

**EXAMINATION FOR THE POSTGRADUATE DIPLOMA IN INTELLECTUAL  
PROPERTY LAW AND PRACTICE**

**REPORT OF THE BOARD OF EXAMINERS' FOR 2009**

**PART ONE**

**A. Statistics**

**1. Numbers and percentages in each category**

The number of candidates taking the examinations was 54 (55 but one candidate withdrew after Part I).

	<b>2009</b>	
<b>Category</b>	<b>No.</b>	<b>%</b>
Distinction	3	6
Pass	50	93
Fail	1	2
<b>Total</b>	<b>54</b>	

**2. Vivas**

Vivas are not used in this Diploma.

**3. Marking of scripts**

Double marking of scripts is not routinely operated. 151 out of 326 scripts (46.32%) were second marked. Third marking may be used in exceptional cases (eg. medical cases) and 7 scripts (2.15%) were third marked. Further details about second and third 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 course in Oxford in September followed by six 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

focusses on the practice of intellectual property (IP) law and consists of four coursework assignments (two in Michaelmas and two in Hilary Term). Each coursework assignment is preceded by a one-day workshop on the relevant IP topic(s). 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 all short weight scripts were second marked. A few additional scripts were second or third marked by the examiners as an additional test of selected Distinction and failing marks.

### **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) 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. These procedures worked smoothly and no changes are required.
- 2.** The examiners applied the marking and results conventions as agreed by the Law Board and notified to candidates. For the award of the Diploma a candidate must have no mark below 50 in any of the six papers (four coursework assignments plus two examination papers). The results convention also provides for a candidate to pass Part I or Part II with an average mark in that particular Part of 50. Passing in a particular Part is of no advantage to a candidate as a mark of 50 in each of the six papers is required for the award of the Diploma, and the re-examination regulations for the Diploma permit a candidate to re-take in the following year any paper in which they achieved a mark of 49 or less. The examiners recommend that the convention concerning a pass in Part I or Part II be deleted as serving no purpose.
- 3.** A Distinction was awarded to one candidate who did not qualify under the results convention (3 marks of 70 or above, including 70 or above in at least one of the two examination papers, and no mark below 55) but who had 2 marks of 70 or above supported by a 68 and good marks in two other papers. The examiners discussed the terms of the convention, but do not recommend that this be changed for next year; this is a new Diploma and there is as yet no pattern of results to suggest that a change is desirable.

4. The examiners also recommend an amendment to the results convention for the award of a Distinction, so that it is clear that the required Distinction marks must be achieved in the same examination (ie a re-taking or deferred candidate may not obtain a Distinction by adding papers in the following year).

#### **D. Examination conventions**

The Notice to Candidates (known as the Examiners' Edict) is attached (see Appendix 2) and the examination conventions are detailed in paragraph C.1. thereof.

### **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. Some additional second and some third (7 scripts) marking was used by the examiners to confirm Distinction and failing marks.

##### **2. Medical certificates, dyslexia/dyspraxia and special cases**

One medical certificate and one letter detailing special circumstances were forwarded to the examiners. In addition, one candidate was permitted by the Proctors to withdraw from Part II (examination papers) for health reasons.

The following specific details have been requested by the Proctors. One medical certificate (from 1.85% of candidates) was forwarded to the examiners under section 11.8 – 11.10 of the Education Committee's General Regulations for the Conduct of University Examinations (see *Examination Regulations* 2008, pages 34-35). The candidate's final result was not materially affected.

##### **3. Materials in the examination room**

For the two examination papers (Part II) candidates were provided in the examination room with Blackstone's Statutes on Intellectual Property, 9<sup>th</sup> edition (2008). One candidate was permitted to use a bilingual dictionary. All candidates remembered to bring with them their University card (which has to be displayed on their desk to enable their identity to be checked).

##### **4. Legibility**

Typing of the two examination paper scripts was required from one candidate.

## 5. Board of Examiners

Professor Graeme Dinwoodie joined the Board in June 2009, on taking up his appointment as Professor of Intellectual Property and Information Technology Law in the Faculty.

## 6. External Examiner

We owe especial thanks to our external examiner, Dr. Tanya Aplin of King's College London. In the first year of this Diploma, we particularly benefited from her experience of similar courses, and she was very actively involved at all stages of the examination process.

## 7. IPLA Examiner

We are also extremely grateful to Mr. Robert Anderson of Lovells who, as coursework co-ordinator, organised and supervised the teams of practitioners involved in the teaching and examining of the coursework assignments. His advice and liaison with the teams ensured smooth progress of the examination process.

