

FD4¹ Infringement & Validity: Leppard/Richards **Course Description**

Course summary

This intensive course is designed to help prepare trainee patent attorneys for the Final Diploma (FD) Infringement & Validity paper. FD4 is a test of the competence to properly advise a client facing the possibility of being an infringer of a patent or the proprietor of a patent being infringed. While the precise materials may change from year to year, typically the paper is made up of at least: 1 patent, 1 alleged infringement, 2 or more prior art documents and 1 letter explaining the background and seeking advice. The time allowed for this paper is 5 hours.

Candidates are expected to have underpinning knowledge of the relevant law (see **Annexe A**), built up from Foundation Certificate and subsequent study, and practical experience. The emphasis of this course is practical and is focused on the competencies that FD4 tests. The tutors will advise on what is expected in exam answers and present strategies on how to read and approach the problem set in the exam paper and to prepare the memorandum setting out an answer. There will be directed pre-course work, including past papers you will be asked to read and which will form the basis of practice during the course.

Content

Each session contains a session title, session summary and set of learning outcomes. The learning outcomes of the sessions have been mapped to the tested competencies set out in the **FD4 Syllabus**.

¹ Formerly P6.

Pre-course preparation

Summary

Annexe B provides guidance on preparing for the course and the later exam. Participants will be asked to read the FD4 syllabus, the examination guidance, instructions to past papers and have attempted a FD4 (P6) past paper. They will also need to revisit and build on their Foundation knowledge of the relevant sections of the Patent Acts and should read CIPA's *Infringement & Validity: How to Pass FD4/P6* (2015). The better prepared participants are, the more they – and the group - will get out of this intensive course.

Expected learning outcomes

At the completion of their pre-course preparation, participants will be able to:

- understand the scope of the FD4 syllabus and the knowledge and competencies required;
- appreciate the format of the exam, the documents that are likely to be included and what they are likely to be asked to do, the time allowed, and the exam instructions regulations;
- as far as possible, have an appropriate level of practical experience;
- recall and apply the areas of law and practice that are tested in FD4; and
- identify and apply the key case law relating to interpretation of claims by UK courts and assessment of novelty, obviousness and infringement.

Session 1: Introductory Overview of FD4 and the Examiner's Expectations

Session summary

In this session the tutors will provide, through a lecture/presentation, an overview of the FD4 exam, explaining its key challenges and what the examiner expects for an answer to secure a pass.

Expected learning outcomes

At the end of this session, participants will be able to explain what the examiner is looking for candidates to demonstrate in their answers – for example, awareness of issues that are important in the light of the prior art or infringement, and of the client's objectives and interests, but remaining objective and impartial to provide a balanced view of the construction of the claims and whether they are infringed and valid.

Session 2: Strategies and Techniques for FD4

Session summary

In this session the tutors will provide, through a presentation, and simplified example, advice on:

- how to read the paper - with its letter/document explaining the problem, the patent that is potentially infringed and (up to four) documents that may be relevant to the infringement and/or validity of the patent;
- techniques/strategies for analysing and interpreting this information and preparing a memorandum setting out an opinion;
- how to distribute time across tasks and manage time efficiently;
- how to structure and present your answer to the problem; and
- the tone and type of language to use.

Expected learning outcomes

At the end of this session participants will be able to:

- recall an efficient way of reading the paper to extract the key and relevant information;
- recognise a number of techniques/strategies for analysing and interpreting the information in the paper;
- outline how to distribute time on the various tasks involved for FD4; and
- recognise how to prepare the information and arguments that will go into the memorandum answering the question;
- recall how to structure and present answers; and
- identify appropriate language and tone to use.

