

FACULTY OF LAW
POSTGRADUATE DIPLOMA IN INTELLECTUAL PROPERTY LAW
AND PRACTICE 2017-18

Examiners' Report 2018

PART ONE

A. Statistics

1. Numbers and percentages in each category

The number of candidates taking the examinations was 70 (including one candidate who re-took two papers, and three reinstated candidates (suspended in 2016-17) who took two or three papers).

	2018		2017		2016		2015	
Category	No	%	No	%	No	%	No	%
Distinction	10**	14.29	8	12.12	10	16.13	7	12.5
Pass	55***	78.57	57****	86.36	48	77.42	41*****	73.21
Partial Fail*	5	7.14	1	1.52	2	3.2	8	14.29
Fail	0		0		2	3.2	0	
Total	70		66		62		56	

* candidates who failed one or more papers and are eligible to re-take those in the next academic year

** includes one candidate who withdrew from three papers in 2016-17 and completed the Diploma in 2017-18

*** includes one candidate who withdrew from three papers in 2016-17 and one candidate who withdrew from two papers in 2016-17 and who both completed the Diploma in 2017-18

**** includes three candidates who withdrew from two papers in 2015-16 and completed the Diploma in 2016-17

***** includes a candidate who withdrew from two papers in 2013-14 and completed the Diploma in 2014-15

2. Vivas

Vivas are not used in this Diploma.

3. Marking of scripts

Double marking of scripts is not routinely operated. 230 out of 472 (48.73%) scripts (34.07% in 2017; 43.67% in 2016; 39.2% in 2015) were second marked. Third marking may be used in exceptional cases and one script (0.21%) was third marked this year. Further details about second marking are given in Part Two (A.1.).

B. New examining methods and procedures

The Diploma is jointly taught and examined by senior law practitioners (solicitors) who are members of the Intellectual Property Law Association (IPLA) and by members of the Faculty of Law. Teaching commences with a two-week residential programme in Oxford in August/September followed by nine workshops (two of which are revision workshops) spaced over the academic year. The candidates are all newly qualified or trainee solicitors or barristers. The Diploma examination is divided into Part I and Part II. Part I focuses on the practice of intellectual property (IP) law and consists of five coursework assignments (two in Michaelmas, two in Hilary and one in Trinity Term). Each coursework assignment is preceded by a one-day workshop on the relevant IP subject. Part II consists of two unseen two-hour examination papers covering the range of IP law, and are written at the end of Trinity Term.

In each paper (coursework assignment or examination paper) a proportion of scripts chosen at random were second marked as a check to ensure that markers were adopting similar standards. Where any significant discrepancy was found, scripts were second marked and markers adjusted their marks (for all scripts) if they were out of line with other marker(s). In addition, all scripts with borderline marks (ie. 47, 48, 49, 67, 68, 69, also 53 and 54 as a sub-55 mark bars a Distinction), all failing marks (49 or below), and any problem scripts were second marked.

C. Possible changes to examining methods, procedures and conventions

1. Setting and checking the question paper for each coursework assignment (Part I) and examination paper (Part II) and the marking of candidates' scripts are the responsibility of a team of two (or more) members. The leader of the team has a considerable additional responsibility to ensure that procedures are carried out and deadlines met.
2. The examiners applied the marking and final outcome conventions as agreed by the Teaching Audit Committee of the Board of the Social Sciences Division and notified to candidates. For the award of the Diploma a candidate must have no mark below 50 in any of the seven papers (five coursework assignments plus two examination papers). A mark below 50 may not be compensated by good performance elsewhere.
3. A Distinction was awarded to two candidates who did not qualify under the final outcome rules (in the same examination year 3 marks of 70 or above, including 70 or above in at least one of the two examination papers, and no mark below 55). Both of these candidates had at least two marks of 70 or above supported by one or more high marks (68, 69).
4. The introduction by the University from October 2018 of a Merit outcome for all postgraduate taught (PGT) courses (which includes this Diploma) is very welcome.

D. Examination Convention

The Examination Convention (known as the Examiners' Edict) and an additional Notice to Candidates are attached (see Appendix 2).

PART TWO

A. General Comments

1. Second and third marking

The procedures for second marking were identified in Part One, B., above. First and second markers were required to discuss their marks and, wherever possible, agree the mark. This worked well with all second marked scripts receiving an agreed mark. One script was third marked.

2. Medical certificates, dyslexia/dyspraxia and special cases

For the two written examination papers special arrangements were required for seven candidates. Six candidates were granted extra time for those two papers, four of whom were also granted the use of a computer. Information in respect of one candidate was forwarded to the Examiners under Part 13.2 and 13.3. (factors affecting performance) of the *Examination Regulations* but the Examiners did not consider it appropriate to alter any mark or the final Diploma classification.

3. Materials in the examination

Candidates are permitted, under strict conditions, to take into the examination room their own copy of the current edition (13th in 2018) of Butterworths Intellectual Property Law Handbook. Their copy has to be absolutely clean and unmarked, and all copies are inspected before the start of the examination. All candidates supplied themselves with the Handbook, and no problems were encountered. In addition, candidates were provided in the examination room with an additional document (see Appendix 2 – Notice to Candidates).

4. Legibility

No candidate was required to have either of their examination paper scripts typed.

5. External Examiner

Dr. Naomi Hawkins joined the Board as our External Examiner. She was fully involved in every part of the examination process and was very helpful to us; we are very grateful to her.

6. IPLA Examiner

We are also very grateful to Mr. Robert Anderson of Hogan Lovells who, as coursework co-ordinator, organised and supervised the teams of practitioners involved in the teaching and examining of the coursework assignments. It is not an easy task to bring together for the Diploma colleagues who also have demanding professional lives, and we very much

appreciate his commitment and care. He was also fully involved in every part of the examination process.

7. Assessors

In addition to the examiners, 37 colleagues were assessors. This number is made up of professional colleagues and includes 4 academic colleagues, 3 of whom were from other universities. The generous help of them all is very much appreciated.

8. Diploma Administrator

Mrs. Ellen Moilanen is in charge of all aspects of the Diploma and is the first port of call for everyone involved, examiners, assessors and candidates. We confidently rely on her to ensure that the Diploma runs efficiently and smoothly. We know how fortunate we are to be in her hands, and we are very grateful.

B. Equal Opportunities issues and breakdown of results by gender

	2018				2017				2016				2015			
	Male		Female		Male		Female		Male		Female		Male		Female	
Category	No	%	No	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Distinction	5	18.5	5	11.63	4	12.12	4	12.12	3	12.5	7	18.42	4	16.67	3	9.38
Pass	19	70.38	36	83.72	29	87.89	28	84.85	18	75	30	78.95	18	75	23	71.88
Fail	3	11.11	2	4.65	0	0	1	3.03	3	12.5	1	2.63	2	8.33	6	18.75
Total	27		43		33		33		24		38		24		32	

The examiners were not asked to produce an ethnicity analysis of the results.

C. Percentage distribution of marks by paper

	70 plus		60-69		50-59		Under 50		Total
Part I	No.	%	No.	%	No.	%	No.	%	
Patents 1	1	1%	42	62%	22	32%	3	4	68
Patents 2	8	9%	46	71%	13	20%	0	0	68
Trade Marks and Passing Off	12	18%	35	51%	21	31%	0	0	68
Copyright	16	23%	40	58%	13	19%	0	0	69*

	70 plus		60-69		50-59		Under 50		Total
Design	13	19%	36	51%	21	30%	0	0	70**
Part II									
Intellectual Property I	7	10%	43	62%	18	26%	1	2	69** *
Intellectual Property II	10	14%	49	70%	10	14%	1	1	70** **

* includes 1 candidate who re-took the paper

** includes 2 candidates who took the paper having suspended in 2016-17

*** includes 3 candidates who took the paper having suspended in 2016-17

****includes 3 candidates who took the paper having suspended in 2016-17 and 1 candidate who re-took the paper

NB The figures above include 2 candidates who took all papers in Part I but then withdrew from both papers in Part II.

D. Comments on individual papers

These appear in Appendix 3.

Mr. R. Anderson (IPLA)
Dr. D. Gangjee
Dr. N. Hawkins (External)
Ms A.S. Kennedy (Chair)

Appendix 1 – External Examiner’s Report

Appendix 2 – Examination Convention and Notice to Candidates

Appendix 3 – Reports on individual papers

**EXTERNAL EXAMINER REPORT FORM 2018**

External examiner name:	Dr Naomi Hawkins	
External examiner home institution:	University of Exeter	
Course examined:	Postgraduate Diploma in Intellectual Property Law and Practice	
Level: (please <i>delete as appropriate</i>)		Postgraduate

Please complete both Parts A and B.

Part A				
<i>Please (✓) as applicable*</i>		Yes	No	N/A / Other
A1.	Are the academic standards and the achievements of students comparable with those in other UK higher education institutions of which you have experience?	✓		
A2.	Do the threshold standards for the programme appropriately reflect the frameworks for higher education qualifications and any applicable subject benchmark statement? <i>[Please refer to paragraph 6 of the Guidelines for External Examiner Reports].</i>	✓		
A3.	Does the assessment process measure student achievement rigorously and fairly against the intended outcomes of the programme(s)?	✓		
A4.	Is the assessment process conducted in line with the University's policies and regulations?	✓		
A5.	Did you receive sufficient information and evidence in a timely manner to be able to carry out the role of External Examiner effectively?	✓		
A6.	Did you receive a written response to your previous report?			✓
A7.	Are you satisfied that comments in your previous report have been properly considered, and where applicable, acted upon?			✓

** If you answer “No” to any question, you should provide further comments when you complete Part B. Further comments may also be given in Part B, if desired, if you answer “Yes” or “N/A / Other”.*

Part B

This is my first year as External Examiner on the Postgraduate Diploma in Intellectual Property Law and Practice, and I am very happy to be involved with the programme. I was given regular updates and my input was sought regularly in relation to the review of multiple assessments during the course of the academic year. I was present at Examination Board meetings on 18 May 2018 and 6 July 2018.

The programme ran smoothly over the course of the academic year, and based on my involvement, I am happy to confirm that the academic standards of the programme were appropriate, with the range of performance of students in keeping with the standards achieved at comparable institutions and that the assessment processes were conducted rigorously, fairly, and in accordance with the University’s regulations. Further detail is provided below.

B1. Academic standards

The Diploma is an excellent course which examines students on the core areas of intellectual property rights. Candidates are expected to have a thorough knowledge of the key principles, controversies and debates relevant to these rights, and demonstrate this through undertaking both assignments and examinations. In the assignments, candidates apply their knowledge and legal reasoning skills to realistic and challenging factual scenarios. In the examinations, candidates also engage with some of the wider policy debates in the field, in answering one essay question and one problem question.

In the Diploma cohort for this academic year, student performance standards were high. An appropriate number of candidates achieved a Distinction result. Although there were a number of re-sits, the numbers were relatively low, and understandable in light of the range of subjects covered, the rigour of the assessment standards and the competing professional commitments of the students.

The introduction of the Merit award classification from next academic year is to be welcomed, as it will help to distinguish the difference in quality of students who currently fall within the same very broad classification. I understand that the introduction of the Merit award has been sought for a long time, and I echo my predecessors in strongly supporting its introduction.

B2. Rigour and conduct of the assessment process

In the Diploma, candidates undertake both assessed coursework (Part I) and examinations (Part II). I had the opportunity to comment on all of the assignment questions as part of the scrutiny process, and was satisfied that they were directed at key issues and were appropriately challenging. I have been impressed by the care and attention given to setting and scrutinising the coursework questions by those involved, both to generating relevant and realistic scenarios, and to ensuring that the questions are appropriately taxing and as fair and free from ambiguity as possible. There was also close attention given to the scrutiny of the Examination questions, for both content and form. I was part of these thoughtful and productive collegiate discussions at the examination board meeting on 6 May 2018.