## 8. Thanks

In addition to the examiners, 14 colleagues were assessors, and we owe our thanks to them all. Coping with new examining procedures and meeting deadlines inevitably added to the workload of very busy practitioner colleagues, and we are very grateful for their generous co-operation and willingness to adapt. Throughout the academic year the organisation and administration of the Diploma in the Faculty Office has been in the very capable hands of Mrs. Ellen Moilanen, Diploma Administrator. She has been 'in charge' of all of us, including the candidates, and we are much in her debt. That the first year of the Diploma ran smoothly is due to her efforts and her tactful and sensible handling of any problems which arose; we are very grateful to her.

## B. Equal Opportunities issues and breakdown of results by gender

Category	2009			
	Male		Female	
	No.	%	No.	%
Distinction	1	5	2	6
Pass	20	91	30	94
Fail	1	5	0	0

**C. Percentage distribution of marks by paper**

	70 plus		60-69		50-59		Under 50		Total
	No.	%	No.	%	No.	%	No.	%	
<b>Part I</b>									
Patents 1	3	6%	23	42%	28	51%	1	2%	55
Patents 2	4	7%	31	56%	20	36%	0	0%	55
Trade Marks and Passing Off	17	31%	14	26%	22	40%	2	4%	55
Copyright and Design	1	2%	14	26%	40	73%	0	0%	55
<b>Part II</b>									
Patents & Confidential Information	8	15%	42	78%	4	7%	0	0%	54
Copyright, Trade Marks & Allied Rights	6	11%	48	89%	0	0%	0	0%	54

**C. Comments on individual papers**

These appear in Appendix 3

Mr. R. Anderson (IPLA)  
 Dr. T. Aplin (External)  
 Professor G. Dinwoodie  
 Ms A.S. Kennedy (Chair)  
 Dr. J. Pila

Appendix 1 – External Examiner’s Report  
 Appendix 2 – Notices to Candidates  
 Appendix 3 – Reports on individual paper

**FACULTY OF LAW**

**POSTGRADUATE DIPLOMA IN INTELLECTUAL PROPERTY LAW  
AND PRACTICE 2008-09**

**External Examiners' Report 2009**

1. Introduction

This academic year (2008-9) the Postgraduate Diploma in Intellectual Property Law and Practice ran for the first time and I am pleased to report that it do so smoothly. I can also confirm that the academic standards of the Diploma were appropriate, the assessment processes were conducted fairly and in accordance with institutional regulations and the performances of students were satisfactory and in keeping with the standards achieved at comparable institutions, such as King's College London. A more detailed discussion of these matters is set out below.

2. Academic standards set for the award of Diploma

The academic standards set for the Diploma are entirely in keeping with an award of this nature. The course covers the major intellectual property rights and expects candidates to have a very good knowledge of the key principles, controversies, and debates relevant to these rights. In the assignments, candidates are expected to apply their legal knowledge and legal reasoning skills to realistic factual scenarios. In the examinations, there is also the opportunity for candidates to engage with some of the wider policy debates occurring in the intellectual property field. In my view, this is an important balance to maintain.

Unlike most intellectual property programmes in the UK, this one gives equal weight, perhaps even greater weight, to patents, as compared with trade marks and copyright. It is commendable that the Diploma takes seriously this often overlooked area of intellectual property law, although for future years it might be worth reconsidering whether the balance between areas is appropriate.

The teaching was delivered at a two-week residential course in Oxford in August/September 2008 and at six workshops spread over the academic year. This represents significantly more face-to-face teaching time than is available on other comparable Diploma courses offered by institutions, such as King's College London. Having a mixture of academics and senior law practitioners teaching on the Diploma is not unusual in my experience. My only observation is that, with such an array of experts and different teaching styles, it is important that a core consistency is maintained and that students are clear about what is expected from them. I have no reason to believe this was not the case for this academic year, but merely flag this as a potential issue.

### 3. Assessment processes

In Part I, candidates had to undertake four pieces of assessed coursework – two in patents and one each in copyright and trade marks. In Part II, candidates sat two unseen two-hour examinations – one in Patents and Breach of Confidence and another in Copyright and Trade Marks.

Part I focuses on the practice of intellectual property law by presenting candidates with realistic factual scenarios and asking them to apply their legal knowledge and legal reasoning skills. I had the opportunity to comment on all of the assignment questions, in advance of them being released to candidates, and was satisfied that they were aimed at key issues and were appropriately challenging.

Part II comprises two unseen two-hour examinations relating to the major intellectual property rights. I was given adequate opportunity to comment on the content and structure of the examinations and was satisfied that they reflected a good balance between problem and essay questions and an appropriate level of difficulty.

The assessment processes appeared to be rigorous and fair. As I have already mentioned, examiners were given ample opportunity to comment on the forms of assessment. Assessors appeared to carry out their marking duties promptly and in accordance with the marking criteria. I was generally satisfied that the marks awarded by the assessors were in keeping with standards at other comparable institutions which offer Diploma courses.

