

GENERAL GUIDE TO ANSWERING PROBLEM QUESTIONS ON INTELLECTUAL PROPERTY LAW

What are Problem Questions (PQs)?

- PQs involve a set of hypothetical facts – there will be at least one key question that needs to be answered by reference to the law.
- The facts give rise to potential legal responsibility about which you are expected to offer advice to one or more of the parties.
- PQs tend to end with a question or instruction so that you are clear about the task, e.g.:
 - “Does Stuart have a claim under copyright law?”
 - “Advise Maha as to the whether she may have committed trade mark infringement.”
- The facts of the problem will be constructed so that the answer to the question is not clear.
- It is not an essay! The key factor is to give only relevant information – it is not an opportunity to write on the theory of IP! Remember that a client would not be interested in this question.

General Tips for Tackling Problem Questions

- Consider your instructions
- Who are being asked to advise?
- Are you advising all of the parties, a few of them, or just one of them?
- Address each issue in the order that it appears
- Do you give both sides of the argument? The law may be unclear and the issues will likely be contestable.
- Most clients do not want to know the history of the law... But they do want to know:
 - What is the relevant legal situation they are in or relevant issue?
 - What is the relevant law that is applicable to their legal situation?
 - How does it apply to their situation?
 - What is the likely outcome, i.e. is their claim likely to succeed or fail? Do not forget to give the advice.
 - Primary sources are king! Statutes and case law should make up your primary citations.

A Guide to Answering a Problem Question – Preliminary Steps

- Read the fact pattern carefully – write down the parties' names and what you are asked to advise on
- Consider the question proposed and identify the general area of IP law it concerns (copyright, patents, trade marks, etc.)
- Ask yourself, to the best of your knowledge what specific issue does this question concern?
- If a piece of coursework: conduct the relevant research
- If an exam: brainstorm the key authorities that you will need to answer the question before you start to write your answer – this time spent planning your answer will ensure your answer stays relevant to the facts

A Guide to Answering a Problem Question – The Writing Stage

- Separate the legal issues as they appear into separate subheadings if you can
- Order each issue in the same order that it appears in the question
- Imagine that the party/parties you are advising are sitting in front of you – what do they need to know and what do they not need to know?
- Apply IPAC – Issue, Principle, Application, Conclusion
 - (I) For each legal issue, state what it is!
 - (P) State the relevant applicable legal principle and give sources (statutes, case law)
 - (A) Apply the relevant law to each legal issue in the facts
 - (C) Conclude and advise the relevant party on the likely outcome of their claim – whether it is good or bad!

A Guide to Answering a Problem Question – The Finishing Stage

- Re-read everything that you have written and make sure that it all makes sense
- Make sure that the order of your arguments sets the right tone to persuade the reader of your argument
- If a piece of coursework: check that you have referenced all of the material you have used correctly
- If an exam: check that you have shown your authorities

EXAMPLE: Chapter one – guidance for answering the problem question

Read this problem question carefully, and keep it in mind while you are working through the chapter that follows. At the end of this chapter, you will be able to apply what you have learnt to the problem question and advise the relevant parties.

Steven Murphy was a poet who lived all his life in London, UK. He wrote at least one poem every day from the age of 21 until he died at the young age of 33. During his life, he hand wrote the poems on paper and posted them to his friends, keeping only one hand-written copy of each poem in a drawer in his study. In his letters, Steven simply wanted to share them with his friends—but he made clear that the poems were to be kept private. When he died his letters and writings all passed to his wife Sharon Murphy. Earlier this year, Sharon unexpectedly saw Steven’s friend Adil, an actor, speak out one of Steven’s poems during a popular BBC TV programme. By coincidence Sharon had been reading the specific poem earlier that day in Steven’s former study. Sharon was shocked as she is sure nobody asked Steven about this before his death, and nobody sought her permission either. She has never thought about the authorship or ownership of Steven’s poems. She is unaware of how works of literature are protected under copyright. She knows nothing of the history of the law or about the requirements of protection. She has no idea what Steven’s rights are in this circumstance, or even why copyright exists in the first place, nor whether she, as a surviving spouse who inherited all of Steven’s property, has any rights to enforce Steven’s copyright. Advise Sharon as to the history, nature and purpose of copyright, and whether she can enforce rights over the poems, given that she inherited all of Steven’s property.

- Here the law of copyright applies so knowledge of the CDPA 1988 and related case law would be required
- We are asked to advise Sharon about whether she can enforce rights over her late husband’s works
- This involves first establishing what, if any, copyright works exist; who is the author of those works; and who is the owner of the copyright in those works now that Steven has passed away
- In particular does Sharon own the copyright in her late husband’s copyright works?
- The cause of action would be copyright infringement
- The possible legal action would be taken against the apparent infringers - Adil and the BBC

In this problem scenario, we can state with confidence that during his lifetime Steven Murphy was an author and owner of copyright in his poems as literary works under s. 1-3

and s. 9 of the CDPA 1988 (and in line with relevant case law such as *Infopaq*, *Painer* at the EU level and UK case law such as *Meltwater* and *Baigent*—as his works appear to be original (in the sense of an intellectual creation) and were fixed in hand-written form. When he died, the copyright in his works would have all passed, along with his other property, to his heirs—in this case his widow, Sharon Murphy. Under current UK copyright (CDPA s 12), the duration of protection is 70 years from the author’s death, so Sharon, as owner, is in a position to enforce copyright in Steven’s works. We can advise her that this is justified under copyright theory—copyright law has been designed to give protection not just to authors during their lifetime, but also to their heirs, a factor particularly significant when an author dies young and leaves family members behind. By performing Steven’s copyright work without permission, Adil has likely committed copyright infringement (CDPA s 16-21). By recording and broadcasting Adil’s performance of Steven’s poem, the BBC have also likely infringed the copyright work now owned by Sharon. In such circumstances a licence agreement could be reached with the parties—and failing that there are several remedies Sharon could claim (CDPA s 96-100), including an injunction to prevent future performances and damages to compensate for the use of the work without permission. As a first step, Sharon could consider asking Adil to refrain from future performances of Steven’s poem, and ask the BBC for compensation for the use of the work without permission. If these requests are not met with a satisfactory answer, she can consider filing a copyright claim at the Intellectual Property Enterprise Court (IPEC).