I was present at the examination board meeting on 6 July 2018, where all the award classifications were closely scrutinised before being finalised. Close attention was paid in particular to any borderline cases, and final classifications agreed. In two cases, one borderline fail, and one where medical evidence for special consideration was put forward, individual scripts were reconsidered before final classifications agreed. In all cases, I was convinced by explanations for particular results and patterns of results.

The smooth running of the Diploma depends on the coordination and management of many people, and the administration of a number of pieces of assessment with tight deadlines. Ellen Moilanen does an excellent job in administrating these complex elements and ensuring all goes according to plan.

B3. Issues

In my view, there are no issues which should be brought to the attention of supervising committees in the faculty/department, division or wider University.

B4. Good practice and enhancement opportunities


As noted in other sections.

B5. Any other comments

There is great care and attention to detail shown throughout the administration and assessment on the Diploma. The candidates achieve highly, with an appropriate range of marks, including a good number of distinctions and an appropriate number of re-sits. It has been a pleasure to be associated with such an impressive postgraduate programme, and I look forward to continuing my involvement in future years.

Dr Naomi Hawkins
Senior Lecturer

University of Exeter Law School
Amory Building
Rennes Dr
Exeter EX4 4RJ

Signed:	
Date:	2 August 2018

Please ensure you have completed parts A & B, and email your completed form to: external-examiners@admin.ox.ac.uk, and copy it to the applicable divisional contact set out in the guidelines.

IMPORTANT – TO BE RETAINED FOR FUTURE REFERENCE**UNIVERSITY OF OXFORD****FACULTY OF LAW****DIPLOMA IN INTELLECTUAL PROPERTY LAW AND PRACTICE 2017-18****EXAMINATION CONVENTION (NOTICE TO CANDIDATES)**

*This document is traditionally known as the Examiners' Edict. It is the means by which the Examiners communicate to the candidates information about the examination. It is very important that you should read it carefully; **there are procedures to be followed and deadlines to be observed.***

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1. INTRODUCTION

ROLES OF THE BOARD OF THE SOCIAL SCIENCES DIVISION AND OF THE BOARD OF THE FACULTY OF LAW

Examination conventions are the formal record of the specific assessment standards for the course or courses to which they apply. They set out how examined work will be marked and how the resulting marks will be used to arrive at a final result and classification of an award.

The supervisory body responsible for approving these conventions is the Social Sciences Board's Teaching Audit Committee.

The version number of this document is given below. Subsequent versions will follow a numbering sequence from 1.1 upwards. Each time a new version is issued, you will be informed by email, and the updates will be highlighted in the text and listed below. Amendments and modifications to these conventions must be approved by the Law Faculty and the supervisory body responsible for the course and examination.

Version 1

This version and subsequent versions can be obtained from the Weblearn site

<https://weblearn.ox.ac.uk/portal/site/socsci/law/postgrad/odip>

ROLE OF THE PROCTORS

The University Proctors act as independent overseers of the conduct of examinations. They have a statutory duty (Statute IX) to see that examinations are properly conducted in accordance with the statutes and regulations concerning them. The University's *Examination Regulations* reserve to the Proctors certain powers in connection with the conduct of examinations, such as granting permission for late submission of written work. These powers are exercised independently of the University's Education Committee and of all divisional or faculty boards or other bodies responsible for the academic content of examinations. Fairness is thereby enhanced because candidates in all examinations are treated by the Proctors on the same terms. For the same reason candidates may not make direct contact with the Chair or Board of Examiners; any special applications concerning a candidate must be made through the Proctors. Candidates may not make direct contact with the Proctors; any special applications must be made by the Diploma Administrator on the candidate's behalf.

ROLE OF THE DIPLOMA ADMINISTRATOR

Any queries or difficulties concerning examination matters should be referred at once to the **Diploma Administrator, Mrs. Ellen Moilanen, in the Law Faculty Office (St. Cross Building, St. Cross Road, Oxford OX1 3UL). Telephone: (01865) 271457. E-mail address: ellen.moilanen@law.ox.ac.uk.** Should it be necessary to apply to the Proctors, the Diploma Administrator will contact them on your behalf. Where the *Examination Regulations* refer to action by a candidate's college or the Senior Tutor of a candidate's college, please **substitute** the Diploma Administrator. Candidates should not under any circumstances seek to make contact with individual internal or external Examiners.

CANDIDATE'S EXAMINATION NUMBER AND ANONYMITY

In all examinations candidates are identified only by their examination number which will be notified to you by the Diploma Administrator. Only your examination number (not your name) should be quoted on written work or examination scripts submitted to the examiners.

EXAMINATION ENTRY DETAILS

The Examination Schools will automatically attach compulsory papers to your academic record on registration. It is your responsibility to ensure your examination entry details are correct via the Student Self Service. See <https://www.ox.ac.uk/students?wssl=1>.

STATUTES AND OTHER SOURCE MATERIAL IN THE EXAMINATION ROOM

You will be permitted to bring into the examination room for the two examination papers (Part II) your own copy of Butterworths Intellectual Property Law Handbook, 13th edition (Butterworths Handbook), subject to conditions which **it is essential to observe throughout the academic year. Full details are given in Part 5.8. below** and include that the copy of the 13th edition taken into the examination room **must be absolutely clean and unmarked.** .

UNIVERSITY OF OXFORD EXAMINATION REGULATIONS 2017 (for academic year 2017-18)

Available on <http://www.admin.ox.ac.uk/examregs/>. This Examiners' Edict provides a guide to the rules for this Diploma programme, but in case of any conflict, the *Examination Regulations* prevail.

2. RUBRICS FOR INDIVIDUAL PAPERS IN PART I AND PART II

Candidates must complete Part I and Part II. Part I consists of five compulsory coursework assignments, and Part II of two unseen written examination papers.

Part I – All questions are compulsory and candidates must answer all questions in the coursework assignments.

Part II – See 5.10.

3. MARKING CONVENTIONS, ASSESSMENT STANDARDS AND RE-EXAMINATION

These are set out and explained in Schedule I

4. INFORMATION FOR CANDIDATES REGARDING THE COURSEWORK ASSIGNMENTS (PART I)

4.1 Timing

Coursework Assignment	Distribution Date	Submission Deadline
Trade Marks and Passing off	6pm, 7 October 2017	1pm, 3 November 2017
Patents 1	6pm, 11 November 2017	1pm, 8 December 2017
Patents 2	6pm, 13 January 2018	1pm, 9 February 2018
Copyright	6pm, 10 March 2018	1pm, 6 April 2018
Designs	6pm, 14 April 2018	1pm, 11 May 2018

Each assignment question paper will be available via the [PG Dip in IP Law Weblearn site](https://weblearn.ox.ac.uk/portal/site/socsci/law/postgrad/odip) (<https://weblearn.ox.ac.uk/portal/site/socsci/law/postgrad/odip>) from 6.00 pm on the Saturday of the relevant Workshop, and will also be available from the Diploma Administrator on the immediately following Monday.

You may complete and submit a coursework assignment although you were not able to attend the relevant Workshop. It is your responsibility to obtain a copy of the question paper from the Diploma Administrator; an extension of the time for submission may not be granted solely because of non-attendance at the Workshop or difficulty in accessing the question paper (see further 4.3.(ii) below).

Raising of queries – if you have any queries about the content of the coursework assignment, you must submit your queries to the Diploma Administrator **not later than 7 days after the date** (see above) **when the relevant assignment question paper was posted on the PG Dip in IP Law Weblearn site.** Queries received after this 7 day period will not be entertained.

4.2 Methods of Assessment and Format of Assignment

Each coursework assignment shall be examined by means of an assessed written exercise of 3,000 words unless otherwise stated in the question paper (inclusive of footnotes) (see also 4.4. below).

You are not required to use any particular system of referencing of sources, but you must reference clearly and consistently in a way that allows the reader to check your sources easily. Titles may be shortened provided that the identity of the full version is readily recognisable. A bibliography is not expected. (See further 4.3.(i) below). For Marking Conventions and Assessment Standards see attached Schedule I. Each assignment will take the form of a practical exercise, such as drafting of statements of case or instructions to counsel.

The University has strict regulations governing assessment. Marks may not be disclosed to candidates until they have been agreed as final marks by the Board of Examiners. It is therefore not possible to disclose the marks for the coursework assignments (Part I) until after the final meeting of the Board in July (see 7.1. below) when the Board will decide the final result of the Diploma, having reviewed and agreed the complete marks profile (Part I and Part II) for each candidate. The Board may need to make adjustments to marks after scrutinising the marking profiles of markers across each paper and across all papers and after considering other relevant information, such as medical evidence. If the marks for any of the Part I papers had already been agreed by the Board as final marks and disclosed to candidates at an earlier date, it would not be possible to revisit those marks later. The Board has also taken the view that knowledge of their marks would not necessarily be helpful to candidates approaching the examination papers (Part II) in a few weeks' time; some would be encouraged but others discouraged by their earlier performance and have little time for additional preparation.

The University does not permit assessors to provide detailed feedback on their performance in written papers to individual candidates, hence you will receive only a mark for each coursework assignment (and each examination paper) and no comments on how that mark was reached. General comments on each paper and how questions were tackled will be included in the Report of the Examiners on the year's examination, but this Report will not be available until several months after completion of the Diploma. To assist candidates as they progress through the course, the Board of Examiners has asked assessors after completion of the marking of each coursework assignment to prepare general comments on the issues raised by the questions and the points which might be included in the answers, and to comment generally on the performance of the cohort in completing the assignment. The document will not be a model answer, and will not provide a comprehensive analysis of the scripts submitted, but will identify some of the most common mistakes seen by the assessors. As soon as each text has been approved by the Board, it will be released to candidates. This is dependent on the timing of the completion of the marking process and may not always be possible.

The Reports of the Examiners and of the External Examiner on the previous years' examination are available for consultation on the Faculty website <https://www.law.ox.ac.uk/document-archive>. These reports contain (inter alia) information on examining methods and statistical analyses of performance.

4.3 Submission of Coursework Assignments

(i) Submission Requirements

Candidates are required to submit a **typewritten copy** of each coursework assignment. The coursework assignment must be typed on A4 paper-size only, with a margin of 3 to 3.5 centimetres on the left-hand side of each page. The text should be double spaced and the footnotes and quotations should be single-spaced. The pages should be numbered. You must **not** write your name anywhere on the coursework assignment. All written work must be submitted in English.

Cover sheet - each coursework assignment should have a cover sheet containing the title and your examination number. It should also state the year of submission and the number of words (inclusive of footnotes).

Note-form answers should be avoided except where note-form is appropriate (e.g. in a table). Your answer should be as articulate and as readable as an explanation you would send to a client.

Electronic submission

You must submit electronically a copy of your assignment through Weblearn by the **deadline of 1 pm on the relevant submission date – see 4.1. above**. Your examination number (not your

name) must be written on the cover sheet. Late submission of the electronic copy may be penalised (see 4.3.(ii) below).

Please ensure that you have the correct file before submitting the coursework assignment. **You can ONLY upload the file ONCE.** Once you have uploaded your essay to Weblearn (see Schedule II Instructions for submission of electronic copy of assignment to Weblearn) you must read the Declaration of Authorship (see Schedule III Extract from Weblearn re: Declaration of Authorship). You cannot submit your assignment until you have ticked this Declaration to say you have read and understood it. Unless in exceptional circumstances, the contents of the Declaration will not be disclosed to the Examiners until the mark for the assignment has been finally determined.