I was present at all Examination Boards, which were conducted with efficiency and entirely in keeping with the Examination regulations.

### 4. Standards of student performance

Out of the Diploma cohort for 2008-9, 3 candidates achieved an award of Distinction, 50 candidates achieved an award of Pass and 1 candidate failed. This distribution of results, particularly the number of Distinctions, is in keeping with the levels of student performance at comparable institutions, such as King's College London, which offer Diploma courses.

More generally, I would say that I was impressed that most, if not all, candidates submitted their Part I assignments by the deadline. I also thought the quality of answers for both Part I and Part II were, on the whole, very good.

Dr Tanya Aplin  
Reader in Intellectual Property Law  
King's College London  
28.08.09

## **Individual Reports**

### **Coursework assignments**

#### **PATENTS 1**

The majority of the answers were satisfactory to good. There were a few extremely good answers. A small number were marginal. A recurrent deficiency at the lower end of the scale was to set out the general legal principles but fail to apply the law to the facts in sufficient detail. In relation to the determination of lack of novelty/ obviousness and infringement some candidates did not properly consider each integer of the claim.

A few candidates in answering the validity question completely ignored the issue of insufficiency. Several did not appear to understand fully the restrictions on amendment of the patent – the prohibition of added matter or an extension of protection.

#### **PATENTS 2**

The standard of coursework was good. The assignment required candidates to draft particulars of claim, particulars of infringement, defence and counterclaim and grounds of invalidity and provide concise notes on the draft pleadings. Regrettably, a number of candidates failed to produce concise notes. Notes are meant to illustrate that the candidate understands the issues and provides reasons for, for example, choice of defendants, claims infringed etc. Several candidates produced notes of over 45 pages which cannot by any stretch of the imagination be regarded as “concise”.

### **Examination papers**

#### **PATENTS & CONFIDENTIAL INFORMATION**

There were four questions on this paper, of which candidates were required to answer two. All candidates answered Question 4, and the vast majority answered Question 3. Of those that did not answer Question 3, most answered Question 1 (an essay on the development of the breach of confidence action), with a very small number answering Question 2 (an essay on the patentability of computer programmes).

The standard of answers to Question 4 was high, in contrast to the standard of answers to Question 3, which was considerably lower. Question 4 was very similar to the patent problems discussed at the revision workshop in May, unlike Question 3, which raised different issues and took a different form. With respect to Question 3(a): many students were unaware of any sources of law relating to gene patents, including the Biotech Directive and corresponding provisions of the EPC. More disappointing were the

answers to Question 3(b). Few students recognised the method as a potentially unpatentable diagnostic method, and only two were aware of the Enlarged Board of Appeal's decision on that issue. The discussion of other potential grounds of revocation was also limited, reflecting a certain lack of confidence with the law of biotech patenting in general. The overwhelming majority of candidates focused on basic principles of patent scope, with many wrongly treating *Improver* as the authoritative case on that issue, notwithstanding the clarification of its status at the revision workshop.

In the absence of an agreed case list, the examiners thought it appropriate to mark Question 3 generously, and on the assumption that little attention was given to principles of biotech patenting specifically during the Diploma.

The standard of answers to Questions 1 and 2 was high. The fact that only two candidates attempted Question 2 was surprising given the 2008 decision in *Symbian v Comptroller-General*, the importance of and controversy surrounding Article 52(2)(c) EPC, and the referral of the issue to the Enlarged Board of Appeal. The essays on the breach of confidence action were well done.

## **COPYRIGHT, TRADE MARKS & ALLIED RIGHTS**

### Copyright question

There was only one Copyright question on this paper, and the overwhelming majority of candidates answered it. The standard of the answers was high overall. One area of relative weakness was the implications of joint authorship for © ownership in respect of the various works, and another was moral rights. There appeared to be some uncertainty among candidates regarding the scope of the question, and whether they were expected to consider issues other than those specifically raised, including non-copyright issues such as passing off. Either approach was accepted.

### Trade Marks

54 students sat the Copyright, Trade Marks, and Allied Rights examination. Questions 2, 3, & 4 of the exam pertained to trade marks and/or passing off. In answering two questions, as instructed, all of the students sitting the exam chose to answer question 4, which asked students to consider whether five examples of possible marks could be registered under UK law or as a CTM. Most students also chose to answer question 1, the copyright fact situation, and a few chose a second trade mark/passing off question. Answers on question four did not vary widely, though some gave short shrift to one or another of the proposed marks in their analysis. Some students demonstrated confusion when dealing with the relative grounds in 4(d) or neglected to do so. Overall, the answers were of a fairly consistent mid-2.1 standard. Twenty scripts with trademarks/passing off questions were second marked, having either been chosen at random or having received borderline marks in first-marking, and all of the marks were agreed-upon.