Suggested Answers to the Questions in Chapter 21

1. **Read through the sample agreement at the end of this chapter. What are the key terms it uses? Can you think of any ways you could improve it?**

   The good answer will:

   - Demonstrate knowledge of how licensing (for a limited period) and assignment (permanent transfer) of copyright works typically occurs. In addition refer to the possibility that other IP rights such as patents, designs and trade marks can also be licensed/assigned, with trade secrets being the major exception.

   - Note the terms in the agreement – assignor, licensor, assignee, licensee – and clarify what these mean. Refer also to the agreed terms of the licence – the 6% royalty rate on gross sales and the term of 10 years. Note that it is an exclusive licence, so no further licences are allowable for this work.

   - Note that the first work is assigned – meaning that transfer of ownership is permanent – and the assignee becomes the new owner of the work. The second work, however, is merely licensed for a 10 year period. After that it will become the sole property of the licensor once more.

   - Note that the courts and law of England and Wales are specificed as being the venue and governing law for the resolution of any disputes arising under this agreement.

   - Conclude by reflecting on the licence's terms – overall, does it seem too brief? What limitations might an author/owner want to add? In the case of a dispute with an alleged infringer, who would take legal action – the copyright owner or the exclusive licensee?

Suggested Answers to the Questions in Chapter 21

2. How could you tell, from reading a legal agreement between two parties, whether it is intended to cover a full assignment of rights, or a mere licence? Look again at the sample agreement at the end of this chapter.

The good answer will:

- Demonstrate knowledge of how licensing (for a limited period) and assignment (permanent transfer) of copyright works typically occurs (refer also to the possibility that other IP rights such as patents, designs and trade marks can also be licensed/assigned, with trade secrets being the major exception). Refer also to the agreed terms of the licence – the 6% royalty rate on gross sales and the term of 10 years. Note that it is an exclusive licence – no further licences are allowable for this work.

- Explain the licence and examining whether the terms 'assignment' or 'licence' are used. Note the terms in the agreement – assignor, licensor, assignee, licensee – and clarify what these mean. This will enable you to explain that in our sample licence the first work is assigned – meaning that transfer of ownership is permanent – and the assignee becomes the new owner of the work. The second work, however, is merely licensed for a 10 year period. After that it will become the sole property of the licensor once more.

- Note that the courts and law of England and Wales are specificed as being the venue and governing law for the resolution of any disputes arising under this agreement.

- Conclude by emphasising that assignment and licensing are different – with the former permanent and the latter temporary. The terms in the licence should aim to leave no doubt as to which of the two types of dealing will take place.

Suggested Answers to the Questions in Chapter 21

3. How does open-source licensing provide a challenge to the traditional standard licence agreement?

The good answer will:

- Demonstrate knowledge of free and open-source licensing of computer software as a form of alternative licensing.

- Refer to Kelty, McDonagh or other academic commentary to make the point that alternative licensing systems rely on intellectual property (IP) norms, but do not follow the standard terms of IP licences — rather, they allow them to be tailored to suit individual creators or communities of creators.

- Note that copyright has been the IP area most impacted by alternative licensing; patents and trade marks have been less affected. Explain that the free and open-source software or 'FOSS' licence is the GNU General Public Licence ('GPL'), now in version 3.0. Since the 1990s it has allowed the creators of FOSS to release their Linux software with 'open-source' code. FOSS licences work in the following way: the person who creates the software in the first instance has the right, as the IP-owner, to license the work as that person sees fit. FOSS operates to facilitate linked authorship—at each point, every new creator/collaborator who produces new original modifications to the code must license these new modifications onwards. Therefore, FOSS licences make subversive use of IP law concepts to facilitate a community of shared creativity, rather than a profit-based one.

- Explain that the most prominent attempt to bring the ethos of FOSS to other cultural fields is the Creative Commons ('CC') licence. CC provides an alternative copyright licence for a wide range of creative works, including music, film and literature, enabling creators to use licensing to claim 'some rights reserved' rather than 'all rights reserved'. Under a CC licence, copyright in the work typically remains with the author, but the author can choose one of the CC licences in order to regulate further uses of the work by others. The core terms of a CC licence are: attribution, non-commercial reproduction and derivative use. For instance, it is possible for an author to retain only the attribution right, and to allow (or disallow) commercial uses of the work. By contrast, it is possible to restrict all uses of the work except non-commercial distribution.

- Note that in terms of enforceability, several courts, including those in the US and the Netherlands, have accepted alternative licences, such as FOSS and CC, as being legally valid (US case of *Jacobsen v Katser* and the Dutch case of *Curry v Audax*).

- Conclude by emphasising that although they are an interesting innovation, alternative licences still pose some legal difficulties. For example, under FOSS and CC licences works are protected by the underlying copyright law, but are licensed contractually under a set of

terms chosen by the licensor. In this context, the question of what each term—e.g. 'commercial use'—means is crucial. To take this one example, CC defines 'commercial use' as use exercised 'in any manner that is primarily intended for, or directed toward, commercial advantage or private monetary compensation'. Yet, different jurisdictions may interpret and define 'commercial use' in their own ways, which means that the line between 'commercial' and 'non-commercial' may not always be clear to users. The same is true of terms used in FOSS licences. Until we get more case law we cannot be certain what legal weight these terms have.