The University has strict rules for the submission and examination of coursework assignments. The coursework assignments have to be submitted electronically into Weblearn. A random sample of assignments will be checked for plagiarism using the *Turnitin* software. In order to make an electronic submission, please ensure that you know your Oxford Single Sign-On. **You will not be able to submit your coursework assignment without one. Emailing the coursework as an attachment to the Diploma Administrator does not count as a submission nor hard copies posted to the Diploma Administrator or the Examination Schools.** The Proctors will not permit a non-submission nor late submission due to failure to remember your Oxford Single Sign-on username and password.

You will be given an opportunity to submit a mock coursework assignment in early October to familiarise yourself with the system. It is important for you to use this opportunity as the Diploma Administrator and the Faculty will not be available to assist you at all times with any technical issues involving your electronic submission. If there is a fault to the submission system on our side, we will inform you.

(ii) Late submission

Application to the Proctors for permission for late submission of coursework assignments should be made by the Diploma Administrator, on the candidate's behalf, before the submission date. If the written work is submitted **on the prescribed date but later than the prescribed time**, the work will be passed to the Examiners for marking but a late presentation fee (to cover administrative expenses) will be incurred. Within five working days of the prescribed submission date, the candidate through the Diploma Administrator may apply to the Proctors to request that the circumstances of the late submission be taken into account by the Examiners (see *Examination Regulations* 2017, Part 14.10.). If a candidate fails to submit a coursework assignment on time without prior permission, but submits it **within 14 calendar days of the notification of non-submission**, the Proctors shall enquire into the circumstances. They may instruct the Examiners to accept and mark the work and will forward to the Chair of Examiners an account of the circumstances of the late submission. The Proctors will impose a late presentation fee (to cover administrative expenses) and, in addition, may give leave to the Examiners to impose an academic penalty according to the established conventions agreed by the relevant supervisory body (see *Examination Regulations* 2017, Part 14.11.) The agreed scale of penalties in relation to late submission without prior permission is set out below:

Lateness	Cumulative mark penalty
Up to two hours late	2 marks
Up to 24 hours late	5 marks
Up to six calendar days late	10 marks
Beyond six calendar days late	A mark of zero will be awarded

These penalties may be reduced in special circumstances where there is a partial excuse for the late submission, for instance where medical circumstances contributed to the delay.

A candidate who fails to apply for or to obtain permission from the Proctors for the late submission of any written work, or non-submission (i.e. withdrawal from this examination unit (see 5.7. below)) will be deemed to have failed that assessment unit (coursework assignment). The mark of any resit of the assessment unit will be capped at a pass. See further

Schedule I, paragraph 6. (re-examination).

If there is a risk that you will not be able to meet the deadline for submission, you should as early as possible consult the Diploma Administrator, who will advise you on how to obtain an extension. There must be 'reasonable grounds' for the grant of an extension (e.g. ill-health).

We would strongly ask students not to submit the coursework assignments at the very last minute and leave at least an hour before the deadline to submit the coursework. Technical problems external to the Weblearn system, such as slow internet speeds, will not be accepted as ground for excusing lateness. The Diploma Administrator will inform you if there is any problems with the Weblearn system on the day.

4.4 Length

Candidates should take seriously the word limit imposed (see 4.2. above). If the word limit is exceeded 'the examiners, if they agree to proceed with the examination of the work, may reduce the mark by up to one class (or its equivalent – 10 marks).' (See *Examination Regulations* 2017, Part 16.6.). The Examiners are naturally bound by this. It is necessary, however, to give guidance on the meaning of a 'word' in this context. Because of the manner in which word count software operates, legal citations often inflate the count. The Examiners have therefore determined that an allowance of an extra 3% should be permitted to candidates (should they wish to use it) above the figure of 3,000 words. The word count which appears on the coursework assignments must be the actual word count produced by the software. The word count must include all footnotes. You must ensure that any automatic word-count on the word-processing programme you use is set to count footnotes.

4.5 Third Party Proof-Readers

Students have authorial responsibility for the written work they produce. Proof-reading represents the final stage of producing a piece of academic writing. Students are strongly encouraged to proof-read their own work, as this is an essential skill in the academic writing process. However, for longer pieces of work it is considered acceptable for students to seek the help of a third party for proof-reading. Such third parties can be professional proof-readers, fellow students, friends or family members. This policy does not apply to the supervisory relationship, nor in the case where proof-reading assistance is approved as a reasonable adjustment for disability.

The default position is that the guidance outlined below applies to all assessed written work where the *word limit is 10,000 words or greater*. However, departments and faculties may opt to specify that, for certain assessments, students should not be allowed any proof-reading assistance, if the purpose of the assessment is to determine students' abilities in linguistic areas such as grammar or syntax. In this case, the rubric for the assessment should state clearly that no proof-reading assistance is permitted.

The use of third party proof-readers is not permitted for work where the *word limit is fewer than 10,000 words*.

What a proof-reader may and may not do

Within the context of students' written work, to proof-read is to check for, identify and suggest corrections for errors in text. In no cases should a proof-reader make material changes to a student's writing (that is, check or amend ideas, arguments or structure), since to do so is to compromise the authorship of the work.

A proof-reader may

- Identify typographical, spelling and punctuation errors;
- Identify formatting and layout errors and inconsistencies (e.g. page numbers, font size, line spacing, headers and footers);
- Identify grammatical and syntactical errors and anomalies or ambiguities in phrasing;
- Identify minor formatting errors in referencing (for consistency and order);
- Identify errors in the labelling of diagrams, charts or figures;

- Identify lexical repetition or omissions.

A proof-reader may not

- Add to content in any way;
- Check or correct facts, data calculations, formulae or equations;
- Rewrite content where meaning is ambiguous;
- Alter argument or logic where faulty;
- Re-arrange or re-order paragraphs to enhance structure or argument;
- Implement or significantly alter a referencing system;
- Re-label diagrams, charts or figures;
- Reduce content so as to comply with a specified word limit;
- Translate any part of the work into English.

Authorial responsibility

Students have overall authorial responsibility for their work and should choose whether they wish to accept the proof-reader's advice. A third party proof-reader should mark up the student's work with suggested changes which the student may then choose to accept or reject.

Failure to adhere to these guidelines could constitute a breach of academic integrity and contravene the *Proctors' Disciplinary Regulations for Candidates in Examination* (<http://www.admin.ox.ac.uk/statutes/regulations/288-072.shtml>). It is therefore the student's responsibility to provide the proof-reader with a copy of this policy statement.

4.6 Academic Integrity – avoidance of Plagiarism

See 6 below.

4.7 Illness or other Causes affecting Candidates for examination

See 5.6. below.

4.8 Withdrawal from entire Diploma examination

See 5.7. below.

5 INFORMATION FOR CANDIDATES REGARDING THE WRITTEN EXAMINATION PAPERS (PART II)

5.1 Timing and Place of Examination

Monday 25 June 2018

Intellectual Property I	9.30am - 11.30am
Intellectual Property II	2.30pm - 4.30pm

The written examination papers will be taken at the Examination Schools in the 75-81 High Street, Oxford. Candidates are advised to reach the Examination Schools twenty minutes before the stated time of the examination. A bell will be rung some minutes before some minutes before the examination to give candidates time to move to the examination room. Notices will direct candidates to the appropriate room. Seating in the examination room will be by desk number only. Seating charts will be displayed in the reception area, displaying candidates' names and desk numbers, as well as outside the examination room. You will need your University Card

for each paper (see 5.3.(i) below). Dark formal attire must be worn (e.g. lounge suit).

See also 5.8.(i) below concerning the conditions under which you may have a copy of approved statutory materials in the examination room.

5.2 *Method of Assessment and Examination Technique; cut-off date*

The substantive law elements of the course shall be examined by means of two written examination papers, each of two hours (see also 5.10) below. These elements were covered in the residential programme and the cases listed under **Essential Reading** on the core reading list. The **cut-off date** for inclusion of new material will be **Friday 11 May 2018** (the date for submission of the Designs coursework assignment). An updated core reading list will be circulated after this date.

Candidates will not be required to have detailed knowledge of developments and cases after the cut-off date. Cases listed in the core reading list under Further Reading, or included by tutors in their own reading lists (eg listing sources that might be read prior to a lecture or workshop) will not be examined. For Marking Conventions and for Assessment Standards see Schedule I. Sample questions will be provided and discussed in the two revision workshops, Saturdays 2 June and 9 June 2018. (See also 5.10. below).

5.3 *Scripts*

(i) **Anonymity**

You will be informed of your examination number and you should bring to the examination room the note advising you of that number. You must **not** write your name on any answer book. **Write your examination number only** in the appropriate place in each answer book you use. Please also bring with you to each examination your University Card. This must be placed face up on the desk at which you are writing.

(ii) **Legibility**

Candidates must not write in pencil. Candidates submitting illegible scripts will be required to have them typed at their own expense. The examiners will make every effort to identify such candidates to the Diploma Administrator as early as possible. Please provide the Diploma Administrator with details of where you can be contacted by telephone and email in the week following the date of the examination papers. If any of your scripts have to be typed, you will be asked to return to Oxford to dictate your answers to a typist in the presence of an invigilator. At that time, further instructions will be given to you by the Diploma Administrator.

(iii) **Rough work**

If you wish to write plans or rough drafts, you may do so either in the same booklet as your answers (but cross out the rough work) or in a separate booklet (indicating that this is rough work) which must be handed in along with your answer booklets.

(iv) **Handing in scripts**

It is the **candidate's own duty to hand in his or her scripts when collected from your desk by an invigilator**. Any candidate who does not hand in a script **must** inform an invigilator.

(v) **Incomplete scripts**

The mark for a completely absent answer in any script will be zero, and the mark for a part answer, or a "skimped", "rushed final", "short" or "weak" answer, will be such a mark above zero as is appropriate, relative to more successful answers, in terms of the quality of what has been written, and the extent to which it covers the question.

The overall mark for a script will be arrived at by averaging the number of marks, including zeros, over the number of questions that should have been answered on the paper.

If a candidate completes the correct number of questions, but fails to answer a question which is compulsory (e.g. where the candidate does not answer a problem question as required by the rubric of that paper), the Examiners may reduce the mark by up to one class (or its equivalent – 10 marks) and this may affect the final result. It is therefore of the utmost importance that

candidates comply with the rubric of the paper and answer the number and type of questions stipulated.

Candidates who write answers in note form may also expect to have their overall mark for the paper reduced.

5.4 Leaving the examination room, arriving late and failing to attend

- (i) **During first half hour and last half hour of examination**
No candidate may leave the examination room within half-an-hour of the beginning of the examination and, to avoid disturbance to other candidates, candidates may not leave the examination room within half-an-hour of the end of the examination.
- (ii) **Examination Protocol**
Please refer to this [website](https://www.ox.ac.uk/students/academic/exams/guidance?wssl=1) (<https://www.ox.ac.uk/students/academic/exams/guidance?wssl=1>).
- (iii) **Illness during the examination**
A candidate who is taken ill while sitting a written paper may (with the invigilator's permission) leave the room and return while the examination is in progress to resume the paper on **one** occasion only (and no extra time shall be allowed). If the candidate is unable to complete the paper concerned because they have been taken ill a second time, they should inform an invigilator so that the incomplete script can be handed in. It is the candidate's responsibility to obtain a medical certificate explaining how the performance in the paper concerned may have been affected by illness. The Examiners will only be made aware of any difficulties suffered by a candidate in the examination room if the candidate subsequently obtains a medical certificate and that, plus any other relevant information, is submitted to the Registrar or Proctors and passed on by them to the Examiners. For the procedure to be followed see 5.6. below.
- (iv) **Late arrival**
A candidate who arrives more than half-an-hour after the time when the examination begins will be allowed by the invigilator to attempt the paper, finishing at the same time as the others. The circumstances will be reported to the Proctors, and the work shall not be taken into account by the Examiners without the consent of the Proctors. The candidate should contact the Diploma Administrator as soon as possible so that a submission explaining the reasons for late arrival may be made to the Proctors.
- (v) **Failure to attend the examination**
Candidates who fail to attend a written examination paper without having obtained the prior permission of the Proctors are deemed to have failed that assessment unit (the paper) unless the Proctors give instructions to the Examiners about reinstating them (see *Examination Regulations* 2017, Part 14.15. and 14.16.). The mark of any resits of the assessment will be capped at a pass. See further Schedule I, paragraph 6. (re- examination). For the procedure for withdrawal (from the entire Diploma examination and from a particular part of the examination) before the Diploma examination and after the Diploma examination has started, see paragraph 5.7. below. Candidates should consult the Diploma Administrator if any of these provisions apply to them. A candidate may not withdraw from the Diploma examination after the written parts of the examination are complete.