Session 3-6: Practice of Past Questions

Session summary

In these sessions participants will practise analysing and answering the specified past papers they had been asked to read before the course. The tutors will oversee a series of exercises and will provide one-to-one advice to participants on their answers and challenges they face in answering the questions. The tutors will also provide advice to the group as common issues emerge during the practice. In these sessions the tutors will lead the participants through

- analysing claim terms;
- identifying obstacles to providing advice;
- dealing with ambiguity through:
 - conflicting information;
 - unclear information;
 - paucity of information;
- reasoned selection of claim terms to discuss;
- preparation of a written construction for claim terms;
- application of candidates' own claim constructions to the problems in the paper;
- drawing relevant legal conclusions from candidates' own analyses;
- drafting of client-appropriate advice;
- analysing and disposing of peripheral problems posed by the paper' and
- time management for maximising marks scored.

Expected learning outcomes

At the end of this session, participants will be able to recognise and demonstrate, through their answers to past questions, improvements in their ability to read the FD4 paper, analyse the information contained in the question and prepare and write answers that demonstrate the FD4 competencies of:

- having a thorough knowledge and understanding of the key aspects of law and practice relating to validity and infringement of UK patents;
- exploiting this knowledge in advising clients;
- seeing the overall picture;
- ability to understand and interpret patents and other technical information;
- assimilating data and information provided to extract the key issues;
- ability to reach an informed opinion on a finely balanced point;
- ability to use the information available to support the opinion reached;
- proposing actions solely on the basis of the information available in the question;
- identifying further information that may be required for a final opinion;

- identifying key issues and where appropriate the alternative scenario or interpretation;
- communicating in a way that is clear, advisory, persuasive and informative;
- providing advice that reflects the client's needs and priorities;
- providing proposals that are based on balanced analysis of information, risks and costs; and
- providing proposals that are practicable and achievable;

Session 7: Summary, Evaluation and Final Preparations for the FD4 Exam

Session summary

In this closing session the tutors will summarise key points of advice on how to tackle the FD4 paper. Participants will be asked to complete evaluations on the content of the course, delivery and achievement of expected learning outcomes. The tutors will then advise on how participants can best make use of the remaining weeks before the exam to prepare - with guidance on further practice of past exam papers and on materials to read, including examiners' comments.

Expected learning outcomes

At the end of this session, participants will be able to:

- recall the key pieces of advice from the tutors on how to tackle FD4 and structure answers;
- plan their final stages of revision and practice for the exam; and
- identify areas where they need to do further reading and practice.

ANNEXE A: EXTRACTS FROM THE FD4 SYLLABUS²
SETTING OUT CONTENT THEMES AND RELEVANT LEGAL PROVISIONS

CONTENT THEMES	LEGAL PROVISIONS	
	Patents Act (PA) 1977 and European Patent Convention (EPC) 2000	Patent Rules 2007
1. The law and practice relating to patentable inventions in the UK	PA1 – Patentable inventions PA2 – Novelty PA3 – Inventive step PA4 – Industrial application PA125 – Extent of invention	PR5
2. The law and practice relating to the amendment of UK patents	PA 27 – General powers to amend PA 75 – Amendment of patent in infringement or revocation proceedings PA 76 – Amendments of applications and patents not to include added matter PA 117 – Correction of errors in patents and applications EPC Art 105a – Request for Limitation or revocation	PR35 PR105
3. The law and practice relating to infringement of a UK patent	PA 60 – Meaning of Infringement PA 61 – Proceedings for Infringement of patent PA 64 – Right to continue use begun before priority date PA 125 – Extent of invention	
4. The law and practice relating to challenging validity of a UK patent	PA14(3) – Sufficiency PA72 – Power to revoke patents on application PA74 – Proceeding in which validity of patent may be put in issue EPC Art 99 – Opposition EPC Art 100 – Grounds for opposition	
5. Advise lay clients during the process of examining potential infringements of patents	See all sections of the Patents Act and EPC above and PA70 – Remedy for groundless threats of infringement Proceedings PA71 – Declaration or declarator as to non- infringement PA74A – Opinions on matters prescribed in the rules	

² You should read the full syllabus to understand the Learning Outcomes you will have to demonstrate in the examination to show that you have the required knowledge and skills.

