 30</u> • <u>Copyright, Designs and Patents Act (CPDA) 1988 – Section 90</u> • <u>The Trade Marks Act 1994 (UKTMA) – Section 22</u> b) Differentiate between legal and equitable title and when they might arise in assignments of IP rights c) Outline the nature of co-ownership of intellectual property rights d) Define the terms joint tenants and tenants in common in the context of co-ownership of intellectual property rights e) Describe how IP rights may be transferred or licensed, including by • deed • contract (including by necessary implication into a term of a contract) • gift

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		f) Define when a Deed is required to transfer IP rights, e.g. if part of a larger transaction g) Define the requirements to demonstrate a gift of IP rights has occurred h) Describe when a gratuitous licence may arise i) Describe how defects in legal title can be perfected and the requirements to be shown to a court to exercise its discretion to perfect such title j) Outline the advantages for an assignee or licensee of an enforceable agreement k) Apply (a) to (j) to a scenario
8	The Law of Trade Secrets and confidential information (Patent law - the legal protection of trade secrets and confidential information)	a) Identify how commercial and technical information such as know-how can be protected using trade secrets b) Outline the statutory protection of trade secrets law under The Trade Secrets (Enforcement etc) Regulations 2018, including without limit provisions applicable to procedures and remedies set out therein c) Define the test for the existence of a trade secret under The Trade Secrets (Enforcement etc) Regulations 2018 and contrast its protection with common law protection d) Define the 3-stage test that is laid down in <i>Coco v Clark (Engineers) Ltd [1969] FSR 41</i> to protect trade secrets in the UK under the common law rule of confidential information: - the information has the necessary quality of confidence - there is an obligation of confidence - there has been breach by misuse or disclosure e) Referring to the first stage of the test, outline the principles relating to the term “information”, including: - the different types of information protected - the requirement for the information to be definite - the quality of the information (e.g. immorality, non-trivial, novelty not required etc.) f) Referring to the first stage of the test, outline the principles relating to the term “confidence”, including: - that the protection of secrets or of value or significance is unknown to the public - the implications of reverse engineering - the implications of incorporation into a product g) Referring to the second stage of the test, outline the “reasonable recipient” test, including: - the implications of fiduciary, express and implied agreements

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		• that there is no requirement for a contract • the nature of the obligation, including its scope, its limitations in social situations, and the fact that it is a legal rather than a moral obligation h) Referring to the third stage of the test, outline the principles relating to the term “breach”, including: • that the breach is judged by the scope of the duty • the role of bad faith • the role of detriment i) Describe how breach of the 3-stage test is proven: • using direct evidence of derivation • using indirect evidence such as a “fingerprint” in a document • persuading a court that the defendant could not have derived the information from legitimate sources j) Outline the possible defences to an alleged breach: • consent (explicit or implied) • that the information is part of the defendant’s stock of knowledge • public interest (at a general level only) • freedom of expression (at a general level only) • legal rights to disclose (at a general level only) k) Outline the remedies for breach, including damages (or account of profits) and injunction l) Compare the different types of injunctions: • Urgent injunction – useful because information cannot be put back into the private domain • Final “springboard injunctions” including that court has discretion to ○ vary the length of time, ○ cover derivative products ○ possibly punish defendants • Possible injunctions on third parties - where they “knew or should from the circumstances have known of [the defendant’s] duty”

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		m) Outline the duty of good faith on employees as set out in leading case of <i>Faccenda Chicken v Fowler [1986] 1 All ER 617</i>: • rule is not one of strict liability • possible whistleblowing rights (no detail required) • role of restrictive covenants (no detail required) n) Outline the differences between a breach of confidence claim and a property right claim o) Outline the differences between a breach of confidence claim and breach of contract claim p) Apply (a) to (o) to a scenario
9	Business structures (Corporate structures)	a) Define the different types of businesses, including: • Limited companies ○ nature as separate legal entity ○ role of Articles of Association & Memorandum ○ requirements for incorporation ○ on-going registration at Companies House • Limited partnerships ○ nature ○ requirements for formation ○ types of partners • Limited liability partnerships ○ nature ○ requirements for formation ○ types of partners ○ requirements for on-going registration at Companies House • Partnerships ○ nature as a collection of individuals in business together as defined by Partnership Act 1890 ss1, 2 & 4, ○ existence or not of partnership agreement

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		○ collective liability for debt • Sole traders ○ individuals acting in business for themselves under their own legal identity ○ requirements or lack thereof of setting up in business b) Define the obligations and liabilities for the owners of these different types of business c) Compare the advantages and disadvantages of these different types of business d) Describe how security can be taken in return for investment in businesses and define the terms: • fixed charge • floating charge e) Identify the availability of the different types of investment to individuals and other legal structures f) Describe the relevant types of property over which the appropriate type of security can be taken g) Outline the registration of security interests on the Patent and Trade Mark registers h) Outline the legal and procedural basis of the right to object to a new company name at Companies House, including but not limited to the basis for an action before the Company Names Tribunal i) Describe the rights that may or may not exist to use a company name once it has been registered and contrast with the rights to use registered trade mark rights and unregistered trade mark rights (passing off) (knowledge of the law of passing off or trade marks is not required except in so far as to appreciate that such evidence may be required) j) Apply (a) to (i) to a scenario
10	Professional Conduct for a Registered Patent Attorney (The IPReg Code of Conduct, standards of care and duties to clients, conflicts of interest, client confidentiality, financial activity, professional ethics)	a) Describe a Registered Patent Attorney's ethical, legal and financial responsibilities as set out in IPReg's: i) Core Regulatory Framework Chapters 1, 2, 3, 6, ii) Client money guidance iii) Transparency and costs guidance; recalling the material to a high level of detail b) Outline the authorization given to a Registered Patent Attorney under the Legal Services Act 2007 to conduct litigation c) Describe the right to privilege in communications with clients under the Legal Services Act 2007 Apply (a) to (c) to a scenario

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3. Reading

The IPReg Core Regulatory Framework and Code of Conduct are essential reading.

Books and/or websites listed here can be used to support your learning. It is not an exhaustive list and other sources of information can be used.

- *The English Legal System* 2020 Gary Slapper and David Kelly, (19th edition) Routledge
- *Anson's Law of Contract* (2020) Beatson, Burrows & Cartwright (31st edition) Oxford
- *Street on Torts* (2021), Whitting, (16th edition) Oxford
- *Smith and Keenan's English Law* (2013) Charles Wild and Stuart Weinstein (17th edition) Pearson
- *Smith and Keenan's Company Law* (2019) Charles Wild and Stuart Weinstein (18th edition) Pearson
- *Legal Practice Course Guide Business Law 2020* Mavrikakis et al CLP

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4. The Examination

This syllabus is assessed via a three hour unseen examination. The pass mark is 50%.

The question paper is divided into Section A and Section B.

There are 100 marks available in total: 40 marks in Section A and 60 marks in Section B.

Candidates are instructed to attempt **all** questions in Section A and **three questions from four questions** in Section B.

- Each question in Section A is worth between **2** and 10 marks.
- Approximately 10 marks in Section A will examine 'Professional Conduct for a Registered Patent Attorney'.
- Each question in Section B carries 20 marks.