5.5 Academic Integrity – avoidance of Plagiarism

See 6. below.

5.6 Alternative Arrangements, Illness or other Causes affecting Candidates for examination

The Proctors have authority to authorise alternative arrangements for candidates who for medical or other sufficient reasons are likely to have difficulty in writing their scripts or completing the examination in the time allowed (*Examination Regulations* 2017, Part 12). If this applies, you should consult the Diploma Administrator. Applications for such arrangements **must be submitted to the**

Proctors by Friday of Week 4 of term before the examination is due to take place (i.e. by 18 May 2018). Where a candidate's performance in any part of an examination is likely to be, or has been, affected by factors, such as illness or disability, of which the Examiners have no knowledge, the candidate may, through the Diploma Administrator, inform the Registrar of these factors. Usually this will involve submitting a medical certificate to the Proctors, in which as much detail as possible should be recorded by the certifying doctor to explain the case. The certificate should indicate the medical reason for the special request. The candidate should request the certificate from the doctor at the time when the doctor is able to certify the facts. Information submitted after the final Examiners' meeting (mid-July 2018) will be passed by the Registrar to the Proctors. The Proctors will normally only pass the information on to the Examiners if it is received within three months of the publication of the results, and if one or more of the following applies: (a) the candidate's condition is such as has prevented them from making an earlier submission; (b) the candidate's condition is not known or diagnosed until after the final meeting of the Examiners; (c) there has been a procedural error that has prevented the candidate's information from being submitted. If the Proctors decide not to pass on the information they shall give reasons for their decision (*Examination Regulations* 2017, Part 13.4.) An appeal may be made within 14 days of the Proctors' decision (see 7.2. below).

The Examiners cannot take account of any special circumstances other than those communicated by the Registrar or Proctors. See also 5.4.(iii) – (v) above.

The Proctors also have authority to authorise special arrangements for candidates who are forbidden for reasons of faith from taking examinations on religious festivals or other special days which may coincide with days on which examinations are set (*Examination Regulations* 2017, Part 11). If this applies, you should consult the Diploma Administrator. Applications for such arrangements **must be submitted to the Proctors by Friday 3 November 2017.**

5.7 *Withdrawal from the Diploma Examination*

A candidate may withdraw from the entire Diploma examination at any time before the date for submission of the first coursework assignment (Part I). Withdrawal will be effected by the Diploma Administrator on the candidate's behalf. A candidate may not withdraw from the entire Diploma examination, or any part of it, after the start of the first paper or date for submission of the first paper or other exercise unless by reason of acute illness or other urgent cause (*Examination Regulations* 2017, Part 14.21. and 14.22.). A candidate may not withdraw from the Diploma examination after the written parts of the examination are complete. The point of completion is deemed to be the conclusion of the last paper for which the candidate has entered, or the time by which a dissertation or other written material is due to be submitted, whichever is the later. See further Schedule I para. 6. for provisions for re-examination. Candidates should contact the Diploma Administrator at once if any of these provisions apply to them; it may be necessary for the Diploma Administrator to apply to the Proctors on the candidate's behalf, and there are administrative consequences too.

5.8 *Materials in the Examination Room*

(i) **Statutes and other Source Materials**

Statutes and other source materials may only be brought into the examination room with the prior approval of the Proctors and then only subject to strict conditions. For Intellectual Property I and Intellectual Property II in 2017-18 candidates will be permitted to bring into the examination room their own copies of Butterworths Intellectual Property Law Handbook, 13th edition (Butterworths Handbook). The following regulations will apply:

- (1) The copy of Butterworths Handbook which you bring into the examination room must be **absolutely clean and unmarked**. As an aid to finding individual materials in the Handbook collection, tabs may be attached to the edge of relevant pages. These tabs may be of different colours but must be **absolutely clean and unmarked**. These regulations will be strictly enforced. Particular attention will be paid to personal possession markings (e.g. your name, the name of your chambers/firm) which **must do no more than identify the ownership of the Handbook**.

- (2) Your copy of Butterworths Handbook will be inspected by the examiners/invigilators in your presence immediately before the start of the first examination paper (Intellectual Property I). This will be carried out as quickly as possible, but may result in a short delay to the start of the paper. Thereafter during the examination scrutiny will be conducted as part of invigilation and will be random. Your copy of Butterworths Handbook must remain **absolutely clean and unmarked** (see (1) above) **for the duration of the first and second examination paper** (Intellectual Property II), so do not write or mark it in any way during the first and second papers.
- (3) At the end of the first paper your copy of Butterworths Handbook must be left on your desk in the examination room. The inspection (see (2) above) will be repeated for the second examination paper (Intellectual Property II).
- (4) In the event of any infringement or breach of regulations specified above, your copy of Butterworths Handbook will immediately be confiscated and the matter reported to the Proctors. You will be permitted to continue and complete the two examination papers but without access to the collection of materials in Butterworths Handbook. Similarly, if for some reason you forget to bring your copy of Butterworths Handbook to the examination, you will be permitted to write the papers but without access to the materials in Butterworths Handbook.
- (5) The Proctors will suspend the candidate's examination while they fully investigate (including interviewing the candidate) the reported infringement or breach of the regulations. If they come to the view that a breach of the Disciplinary Regulations has occurred, the Proctors are empowered to refer the matter to the Student Disciplinary Panel. Further information about these Regulations and disciplinary procedures may also be found on <http://www.admin.ox.ac.uk/proctors>. Students who breach the Disciplinary Regulations for University Examinations may have their marks reduced, or may be failed in that examination or, in the most serious cases, may be expelled. Serious breach of University discipline may also be reported to the Bar Standards Board/Solicitors Regulation Authority.

Any additional materials will be placed on the desks in the examination room. Details of these will be notified specifically to candidates.

(ii) Dictionaries

No dictionaries are allowed in the examination room.

(iii) Other materials

No other books or papers whatever, and no calculators may be taken into the examination room.

(iv) Food and drink

Candidates are permitted to take non-carbonated water, in a spill-proof bottle (i.e. with a valve or sports cap, not screw cap; this is strictly enforced), into the examination room. Also a small packet of sweets (e.g. Polos), but any noisy wrappers and packaging must be removed prior to entering the room; chewing gum is not allowed. No other drinks and/or foods will be permitted except on medical grounds, and with prior approval. Water is also available in the lobby just outside the room.

Provided they have prior approval diabetic students are permitted to take into the examination room silent blood testing kits, and glucose drinks (e.g. Lucozade) and/or glucose tablets (e.g. Dextro energy tablets) in case of hypoglycaemia, also Insulin syringes/supplies. Also permitted with prior approval are asthma inhaler, epi-pen, over-the-counter and/or prescription medicine, small unobtrusive snack (please note nuts may not be taken into the examination), medical aids such as wrist splint/support, back support pillow, ice-pack. In all these cases the item will only be permitted in the examination room provided you have obtained permission in advance, and you must carry the permission letter with you and produce it if requested by an invigilator. If any of these provisions apply to you, please consult the Diploma Administrator.

5.9 Academic Integrity – avoidance of Plagiarism

See 6. below.

5.10 The Question Papers

- (i) **Intellectual Property I and Intellectual Property II** – in each of the two papers there will be 4 questions. Candidates should answer two questions; of which one must be an essay question and one a problem question. Questions may cover more than one topic.
- (ii) **Queries** – An examiner will be present during the first half-hour of each examination paper to address any question concerning the paper. (See also 5.2. above).

6 ACADEMIC INTEGRITY – AVOIDANCE OF PLAGIARISM

Plagiarism is the copying or paraphrasing of other people's work or ideas into their own work without full acknowledgement. All published and unpublished material, whether in manuscript, printed or electronic form, is covered under this description. Collusion is another form of plagiarism involving the unauthorised collaboration of students (or others) in a piece of work. The Proctors Disciplinary Regulations concerning conduct in examinations (*Examination Regulations* 2017, Part 19.4. and 19.5.) state that 'No candidate shall present for an examination as his or her own work any part of the substance of any part of another person's work. In any written work (whether thesis, dissertation, essay, coursework, or written examination) passages quoted or closely paraphrased from another person's work must be identified as quotations or paraphrases, and the source of the quoted or paraphrased material must be clearly acknowledged.' Examples of plagiarism and how to avoid it are given on <http://www.ox.ac.uk/students/academic/guidance/skills/plagiarism> and you are strongly advised to consult this website. Guidance and examples are also given in the Faculty Handbook for the Diploma 2017-18. The University reserves the right to use software applications to screen any individual's submitted work for matches either to published sources or to other submitted work. Any such matches respectively might indicate either plagiarism or collusion.

The Board of Examiners will deal wholly with cases of poor academic practice where the material under review is small and does not exceed 10% of the whole. Assessors will mark work on its academic merit with the Board responsible for deducting marks for derivative or poor referencing.

Determined by the extent of poor academic practice, the Board will deduct between 1% and 10% of the marks available for cases of poor referencing where material is widely available factual information or a technical description that could not be paraphrased easily; where passage(s) draw on a variety of sources, either verbatim or derivative, in patchwork fashion (and examiners consider that this represents poor academic practice rather than an attempt to deceive); where some attempt has been made to provide references, however incomplete (e.g. footnotes but no quotation marks, Harvard-style references at the end of a paragraph, inclusion in bibliography); or where passage(s) are 'grey literature' i.e. a web source with no clear owner.

If a student has previously had marks deducted for poor academic practice or has been referred to the Proctors for suspected plagiarism the case must always be referred to the Proctors. Also, where the deduction of marks results in failure of a coursework assignment or examination paper and of the Diploma the case must be referred to the Proctors.

In addition, any more serious cases of poor academic practice than described above must also always be referred to the Proctors.

7 GENERAL INFORMATION

7.1 Publication of Results

The individual examination results can be viewed within the Student Self Service webpage (<https://www.ox.ac.uk/students/academic/exams/results?wss1=1>). Official University Transcripts will also be sent by the Examination Schools to candidates' home addresses (as contained within the Student Self Service webpage in OSS). Please note that results will not be available over the telephone from the Examination Schools. Results will also not be available over the telephone from the Diploma Administrator. See also 4.2. above.

7.2 Appeals from Decisions of the Proctors and Examiners

For the procedures for appeals from decisions of the Proctors, see *Examination Regulations* 2017, Part 18.1.). The appeal must be made within 14 days of the date of the Proctors' decision. For appeals from the decisions of the Examiners, see *Examination Regulations* 2017, Part 18.2., and Part 20, paragraph 7. If you wish to raise a query or make a complaint about the conduct of your examination you should consult urgently the Diploma Administrator. Queries and complaints must not be raised directly with the Examiners, but must be made formally to the Proctors through the Diploma Administrator (preferably within one month, and no later than three months after the notification of the results. The Proctors are not empowered to consider appeals against the academic judgment of examiners, only complaints about the conduct of examinations. The Proctors will only authorise the re-checking of marks if at first sight there is evidence of an irregularity having occurred or if some other sufficiently serious justification is in play (e.g. a candidate's overall classification being absolutely borderline or one mark being very significantly out of line with the others). Marks will not be checked merely because a candidate is disappointed with them or is puzzled by the distribution. Papers will be re-marked only if investigation by the Proctors has found a serious problem in the original examination process. See further *Student Handbook* 2017-18, particularly section 8.6. (7.3. below).