ANNEXE B: HOW TO PREPARE FOR FD4 AND THE COURSE

A. General preparation for FD4

1. Read and familiarise yourself with the FD4 syllabus to understand:

- what knowledge and skills you need for the exam;
- what you will have to demonstrate in the exam to show that you have the required knowledge and skills; and
- the key sections of legal provisions relevant to FD4.

The syllabus is available from the Patent Examination Board (PEB) website.

2. Read the most recent FD4 Exam Paper, the Examiner's Report and the Marking Scheme to understand the requirements of the exam, what the examiner expect and how marks are allocated.

After reading the Exam Paper:

- study carefully the Examiner's Report on the paper;
- look simultaneously at the Exam Paper and the Marking Scheme to understand how the marks were allocated; and
- look at the Sample Pass Scripts, which show the overall marks awarded to each.

The Exam Paper, Examiner's Report, the Marking Scheme and Sample Pass Scripts are available on the PEB website.

3. Ensure you are up to date on the areas of law and practice that are set out in the FD4 syllabus and tested in the exam. The key reference books are:

- **CIPA Guide to the Patents Act** ('Black Book': latest edition, Ed. Paul Cole, and supplement), including the relevant cases.
- **Terrell on the Law of Patents** (latest edition).

4. Read (and listen to):

- ***Infringement & Validity: How to Pass FD4/P6*** (Nigel Frankland: 2015). Available from CIPA.
- The FD4P6 (FD4) lectures in the Informals area of the CIPA website.

5. As noted in the Examination Guidance issued until 2014 for P6

- Ensure you are familiar with **case law** relating to interpretation of claims by UK courts and assessment of novelty, obviousness and infringement.
- It is a good idea to study at least **three decisions**, to learn how the UK courts deal with interpretation.

6. Seek out opportunities to get relevant practical experience in two areas which will assist in the FD4 exam:

- i. Drafting and prosecution: to assist candidates in interpreting a claim and establishing the validity of the claim, as interpreted, against prior art as well as determining whether there is infringement of a valid claim.
- ii. Advising on “freedom to use” or in connection with infringement proceedings:
 - “Freedom to use” exercises assist in understanding the three-way situation of a patent, possible infringement and prior art which is tested in FD4. In drafting and prosecution training, candidates must learn to criticise the work done (e.g. claims drafted) and assess whether the work would withstand an attack on validity and be effective to deter a possible infringer. If a candidate can get experience of a real-life “freedom to use” situation it would be a useful exercise if the candidate is given the basic papers (e.g. from a previous situation) and asked to prepare a report. This can be compared with the eventual advice given.
 - Involvement in infringement proceedings, or in part of their preparation, will assist in appreciating that others will often take a different (at least initial) interpretation of a given claim. As suitable real-life infringement situations are not common, using a past example as an exercise is recommended.

B. Specific preparation for this course and the FD4 exam

The FD4 exam is a test of skill that can only be acquired by **practice**. This course will provide direction, focus and support for your preparations: with guidance on how to tackle a FD4 paper and how to structure answers, and feedback on your work. But merely coming on this course will not give you the necessary level of skill. You need to be prepared to set aside sufficient time before and after the course to:

Ahead of the course:

- Read Nigel Frankland’s *Infringement & Validity: How to Pass FD4/P6* (2015).
- Before attending the course, if you have not attempted at least one P6 past paper (in the 5 hour limit), you should do so. You may wish to attempt the 2014 paper, *before reading the Examiner’s Report*, as you can then consult the Marking Scheme. You will need to allocate a full day to this.
- For this course, you will be asked to read several specified FD4/P6 past papers so that you understand the technology and are familiar with the details of the question, but not attempt an answer. These papers will form the basis of practice in sessions 3-6 so being familiar with the questions will allow for efficient use of course time. We will advise you which papers these are at least 4-6 weeks before the course³.

After the course:

- You should also answer another three or more papers to reinforce what you have learned and hone, through practice, your skills.