7.3. *Student Handbook 2017-18 incorporating the Proctors' and Assessor's Memorandum*

The *Student Handbook* contains much useful information and is available on <http://www.admin.ox.ac.uk/proctors>. Section 8 has relevance for examinations.

Ms A.S. Kennedy (Chair)
Mr. R. Anderson (IPLA)
Professor G. Dinwoodie
(External)
5 October 2017

Schedule I – Marking Conventions, Assessment Standards, Re-examination
Schedule II – Instructions for submission of electronic copy assessments to Weblearn
Schedule III – Extract from Weblearn re Declaration of Authorship

SCHEDULE I

DIPLOMA IN INTELLECTUAL LAW AND PRACTICE 2017-18

MARKING CONVENTIONS, ASSESSMENT STANDARDS, RE-EXAMINATION

1. University scale for standardised expression of agreed final marks

Agreed final marks for individual papers (Part I coursework assignments and Part II written examination papers) will be expressed using the following scale:

70-100	Distinction
50-69	Pass
0-49	Fail

2. Qualitative assessment criteria for Part I and Part II papers

Distinction answers are those that represent an excellent level of attainment for a student at postgraduate level. They exhibit the following qualities:

- acute attention to the question asked;
- a deep and detailed knowledge and understanding of the topic addressed and its place in the surrounding context;
- excellent synthesis and analysis of materials, with no or almost no substantial errors or omissions, and coverage of at least some less obvious angles;
- excellent clarity and appropriateness of structure, argument, integration of information and ideas, and expression;
- identification of more than one possible line of argument;
- advanced appreciation of practical arguments concerning the topic, substantial critical facility, and personal contribution to debate on the topic.

Pass answers represent a level of attainment which, for a student at postgraduate level, is within the range acceptable to very good. They exhibit the following qualities:

- attention to the question asked;
- a clear and fairly detailed knowledge and understanding of the topic addressed and its place in the surrounding context;
- good synthesis and analysis of materials, with few substantial errors or omissions;

- a clear and appropriate structure, argument, integration of information and ideas, and expression;
- identification of more than one possible line of argument;
- familiarity with practical arguments concerning the topic, and (especially in the case of high pass answers) a significant degree of critical facility.

Fail answers are those to which the qualities required for a pass answer are absent.

Scripts are marked on the University scale from 1 to 100.

3. Verification and reconciliation of marks

The Law Faculty does not operate a marking regime involving the blind double-marking of all scripts. However, extensive double-marking according to a system approved by the supervisory body does take place and the Faculty takes a great deal of care to ensure the objectivity of marking procedures.

For each paper (Part I coursework assignment or Part II written examination paper) there will be a team of at least two markers. For each paper, a minimum of 6 scripts, or 20% of the scripts, whichever is the greater number, will always be double-marked, as will:

- any script which the first marker found difficult to assess, and
- any script for which the first mark ends in 47, 48, 49, 67, 68, 69, and
- any script for which the first mark ends in 53, 54, and
- any script for which the first mark is below 50, and
- any written examination script where the candidate has misunderstood the question, and
- any written examination script which has an 'absent answer', that is a script which would formerly have been described as of 'short weight'.

For each double-marked script, the markers must meet to compare their marks and to come to an agreement as to the correct mark overall and for each question. The team operates under the aegis of the Board of Examiners and the whole Board meets to discuss/finalise marks, providing an extra layer of assurance of the objectivity of the process, and a means of resolving any situation where two markers are unable to reach agreement. In exceptional circumstances (e.g. medical) third readings may take place.

The Board of Examiners meet and agree a final classification/result for each candidate, having taken account of medical and other special case evidence and having made appropriate adjustments for such matters as absent answers and breach of rubric (including breach of the word limit in a coursework assessment). The decisions of the Board of Examiners are then passed to the Examination Schools. Candidates will be able to view their results (both overall classification and individual paper marks) within the Student Self Service webpage.

4. Qualitative descriptors of Distinction, Pass, Fail

Qualitative descriptors are intended to provide summaries of the qualities that will be demonstrated in attaining each classification – Distinction, Pass, Fail – overall.

The qualities a Distinction will demonstrate include acute attention to the questions asked; extensive and detailed knowledge and understanding of the topic addressed; excellent synthesis and analysis of materials; clear and well structured answers which show an engagement with theoretical arguments and substantial critical facility.

The qualities a Pass will demonstrate a level of attention to the questions that is satisfactory to good; a satisfactory to good knowledge of the topics in question; appropriately structured arguments; and some familiarity with theoretical arguments pertinent to the topic.

A Fail will demonstrate a lack of the qualities required for a Pass in respect of one or more papers.

5. Final outcome rules

The marks awarded for each coursework assignment (Part I) and for each written examination paper (Part II) provide for each candidate a marks profile of seven marks. **The Diploma requires candidates to demonstrate ability over a range of intellectual property subjects and in a range of different situations, hence candidates must pass each of the seven papers** (see (a) below). The final outcomes rules are not inflexible, bearing in mind that the Board of Examiners has some discretion to deal with unusual cases and exceptional circumstances, in accordance with the *Examination Regulations*. Subject to that caveat, the rules which will normally be applied are as follows:

- a. For the award of the Diploma in Intellectual Property Law and Practice there must be no mark below 50. A mark below 50 may not be compensated by very good performance elsewhere.
- b. For the award of a Distinction in the Diploma in Intellectual Property Law and Practice a candidate in the same examination year must achieve marks of 70 or above in three or more papers, including in at least one of the written examination papers (Part II) and must have no mark below 55 in any paper. For this calculation, the coursework assignments (Part I) count as five papers, and the written examination papers (Part II) count as two papers (making a total of seven papers in all).

As for the discretion to depart from the normal final outcome rules, candidates may be assured that it is not exercised except in very unusual circumstances (e.g. medical) in which the Board of Examiners is convinced that the rules would yield an indefensible result. The discretion has to be exercised rationally, and the primary component of rationality in this context is that all candidates should be subjected to exactly the same rules. It follows that the discretion will not be exercised in favour of a candidate merely because the marks very narrowly fail to satisfy the rules or against a candidate merely because they only very narrowly succeed in satisfying the rules.

6. Re-examination

Candidates who fail (academic fail) any of the seven papers (five coursework assignments (Part I) and two written examination papers (Part II)), or who

withdraw before submission of all the seven papers, may re-take/take in the immediately following academic year **only** any paper in which they achieved a mark of 49 or below/or from which they withdrew, and may carry forward the marks of any paper they passed (mark of 50 or above), but will not be eligible for a Distinction.

Similarly, candidates who fail to apply for or obtain permission from the Proctors for the late submission or non submission of any of the five coursework assignments (Part I) or for non-attendance at any written examination paper (Part II) and so fail that paper (technical fail), may re-take in the immediately following academic year **only** the failed paper but the mark for that paper on this second attempt will be capped at 50 (a pass). Otherwise they may carry forward the marks of any paper they passed (mark of 50 or above).

But nothing in this paragraph shall prejudice the powers of the University's Education Committee and Proctors to permit partial re-takes in exceptional circumstances. If since the previous year there has been a change of syllabus, coursework assignments or written examination papers shall nevertheless be set on the previous syllabus for the candidate who is re-taking them, but may not be taken by any other candidate.

SCHEDULE II

DIPLOMA IN INTELLECTUAL PROPERTY LAW AND PRACTICE 2017-18

Instructions concerning the electronic submission of the Coursework Assignments into Weblearn

For ease of reference and to enable this Schedule to be detached from the Examination Convention (Notice to Candidates), all the requirements and instructions for the preparation and electronic submission of coursework assignments are explained in this Schedule.

By the deadline as indicated in Section 4.1 above, you must submit electronically a copy of your coursework assignment into Weblearn for the examiners. Your coursework may be checked for plagiarism using the *Turnitin* software.

Instructions for submission into Weblearn:

1. To submit your essay, log into the IP Diploma Weblearn site (<https://weblearn.ox.ac.uk/portal/site/:socsci:law:postgrad:odip>). This site should be visible in your 'Active Sites' in Weblearn.

Then follow these instructions:

2. Include the cover sheet at the beginning of your essay (indicating Name of Coursework Assignment, Examination/Candidate Number, Year of Submission and Word Count), and save the essay in pdf format. The pdf document name should be your Examination/Candidate Number followed by your surname, for example: 123456Smith.pdf.

3. Click on Assignments on the left menu bar.

4. Click on the blue link for the relevant coursework assignment.

5. Read the instructions on the submission page carefully before uploading your document.

6. Use Choose File and browse for your coursework assignment on your computer. Upload the file. **PLEASE ENSURE THAT YOU HAVE THE CORRECT FILE. YOU CAN ONLY UPLOAD THE FILE ONCE.**

7. Read the Declaration of Authorship. You cannot submit your essay until you have ticked this Declaration.

8. Click Submit.

9. You will receive an email confirmation that you have successfully submitted your work.

If you experience a technical problem during the uploading process, send your essay to ellen.moilanen@law.ox.ac.uk. (You must use your Oxford email account.)

Please ensure that your essay does not contain any pieces of information that could identify you to the marker of your essay.

SCHEDULE III

DIPLOMA IN INTELLECTUAL PROPERTY LAW AND PRACTICE 2017-18

Extract from Weblearn re Declaration of Authorship

I confirm the following:

1. I have read and understood the University's disciplinary regulations concerning conduct in examinations and, in particular, the regulations on plagiarism (The University Student Handbook Section 8.8; available at <https://www.ox.ac.uk/students/academic/student-handbook>).
2. I have read and understood the Education Committee's information and guidance on academic good practice and plagiarism at <https://www.ox.ac.uk/students/academic/guidance/skills?wssl=1>.
3. The [thesis/dissertation/extended essay/assignment/project/other submitted work] I am submitting is entirely my own work except where otherwise indicated.
4. It has not been submitted, either partially or in full, either for this Honour School or qualification or for another Honour School or qualification of this University (except where the Special Regulations for the subject permit this), or for a qualification at any other institution.
5. I have clearly indicated the presence of all material I have quoted from other sources, including any diagrams, charts, tables or graphs.
6. I have clearly indicated the presence of all paraphrased material with appropriate references.
7. I have acknowledged appropriately any assistance I have received in addition to that provided by my [tutor/supervisor/adviser].
8. I have not copied from the work of any other candidate.
9. I have not used the services of any agency providing specimen, model or ghostwritten work in the preparation of this thesis/dissertation/extended essay/assignment/project/other submitted work. (See also section 2.4 of Statute XI on University Discipline under which members of the University are prohibited from providing material of this nature for candidates in examinations at this University or elsewhere: <http://www.admin.ox.ac.uk/statutes/352-051a.shtml>).
10. I agree to retain an electronic copy of this work until the publication of my final examination result, except where submission in hand-written format is permitted.
11. I agree to make any such electronic copy available to the examiners should it be necessary to confirm my word count or to check for plagiarism. ☐
(You must respond to submit your assignment.)

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UNIVERSITY OF OXFORD

FACULTY OF LAW

DIPLOMA IN INTELLECTUAL PROPERTY LAW AND PRACTICE 2017-18

NOTICE TO CANDIDATES

Part II – Two Written Examination Papers

The purpose of this Notice is to explain the arrangements for the two written examination papers (Part II) on Monday 25 June 2018.

Examination Conventions (pages 7 – 12)

INFORMATION FOR CANDIDATES REGARDING THE WRITTEN EXAMINATION PAPERS (PART II)

Candidates are strongly advised to re-read parts 5. and 6. (pages 7 – 12) of the Examination Conventions dated 5 October 2017, (available on the “Examinations” page on the Weblearn site) and the ‘[Sitting Your Examinations](#)’ website provided by the University. What follows in this Notice supplements the information in the Examination Conventions **and paragraphs 4., 5. and 6. below require action by you.**

1. Location, timing and title of examination papers

Examination Schools, 75-81 High Street, Oxford OX1 4BG
(<http://www.admin.ox.ac.uk/schools/contact.shtml>)

Monday 25 June 2018 9.30 – 11.30 am Intellectual Property I

2.30 – 4.30 pm Intellectual Property II

Dark formal attire must be worn. For the men, it would be dark lounge suits (like black or grey etc, not pink, white, yellow etc.) and for the ladies, its equivalent. You may remove jackets and ties during the examination, but must be correctly dressed before you leave the examination room.

You are advised to reach the Schools **twenty minutes** before the timed start of the examination. A bell will be rung some minutes before the examination to give candidates time to move from the entrance of the building to the examination room. **Seating in the examination room will be by desk number only. Seating charts**

will be displayed in the reception area, displaying candidate and desk numbers, as well as outside the examination room.

2. Anonymity and University Card

Please bring with you to each examination paper your University Card which must be placed face up on the desk at which you are writing. You should also bring the examination timetable sent to you by email and post as a reminder of your examination number. You must **not** write your name on any answer book. **Write your examination number only** in the appropriate place in each answer book you use. (NB if you do not have your University Card with you, you may be required to return to Oxford at a later date to undergo a handwriting test).

3. Materials in the Examination Room

Candidates are permitted to bring their own copy of the Butterworths Intellectual Property Law Handbook, 13th edition but only subject to strictly enforced regulations. **It is extremely important to read paragraph 5.8(i)(2) in the Examination Conventions**, but for ease of reference this is also extracted in the attached **Notice to Candidates**.

The following materials will be placed on the desks in the examination room. They are for your reference should you require them. The content of the materials do not provide any indication to the content of the two examination papers. In the event of any change or addition, this will be notified specifically to candidates.

- Redlined Extracts from the 2009 Community Trade Mark Regulation to Reflect Changes Made by the 2015 European Union Trade Mark Regulation (prepared by Alex Von Muhlendahl)

4. Water and medication in the Examination Room

Candidates are permitted to take non-carbonated water, in a spill-proof bottle (ie with a valve or sports cap, not screw cap; this is strictly enforced), into the examination room. Also a small packet of sweets (e.g. Polos), but any noisy wrappers and packaging must be removed prior to entering the room; chewing gum is not allowed. No other drinks and/or foods will be permitted except on medical grounds, and with prior approval. Water is also available in the lobby just outside the room.

Provided they have prior approval diabetic students are permitted to take into the examination room silent blood testing kits, and glucose drinks (e.g. Lucozade) and/or glucose tablets (e.g. Dextro energy tablets) in case of hypoglycaemia, also

Insulin syringes/supplies. Also permitted with prior approval are asthma inhaler, epi-pen, over-the-counter and/or prescription medicine, small unobtrusive snack (please note nuts may not be taken into the examination), medical aids such as wrist splint/support, back support pillow, ice-pack. In all these cases the item will only be permitted in the examination room provided you have obtained permission in advance, and you must carry the permission letter with you and produce it if requested by an invigilator. If any of these provisions apply to you, please contact the Diploma Administrator **by Monday 4 June**.

5. Legibility

Candidates must not write in pencil. Candidates submitting illegible scripts will be required to have them typed at their own expense. The examiners will make every effort to identify such candidates to the Diploma Administrator as early as possible. Please provide the Diploma Administrator with details of **where you can be contacted by telephone and email in the week following the date of the examination papers through this [survey](#)**. If any of your scripts have to be typed, you will be asked to return to Oxford to dictate your answers to a typist in the presence of an invigilator. At that time, further Instructions will be given to you by the Diploma Administrator.

6. Arriving late and failing to attend

A candidate who arrives more than half-an-hour after the time when the examination begins will be allowed by the invigilator to attempt the paper, finishing at the same time as the others. The circumstances will be reported to the Proctors, and the work shall not be taken into account by the Board of Examiners without the consent of the Proctors. The candidate should contact the Diploma Administrator as soon as possible so that a submission explaining the reasons for late arrival may be made to the Proctors.

Candidates who fail to attend a written examination paper without having obtained the prior permission of the Proctors are deemed to have failed the entire Diploma examination (not just that particular part of the examination) , unless the Proctors give instructions to the Board of Examiners about reinstating them.

If you are not present at the beginning of an examination paper, the Examination Schools staff will contact the Diploma Administrator and ask her to account for your absence. It is therefore vital that you inform the Diploma Administrator at once of any difficulties, and, in advance, **by Monday 18 June please give to Ellen Moilanen, Diploma Administrator, a telephone number where you (or someone who knows you) may be contacted on Monday 25 June through this [survey](#)**. Only in an emergency, the Diploma Administrator may be contacted that

day on (01865) 271457 and in an emergency the Examination Schools may also be contacted on (01865) 286223.

To assist you, space for your contact details has been added to the attached template document.

Ms A.S. Kennedy
Chair of Examiners of Diploma in Intellectual Property Law and Practice
May 2018

Materials Permitted in the Exam Room: Butterworths Intellectual Property Law Handbook, 13th edition (Butterworths Handbook).

Statutes and other source materials may only be brought into the examination room with the prior approval of the Proctors and then only subject to strict conditions. For Intellectual Property I and Intellectual Property II in 2017-18 candidates will be permitted to bring into the examination room their own copies of Butterworths Intellectual Property Law Handbook, 13th edition (Butterworths Handbook). The following regulations will apply:

- (1) The copy of Butterworths Handbook which you bring into the examination room must be **absolutely clean and unmarked**. As an aid to finding individual materials in the Handbook collection, tabs may be attached to the edge of relevant pages. These tabs may be of different colours but must be **absolutely clean and unmarked**. These regulations will be strictly enforced. Particular attention will be paid to personal possession markings (eg your name, the name of your chambers/firm) which **must do no more than identify the ownership of the Handbook**.
- (2) Your copy of Butterworths Handbook will be inspected by the examiners/invigilators in your presence immediately before the start of the first examination paper (Intellectual Property I). This will be carried out as quickly as possible, but may result in a short delay to the start of the paper. Thereafter during the examination scrutiny will be conducted as part of invigilation and will be random. Your copy of Butterworths Handbook must remain **absolutely clean and unmarked** (see (1) above) **for the duration of the first and second examination paper** (Intellectual Property II), so do not write or mark it in any way during the first and second papers.
- (3) At the end of the first paper your copy of Butterworths Handbook must be left on your desk in the examination room. The inspection (see (2) above) will be repeated for the second examination paper (Intellectual Property II).
- (4) In the event of any infringement or breach of regulations specified above, your copy of Butterworths Handbook will immediately be confiscated and the matter reported to the Proctors. You will be permitted to continue and complete the two examination papers but without access to the collection of materials in Butterworths Handbook. Similarly, if for some reason you forget to bring your copy of Butterworths Handbook to the examination, you will be permitted to write the papers but without access to the materials in Butterworths Handbook.
- (5) The Proctors will suspend the candidate's examination while they fully investigate (including interviewing the candidate) the reported infringement or breach of the regulations. If they come to the view that a breach of the Disciplinary Regulations has occurred, the Proctors are empowered to refer the matter to the Student Disciplinary Panel. Further information about these Regulations and disciplinary procedures may also be found on <http://www.admin.ox.ac.uk/proctors>. Students who breach the Disciplinary Regulations for University Examinations may have their marks reduced, or may be failed in that examination or, in the most serious cases, may be expelled. Serious breach of University discipline may also be reported to the Bar Standards Board/Solicitors Regulation Authority.

Trade Marks

General Note

There is perhaps more than might at first meet the eye in this problem and it requires some careful thought and judgement to decide where best to spend your limited time and words. The issues raised by the problem do not really fall into neat and tidy boxes, which reflects real life. You were given latitude in relation to how you structured your answers and dealt with each point, with appropriate cross referencing as necessary.

1. Bob

This part of the problem involved advising on a possible opposition based on prior use and bad faith, and on defences to a potential infringement action, which would have to be based on a trade mark not yet registered. This gave a chance to think about how the registration system operates and to what extent it has the potential for withstanding attempts to misuse it. Most of you tackled this well. You saw that Bob had no genuine business interest in the products or the trade mark and is intent on causing trouble for Archie. He had nothing on which to base any action for passing off, and a weak case, if at all, for any rights deriving from a contract or other relationship with Archie.

Most of you recognised that Bob's GUARD-EM trade mark application was not very sound. However it was still necessary to deal with what would happen if Bob's application were to be registered. The existence of Archie's trade mark application was not a defence to infringement as it was filed later, and Archie did not seem to have any other defences to infringement, so his best course was to rely on arguments against infringement or an opposition or counterclaim to get rid of Bob's trade mark application/registration. Bob appeared to have no other basis for action against Archie - for example he had no goodwill on which to base an action for passing off. In theory Bob could have opposed Archie's application based on his earlier filing date but that was not suggested in Bob's letter.

In the context of possible infringement of the registration if granted, most of you discussed the two marks and concluded that Bob's mark/Archie's sign would be found to be very similar but not identical, if considered in relation to *LTJ Diffusion v. Sadas* - whether the differences would go unnoticed by an average consumer. Not all of you realised that you ought also to consider whether Bob's specification of goods could cover Archie's products at all. This required interpretation of the specification of goods in the light of *IP Translator*. The relevant class heading (class 20) was given in the problem, from which it could be seen that Class 20 is an odd class consisting of a very mixed bag of goods. On the basis that, after *IP Translator*, the specification means what it says, it seems that Archie's goods, whether categorised as parts of alarm systems or as model animal figures, were neither the same as nor similar to the goods in Bob's specification.

Therefore Archie did not really have much to fear from Bob's application. He could be advised to write to Bob and tell him that if he pursues his arguments, he will face invalidity claims, whether through an opposition or as a defence to infringement proceedings. Most of you realised that bad faith would seem to be Archie's best ground as Bob appeared to have no genuine interest in the mark he had applied for, and had filed the application to try to get an advantage over Archie. Given

the strength of the bad faith claim, the other grounds could be dealt with relatively briefly, but you should at least have noted that this is a UK application, and therefore opposition can be based on absolute or relative grounds. An opposition could not be based on Archie's own application as that was filed after Bob's, so Archie would need to rely on his use of the mark as "an unregistered trade mark or other sign used in the course of trade" and would have to establish a prospective case in passing off to succeed under s. 5(4)(a). You should therefore have set out the elements of passing off, considered how they might apply to Archie's case, and suggested what further information might be required.

Bob's letter to Archie might count as a threat under s. 21. It was written in July so the old regime applies. However action against Bob was not likely to be a recommended course for Archie. To the extent that there was a threat, it was being made against Archie for applying the trade mark to his products and was therefore not actionable under either version of section 21 in any event. Archie could consider action against Bob for trade mark infringement when his own mark is registered, or an action for passing off if he has enough evidence to support it. However there was nothing in Bob's letter to suggest that he had any intention of making and selling any products himself. Given the strength of Archie's case and Bob's apparent lack of interest in selling products under the GUARD-EM mark, Archie's best approach was probably to suggest that Bob withdraw his application and to be prepared to oppose it if necessary.

2. Golden

There are five aspects to this part of the problem:

Merits of actions or potential actions:

- (i) Golden's opposition;
- (ii) Trade mark infringement (and threats);
- (iii) Passing off;

Advice:

- (i) On interim injunction;
- (ii) On remedies.