As **Annexe C** explains, FD4 is a difficult exam in which marks are clustered closely either side of the 50 mark pass hurdle. Gaining an extra 4 to 5 marks may mean the difference between a pass and a fail, so practice to improve your skills and give you resilience is key.

³ For this course in 2015, the papers specified were 1986 Paper I (Record Clamp), 1993 (Paper Clip), 1998 (Cracker Creations) and 2002 (Conveyor Belt) and it is likely that at least some of these papers will be considered in sessions 3-6 for the 2016 course. So when practising past papers before the course, it would be best to avoid writing answers to these.

ANNEXE C: TRENDS IN OVERALL PASS RATES FOR P6

Figure 1, drawing on PEB data for all candidates, indicates that FD4 (P6) has the lowest average pass rate of all the Final Diploma papers. Since 2000, the P6 rate has fluctuated between a high of 56% in 2007 to a low of 37% in 2012 (see **Figure 2**). The mean pass rate over the period 2000-14 has been 43% as against 47% for FD2 (P3), 52% for FD3 (P4) and 53% for FD1 (P2).

Figure 1: Trends in Pass Rates for All Candidates in the P2, P3, P4 and P6 Papers 2000 to 2014

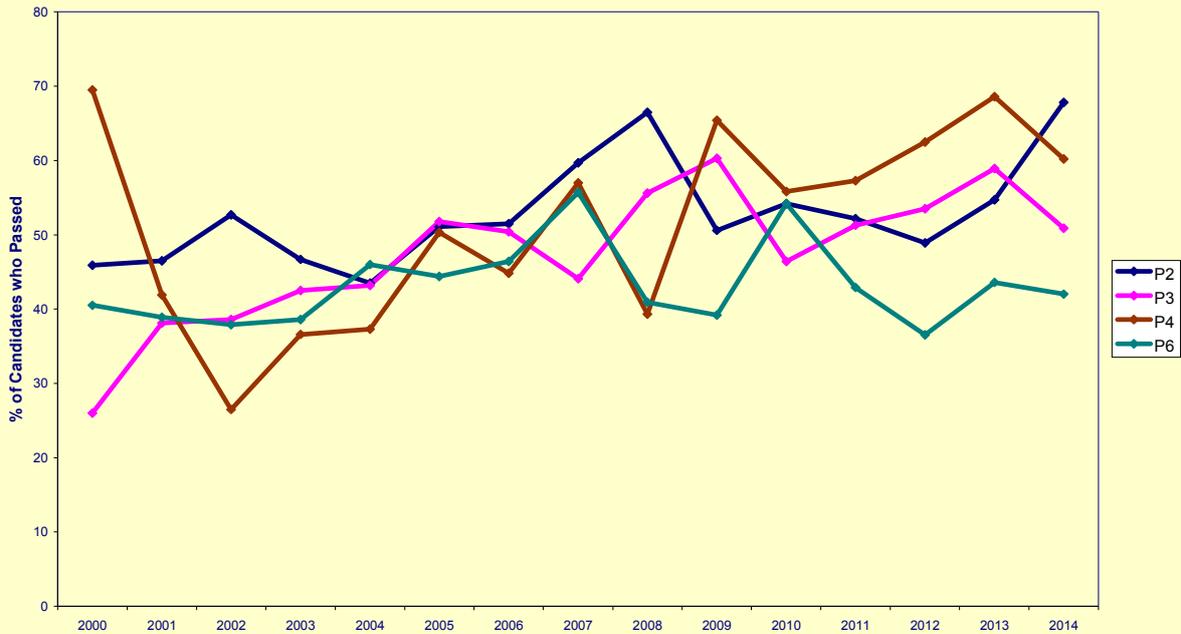
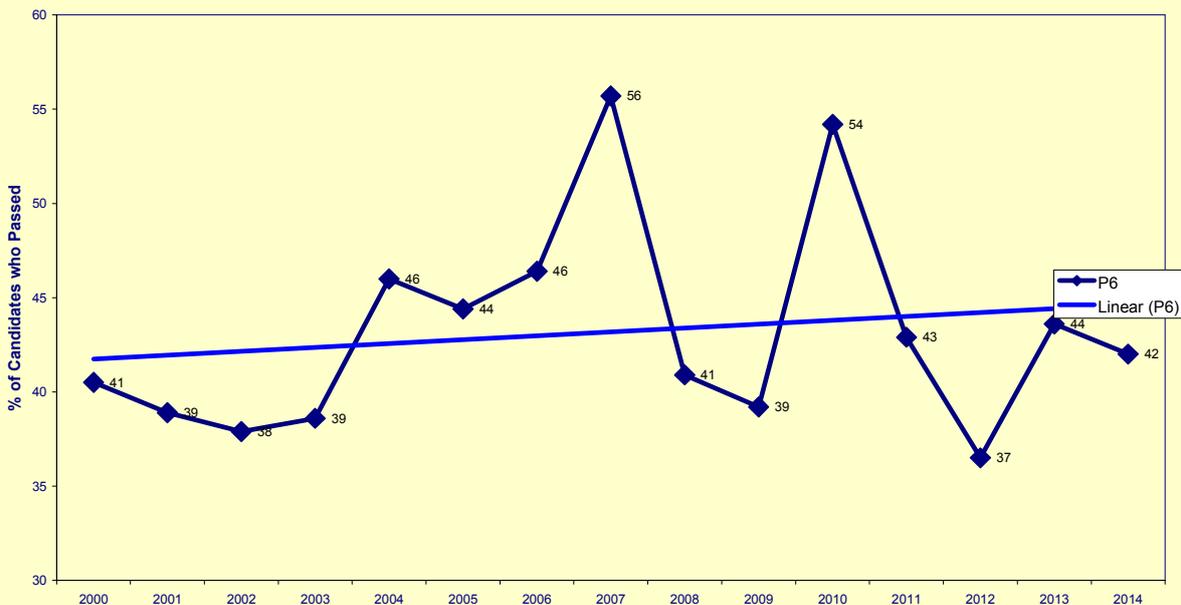
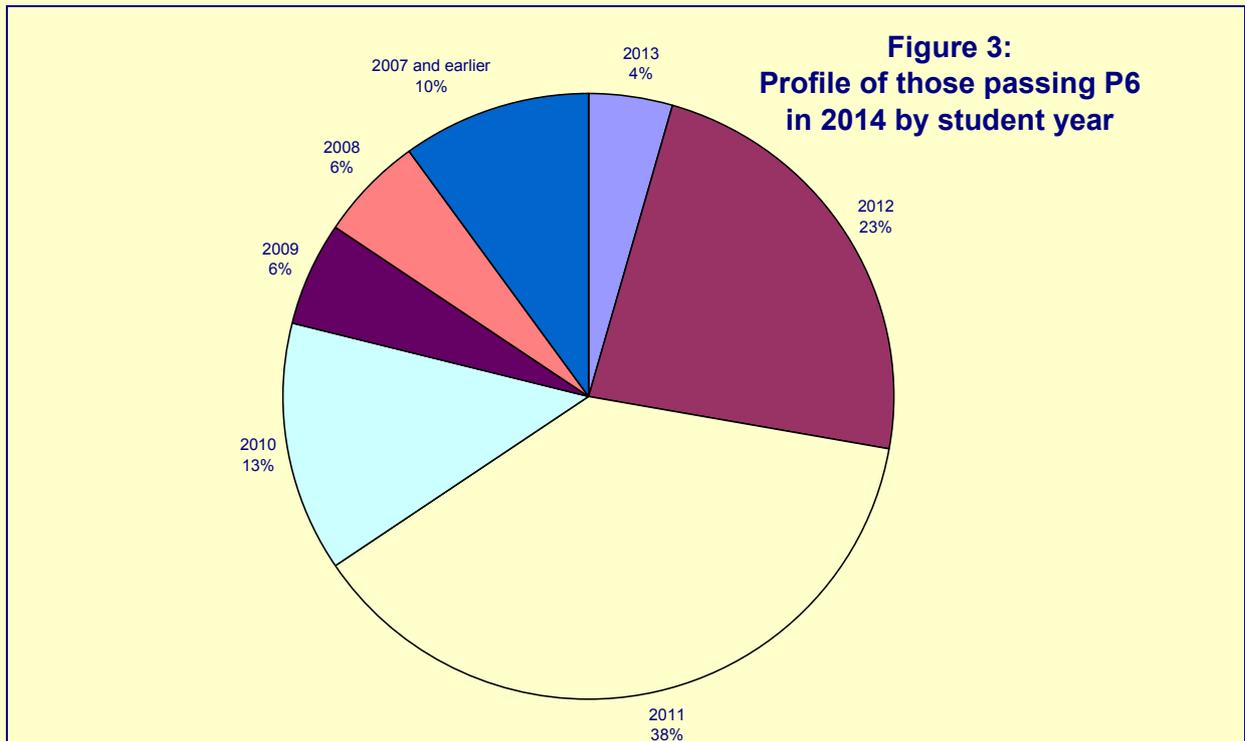


Figure 2: Trends in P6 Pass Rate for All Candidates: 2000-14

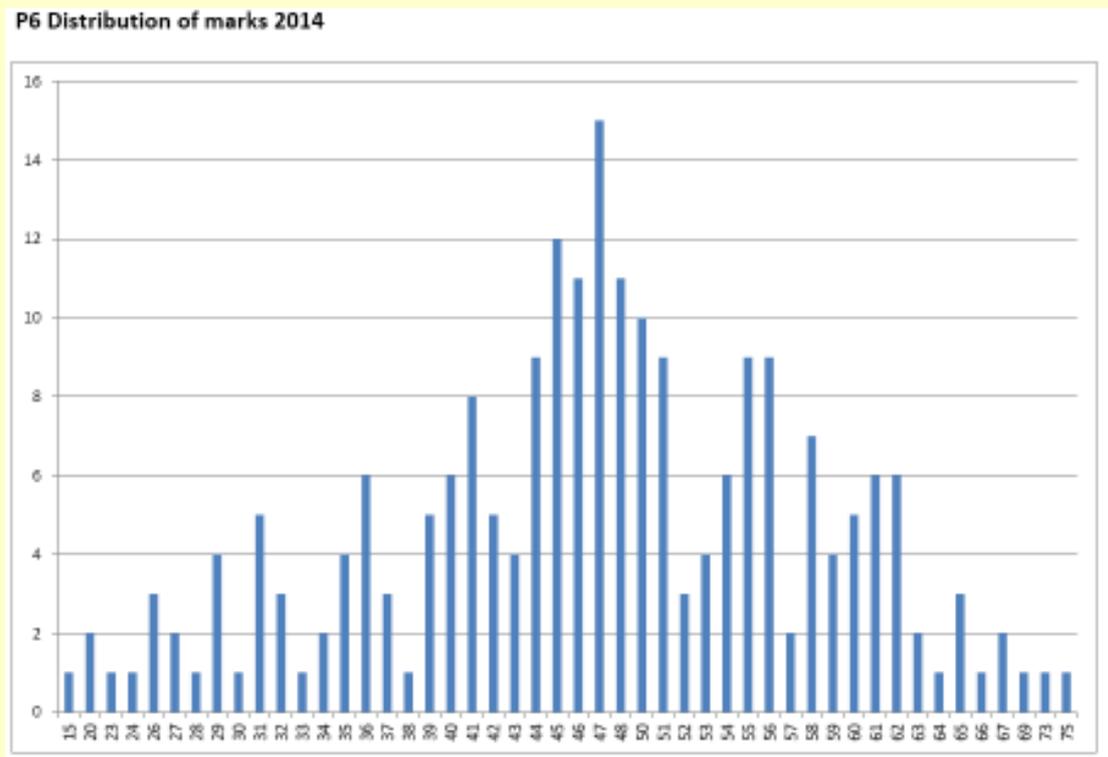


Our analysis (**Figure 3**) indicates that around a quarter of those who passed P6 in 2014 had been students in the profession for five years or more.