Golden's opposition

The marks were GUARDEM and GUARD-EN. You were therefore expected to consider cases on similarity of trade marks. Probably the conclusion should be that the marks might be seen as similar but not identical. Thus you would go on to discuss the global appreciation and average consumer concepts. Would this be a specialist market in which the relatively small differences in the trade marks would be important? Archie might want to argue that visually and conceptually the marks are quite distinct but the greatest difficulty is probably in relation to phonetic similarity.

In relation to the goods, Archie's products were in practice components of electronic alarm systems, so there was a good argument that they would be covered by Golden's specification, in the sense that there would be a likelihood of confusion if a similar trade mark was used on such product. There was no suggestion that the shape of the goods was registered, although any similarity in the shapes of the respective products might come into the consideration of passing off. There did not seem to be

enough relevant goodwill in the UK for a case to be based on that. Although Golden's products were well known in the US that was irrelevant for the opposition.

Golden's use of its mark also needed consideration. Evidence of any use of Golden's EU mark in the UK was shaky. The website did not seem to be set up to target customers outside the US. The rejection of the credit card may have suggested that only US registered cards were accepted. The products had been sold "in Germany", but we are not told how extensively. In addition to that they had been sold in the southern part of Denmark only. Was that sufficient for use of the EU registration? Proof of use should be required in the opposition, and it would be up to Golden to provide sufficient evidence. If not its registration might be vulnerable. You were expected to discuss the relevant cases here..

Trade mark infringement

This involved consideration of similar points to the above. Golden's case on infringement was better than Bob's because Golden's specification was more relevant to the nature of Archie's products, and based on the same considerations of the global appreciation test etc, the case on similarity of marks and likelihood of confusion was probably quite strong. Thus Archie's best defence against Golden might lie in an application for revocation. You were expected to discuss the logistics of this, including whether an application for revocation for non-use could be filed immediately at the EUIPO and what effect this might have on any infringement action in the UK, or whether Archie should wait and counterclaim for revocation if sued. Launching an immediate revocation action might have attractions depending on the facts about Golden's use. A useful tactic might be to write to Golden threatening such an action, which would trigger the three-month period referred to in Article 58(1)(a) of the EU Regulation within which commencement or increase of use by Golden would not count in the context of such an action. Starting revocation proceedings in the EUIPO might also result in any action brought in the UK by Golden being stayed to await the outcome of the revocation proceedings, giving time for negotiation, and could be relevant in relation to any application for an interim injunction by Golden.

Everards' letter is a clear threat of proceedings. The date of the letter is not clear from the problem. You needed to show that you had recognised this and point out the need to verify the date, and without that, cover both versions of section 21. Presumably Everards' letter is exempted as an actionable threat under either version of s. 21 as being directed against Archie in relation to the application of the trade mark to products. Under the new rules there would be a clear provision exemption for Everards as a professional adviser although that is not really an issue.

Passing off

You needed here to refer to the requirements for a passing off action which you might already have set out earlier. Did Golden have any relevant goodwill in the UK? This appeared unlikely on the facts as set out. The reputation in the US and the business in Germany and Denmark were not relevant to the existence of any goodwill in the UK. There was no evidence of UK sales or promotion and the available evidence seemed to suggest that the products were not effectively available in the UK. Without goodwill in the UK to be damaged, reputation elsewhere would not support an action for passing off. Without relevant goodwill, the reference to the shape of Golden's products including coyotes (which are presumably dog-like) was a bit of a red herring. It could possibly be relevant to

the existence of a misrepresentation, but only if Golden were able to get over the hurdle of establishing goodwill.

Interim injunction

This could be based either on a trade mark infringement action or on passing off. Reviewing the basic requirements for an interim injunction, even if Golden had an arguable case of trade mark infringement (query if there is any case on passing off) it would seem that it would have had great difficulty establishing that the balance of convenience would favour an injunction being granted. Indeed, it was likely to be Archie who would suffer irreparable harm or unquantifiable losses as a result of the granting of an injunction. You should also have mentioned the requirement for Golden to give a cross undertaking in damages backed up with some kind of security in the UK.

Remedies

The question asked what remedies Golden would have if any of the three actions was successful. The first “action” is the opposition, whose success would result in Archie’s application not proceeding unless amended in some manner perhaps as a result of a settlement. If successful in the opposition Golden would also be entitled to an award of costs against Archie (on the Registry’s scale). This part of the question just required a straightforward overview of the remedies available.

3. Fanshawe

Archie did not have a trade mark registration. against Fanshawe. The question asked what he could do to get Fanshawe’s products off the market quickly and permanently, so a lengthy discussion of options based on the trade mark registration was not really appropriate here, although you might have noted the additional cause of action he would get if his trade mark was eventually registered.

For passing off Archie would need to show goodwill based on the sales so far made. Was the extent of his business over a short period likely to be sufficient for this and was the nomination for the prize relevant? The Guardit product might itself be confused with Archie’s, with or without the advertisement. It was clear that Fanshawe was potentially further promoting confusion through its advertising and that Archie’s business would be damaged if customers did what was suggested and buy one of Fanshawe’s products in the belief that it was one of his, particularly as they might be dangerous. But would the language used in the advertisement operate as a kind of disclaimer - “these are not GUARDEM products but do the same thing and are cheaper”. Would this be sufficient to remove any likelihood of confusion? Overall it seemed likely that an interim injunction against Fanshawe based on a passing off action had a reasonable prospect of success.

It was not clear from the problem whether the manufacturer was making use of the GUARDEM trade mark, for example by supplying its retailers with the shelf notices, or whether this was something Fanshawe (the retailer) was doing on its own account. Consideration as to what could be done to stop the Guardit products at source, or at least at wholesale/importer level, was also relevant.

If Archie did not want to threaten a passing off action against Fanshawe itself, or seek disclosure from Fanshawe in litigation, Archie could rely on section 21B(2)(a) and (b) to reference to the existence of his application in any letter to Fanshawe, and make a request aimed at “discovering whether, or by whom a [registered] trade mark has been infringed ...”, i.e. by asking Fanshawe for

details of where it has obtained the products from. Archie can then consider further action against the manufacturer, distributor and/or the wholesaler/importer. It would seem that Archie's position is made easier by the new provisions, which would clearly apply to any letter written now (the problem having been distributed after the date when the new provisions came into effect, and you were answering in real time)

Some of you also suggested that Archie could make a report to the local trading standards or health and safety authorities if there was evidence that the products could be dangerous.

Other points

Archie's application in class 20 for "model animals" may not be adequate for his business, as class 20 would appear to be the right class for model animals considered as ornaments, rather than as components of alarm systems. His existing application might (if registered) be effective against Fanshawe whose products would seem essentially to be novelties, but he might be advised to file another application, e.g. in class 9, which is the proper class for alarm systems etc.

Archie may have options for settling with Bob if Bob can be persuaded to be reasonable, including the voluntary withdrawal of his trade mark application. Whether this is possible may depend on the nature of the relationship and the extent of Bob's actual involvement in the business before he left, which we do not know.

Another possibility might be for Archie to act as a distributor or partner with Golden for the UK since they seem to as yet not penetrated the market here. Archie has been successful with his products and is about to get an award which Golden will not know about yet. This could provide a useful basis for negotiating a settlement with Golden.

Patents 1

The standard of the scripts was generally good. There were few excellent answers and a few students seemed to lack a sufficient understanding of some aspects of the law.

Some recurrent issues were:

1. Candidates should mention all reasonable issues, and make assumptions clear – such as the need to check the register and whether the potentially infringing activities took place in the UK.
2. Candidates should identify all possible infringers, including those who might not be obvious commercial competitors and list all possible types of infringing acts as set out in s.60 (e.g. did they keep as well as make? Did they use or offer a process?) and possible joint tortfeasance.
3. It is important to analyse claims, claim by claim and integer by integer in relation to infringement and validity. A number missed significant points on infringement and/or invalidity. Students had been encouraged (although not required) to use claim charts. Some did not, and they were generally more likely to overlook potentially important issues.
4. Answers should make clear what the claim dependencies are (so, for example, to infringe or anticipate claim 2, all features of claim 1 also have to be present, and claim 6 requires that the rod be constructed as described in any preceding claim). One would generally expect a dependent claim to be narrower than those on which it depends.
5. It is well worth reading the patent in suit carefully and taking time to discern the meaning of words in the specification. (e.g. to notice the guidance the patent gives on the meaning of ‘hook’ in [009]).
6. All conclusions should be supported by evidence and/or reasoning. For example, some failed to identify and rely on passages in the prior art (e.g. the description of how the toggle bolt of US 1,600,035 works, which is relevant to claim 6). Setting out possible counter arguments tends to demonstrate that the candidate has really thought about an issue.
7. Lack of novelty and obviousness of each claim should generally be treated separately. This helps avoid a confused answer which may not make clear whether the student understands the concepts properly.
8. It is important to think through how the patented product and the prior art might be used in practice - e.g. a hook could be screwed into the hole in the plug described in Builder’s Bulletin, which hole may be ‘means to allow a hook member to be attached’. Even a conventional screw head may be a ‘hook’.
9. Whilst it may be helpful to state briefly the law, e.g. on permissible amendments, it is far more important to apply it correctly; For example, some suggested claims that would widen the claim coverage whilst others added matter, such as specific dimensions not given in the specification.
10. There is an ambiguity in s.60(1)(b). The CPC (Art 25(b)) makes clear that the requisite knowledge must be proved where a process is offered for use, but not when it is used.

11. Even if confident of one argument (e.g. that claim 1 is anticipated) candidates would be wise to write a full answer covering all other possible lines of argument affecting validity of that claim (e.g. obviousness, insufficiency).

Patents 2

Introduction

The fact pattern of the problem involved a relatively straightforward infringement situation with some construction and equivalence issues. The invalidity aspects of the scenario included potential prior uses, a possible challenge to priority and one published patent prior art reference. The fact pattern was very loosely based on the *Aga v Occlutech* case, but there are significant differences.

Infringement

The candidates generally identified the fact that as a product claim, claim 1 was infringed by Omnicron carried out both infringement under s60(1)(a) through manufacture, keeping, disposing of (to Corazon) and claim 2 under s60(1)(b) by manufacturing the product. Some candidates misread that provision and incorrectly suggested that knowledge (or that it would have to be obvious that the use would be an infringement) was required. Although the fact pattern did not provide clear details of the process which was used by Omnicron, most candidates appreciated that it was probably sufficient to plead and that disclosure would clarify the precise process. Surprisingly, very few candidates mentioned the fact that product and process description could be expected in the ordinary course.

Corazon's website was generally recognised as being sufficient to allege an offer to dispose of the products and therefore this entity was included as second defendant.

Some candidates discussed joint-tortfeasorship, but most saw that there was no obvious benefit in pleading this and that it would unnecessarily complicate the case.

The candidates recognised that the law of construction has changed and included with differing degrees of discussion of *Actavis v Lilly* as well as the small handful of cases such as *Illumina v Premethia* where the new approach has been applied. The two stage nature of the approach: 1) construction and 2) claim scope was widely recognised, as were the new Improver test questions. Where candidates dropped marks this was often where the commentary was conclusory without displaying a proper understanding of the test and/or its application to the facts. Some candidates identified the fact that the specification of the patent enumerated welding as an alternative to the clamping of the claim and discussed the relevance of this to the third improver question. Few identified the relevance of *L'Oreal v RN Ventures* where such an issue was considered.

All candidates also discussed "generally dumbbell shaped" and recognised that it was not likely a term of art. Some candidates commented on the relevance of the "for delivery" wording in claim 1 and recognised it as meaning suitable for.

A number of candidates identified the similarities of the fact pattern with *Occlutech v Aga*, and referred to this in places, but few considered whether it had much relevance following *Actavis v Lilly*.