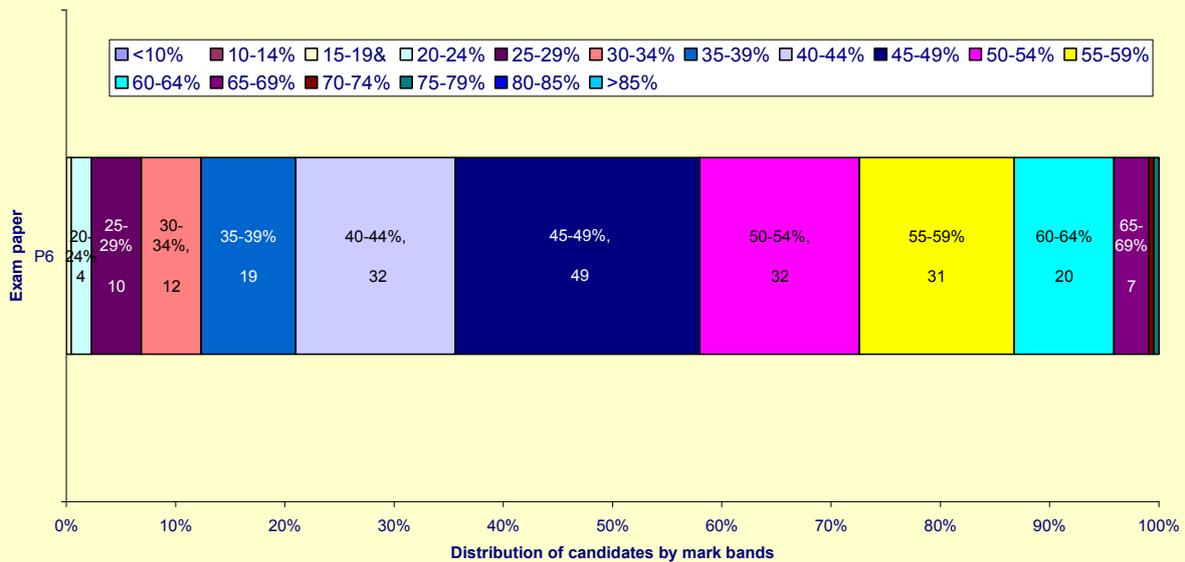
In 2014, the PEB published (**Figure 4**) the distribution of marks for all the candidates who took the P6 exam.

Figure 4: The mark distribution of P6 exam candidates in 2014



This is the first year PEB has published this information, so we do not whether this mark distribution is typical. But analysis of the marks indicates that, 105, or nearly half of all candidates secured marks of between 39 and 51, while 49 candidates (22% of all) were “narrow fails”, with marks of between 45 and 49 (see **Figure 5**).

Figure 5: Distribution of Candidates' Marks in 2014 P6 Exam
(219 candidates)



This points to the importance of candidates ensuring that they maximise all possible marks available, as one or two marks can make the difference between a pass and a fail. For example, the 2014 Examiner’s Report noted that two points were available for Sufficiency, but few candidates obtained these.

One candidate who was successful in the 2014 exam has provided this sound advice to future candidates:

“Practice is the only thing which will help you to pass the exam – read through Nigel Frankland’s book to understand the exam technique, and then apply the same logic to real-world infringement cases that you might be working on. The exam is primarily a study in spotting the relevant features in the claims, and then comparing and contrasting with the infringing device, and everything will fall into place in your head much more quickly if you apply the exam-style to a case you are working on”.