Despite the fact that the case study clearly flagged up a file history estoppel issue, a surprising number of candidates did not discuss this and the significant change in the approach since *Actavis*. It

is possible that they simply did not set out their reasoning and concluded that it was not one of the cases where a file history would clearly be relevant.

Validity

Priority

The fact pattern was deliberately vague in relation to the assignment and who filed the application in order to create uncertainty over whether priority was properly claimed. Almost all candidates identified that priority should be discussed and that if lost, it would bring into play the samples provided to consultants and commercial launch. Most discussed the relevant case law regarding the assignment- equitable vs legal title (*KCI v Smith & Nephew*, *HTC v Gemalto*, *Accord v RCT* and *Edwards v Cook*). Candidates generally pleaded the loss of priority in the alternative and distinguished which prior art was relevant in each case. A sensible way in which to set out the Grounds of Invalidity would have been to set out details for the validity challenge if priority was not maintained, and separate details for the situation where priority was maintained. Not all candidates did this. Some candidates also suggested that a technical priority challenge could be made as the claims had changed in the prosecution. There were insufficient facts to conclude this.

Novelty

The garden prototype was generally understood to be irrelevant given how far from the claimed invention it was. Some candidates speculated that the proof of concept product might have been seen by staff at the hospital. This was a bit of a stretch. The Papworth trials were generally properly discussed as potentially relevant but it was identified that confidentiality should be considered (*Coco v Clark*). Some candidates also recognised that there is no presumption that trials are confidential (*Aga v Occlutech*). The disclosure of the nature of the trial given to patients was correctly understood to be too vague as to amount to a relevant disclosure even for inventive step. Whilst the implanted devices could theoretically have been inspected by patients had they had been extracted, candidates recognised that *Merrel Dow v Norton* applied as this was theoretical. Most candidates discounted WO 136 as not being relevant as a novelty reference as it simply could not even arguably disclose all of the integers of either of the claims.

Obviousness

The skilled person was generally sensibly identified as a team, including an engineer and a cardiologist. WO 136 was well analysed as an obviousness reference and pleaded and the correct law applied (*Windsurfing/Pozzoli*). The fact that its function was to keep the lumen open rather than block holes as well as the lack of clamping was also well explored.

Obviousness over CGK

The case study did suggest that this should be discussed. Candidates should have discussed the challenges with advancing a such a plea and referred to *Napp v ratiopharm* in this context.

Insufficiency

Classic insufficiency was explored by some candidates who pointed out that given the breadth of claim scope, the specification gave little guidance in how to put the invention into effect. This was somewhat of a stretch. However, squeeze arguments between sufficiency and infringement were well taken.

Added Matter

Some candidates suggested that the amendments made in prosecution gave rise to added matter. As the original claim and specification were not provided, this was somewhat speculative.

Copyright

To follow

Designs

To follow

Intellectual Property I

General Comments:

Intellectual Property 1 was taken by 69 Candidates. The answers provided were of a good standard over all. There was a slight increase in the number of candidates achieving a mark of 70% or above, from 9% in 2016/17 to 10% in 2017/18. However, there was a significant decrease in the number of candidates achieving a pass mark of 60% or above, from 91% in 2016/17 to 72% in 2017/18. The average mark achieved in Part A = 63% and in Part B = 61%.

On a general note, it was disappointing to see candidates failing to state the relevant statutory provision and/or legal authority. As noted in previous reports, marks will be lost for such omissions.

Part A

The 'essay' section of the paper saw responses evenly split between the two questions. The average mark for question 1 was 63%, and for question 2 it was 64%.

General observations:

- a) The highest marks were those that critically engaged with the question. For example, in response to question 1, it was appropriate to discuss the nature of the scope of patent rights and defences to infringement. However, better responses went further in the analysis to

consider whether a correlation between these elements exists and whether UK patent law (appropriately or not) ignores this relationship.

- b) As with last year, it was pleasing to see candidates utilising the academic commentary provided on the Reading List. There was also significant evidence of candidates' engagement with a wide variety of legal and academic materials beyond the mandatory reading.

Question 1

The question was designed to bring into play the recent Supreme Court decision on claim construction. However, it required candidates to consider the broader implications of the decision on patent law in the UK, in particular, the defences to patent infringement. As mentioned above, better responses engaged with the nature of the relationship – i.e. does it exist, why it exists, and what the correlation (if any) should be. It was pleasing to see some candidates engage with the theoretical justifications of the patent system to support their arguments. It was interesting that few candidates actually discussed the relevance of the defences listed in s60(5), preferring to focus on the impact on invalidity challenges. While this approach provided a good opportunity to discuss the apparent divergence in construction for the purposes of scope and validity, to focus singularly on this aspect generally resulted in a lower mark.

Question 2

This question provided for a range of possible responses. Most candidates considered various aspects of the patentability criteria in their answers. It was pleasing to see most candidates identify the issue of inventive step as central to the question, with better responses evaluating, for example, the applicable tests for obviousness, the nature of the person skilled in the art, and the plausibility of the invention. Weaker responses merely provided an overview of the main patentability criteria without engaging with nature of the 'standard'. As with question 1, it was pleasing to see some candidates undertake a general policy analysis to ascertain what should be the appropriate 'standard'.

Part B

The 'problem' section of the paper saw most candidates opt to answer question 4 (41) over question 3 (28). The average mark for question 4 was slightly higher (62%) than for question 3 (59%).

General observations:

- a) As noted in the 2016/17 Examiner's Report, candidates must be mindful of the artificial nature of the examination format. Little more than an A4 page of facts is provided which will mean that not all 'real world' information is available to inform the candidates' response. It was noted that several candidates did not adequately apply the law to the facts because they lacked 'expert evidence' or required 'more information'. It is appropriate to highlight to the examiner what further information may be required to provide a full and informed decision, but **always** attempt to apply the law to the facts in the question.
- b) Both questions required candidates to demonstrate knowledge outside of the strict confines of patent law – competition law and breach of confidence respectively. However, few

candidates were able to demonstrate sound understanding in these areas. As noted in [5.2] of the Examination Convention (Notice To Candidates),

*The substantive law elements of the course shall be examined by means of two written examination papers, each of two hours (see also 5.10) below. **These elements were covered in the residential programme** and the cases listed under Essential Reading on the core reading list.*

Thus, all material; covered on the Residential Programme is examinable.

- c) It was evident that a few candidates failed to construct a suitable timeline within which to organise the relevant facts - prior art, filing dates and potential infringing acts. This resulted in a confusing and sometimes incorrect application of the law to the facts.

Question 3

As stated in the question, the validity of the patents and the likely validity of the proposed contract terms was at issue. The first part of the question, relating to the validity of the patents, was generally handled well. The 222 patent was for the product tessimannin per se. Most candidates identified that the question of plausibility was a relevant factor. However, under what criteria should the plausibility analysis be considered? Better responses noted the uncertainty in the law and considered plausibility in the context of both sufficiency, inventive step and even industrial application. The best answers considered in detail the relevance, if any, of the two pieces of prior art for the plausibility assessment. A few responses argued for a lack of inventive step in light of prior art a) applying standard criteria, making no mention of plausibility.

The question of the validity of the 888 patent in light of the earlier patent and the two pieces of prior art was generally handled well. Better responses considered to what extent the toxicity of the compound would impact upon the obviousness of its use in treating IBD.

The latter part of the question required candidates to demonstrate knowledge of EU competition law. Given that the proposed conditions were a 'no-challenge clause' and a 'grant-back clause' respectively, the examiners were expecting a straightforward analysis of the general principles and case law applicable to the application of article 101 (and possibly article 102 for a refusal to license). However, very few candidates were able to provide this analysis. Most answers did not go beyond identifying article 101 as having some relevance. Weaker responses did not identify competition law as a possible issue.

Question 4

Candidates were asked to consider what legal action/s could be taken to prevent the release of EmoTeeMe in August 2018. Most candidates identified that the enforcement of AppyChat patent was not possible until after grant, thus it would only provide a possible remedy at a later date. Better candidates identified that the law of breach of confidence may provide a suitable remedy in the

circumstances. However, as with competition law above, many candidates either did not identify the issue or demonstrated limited knowledge of the law and its authorities. Those that did score highly in this area went beyond a brief application of the *Coco v Clarke* principles to consider in detail the nature of the obligation of an ex-employee and the relevance, if any, of the springboard doctrine.

Returning to patent law, most candidates applied the principles of claim construction to consider whether EmoTeeMe would fall within the scope of AppyChat's patent. As a defence, candidates considered the validity of the AppyChat patent on various grounds. The issue of patentable subject matter was generally applied well, with many making good use of the relevant case law to assist in reaching a conclusion.

The majority of candidates noted the relevance of the prior art obtained from Infinite Inventions website and considered its impact in the context of novelty and inventive step. Better candidates identified that this presented a 'squeeze' argument – if EmoTeeMe falls within the scope of the AppyChat patent, then the AppyChat patent is not new as the EmoTeeMe technology was published on Infinite Inventions before the patent was filed. This necessarily led to a discussion of the recent decision of the High Court in *Generics/Mylan v Yeda*.

Several candidates also considered to what extent Bharti might be considered the inventor of AppyChat's patent. This necessarily gave rise to a discussion of inventorship employee inventions and the applicable law in sections 7, 39-42 Patents Act. While marks were awarded for a detailed analysis of the aspect of patent law, an answer that focussed on entitlement but did not mention the law of confidence was not awarded all available marks.

Intellectual Property II

There were four questions for this paper, of which candidates were required to answer two: one essay and one problem question. The essay questions drew upon trade mark law and design law respectively. Both questions were answered by comparable numbers of candidates. One problem question was on trade mark while the other raised issues of copyright; many candidates answered both, though trade marks was the preferred problem overall. The performance on the exam was very good, overall.

Q1. This question asked candidates to discuss critically the extent to which confusion is necessary to succeed in trade mark infringement actions and passing off cases in the UK. This question was deliberately constructed in order to allow candidates to approach it from different angles so there were a range of acceptable ways to answer the question. While many answers focused on areas of TM law where confusion is explicitly a requirement for infringement, the strongest answers considered issues such as whether CJEU doctrine on infringing uses needing to affect the essential function of the mark and/or how confusion appears in the language passing off judgments. Many other answers compared the evidence needed for consumer confusion in trade marks versus that of showing a misrepresentation in passing off and discussed whether it is coherent for there to be differing standards between the two.

Q2. This question had two parts. Part A was aimed at students understanding the aims of the UKUDR and distinctions between the UKUDR and Community design rights which assess novelty. Most students argued that a novelty standard would be incompatible with the fundamental purpose of the UKUDR. Part B addressed the relationship between design rights and copyright; most students were able to cite s 51 of the CDPA and consider the policy implications of overlapping rights.

Q3. A substantial number of students answered both problem questions. Answers on the copyright question were organised in different ways—some by party, some by identifying all of the works and all the potential infringements and defences. Most students were able to identify the copyright works and considered the issue of subconscious copying and the question of whether the line would constitute a substantial part of the poem. Some answers dealt with the question of possible damages if infringement were to be found. Several answers gave minimal attention to advising Octavius, possibly due to lack of time.

Q4. There was a typographical error on the exam where DURALGO was rendered as DURAGLO at one point in the question. This error was announced by the proctors during the exam; no students suffered any penalties from the error. Answers on the parallel importation question were mixed—a substantial number of candidates unfortunately did not demonstrate that they understood that the goods imported from Brazil would be treated differently from the goods from Portugal. Answers regarding the sports drink generally assessed likelihood of confusion and strong answers also dealt with the possibility of unfair advantage/dilution/tarnishment and passing off. Answers dealing with the competing drug manufacturer were generally good. Many candidates began their answers with discussing the registrability of the shape/colour of the tablet and cited relevant cases, and good answers also considered the possibility of common law protection through passing off.