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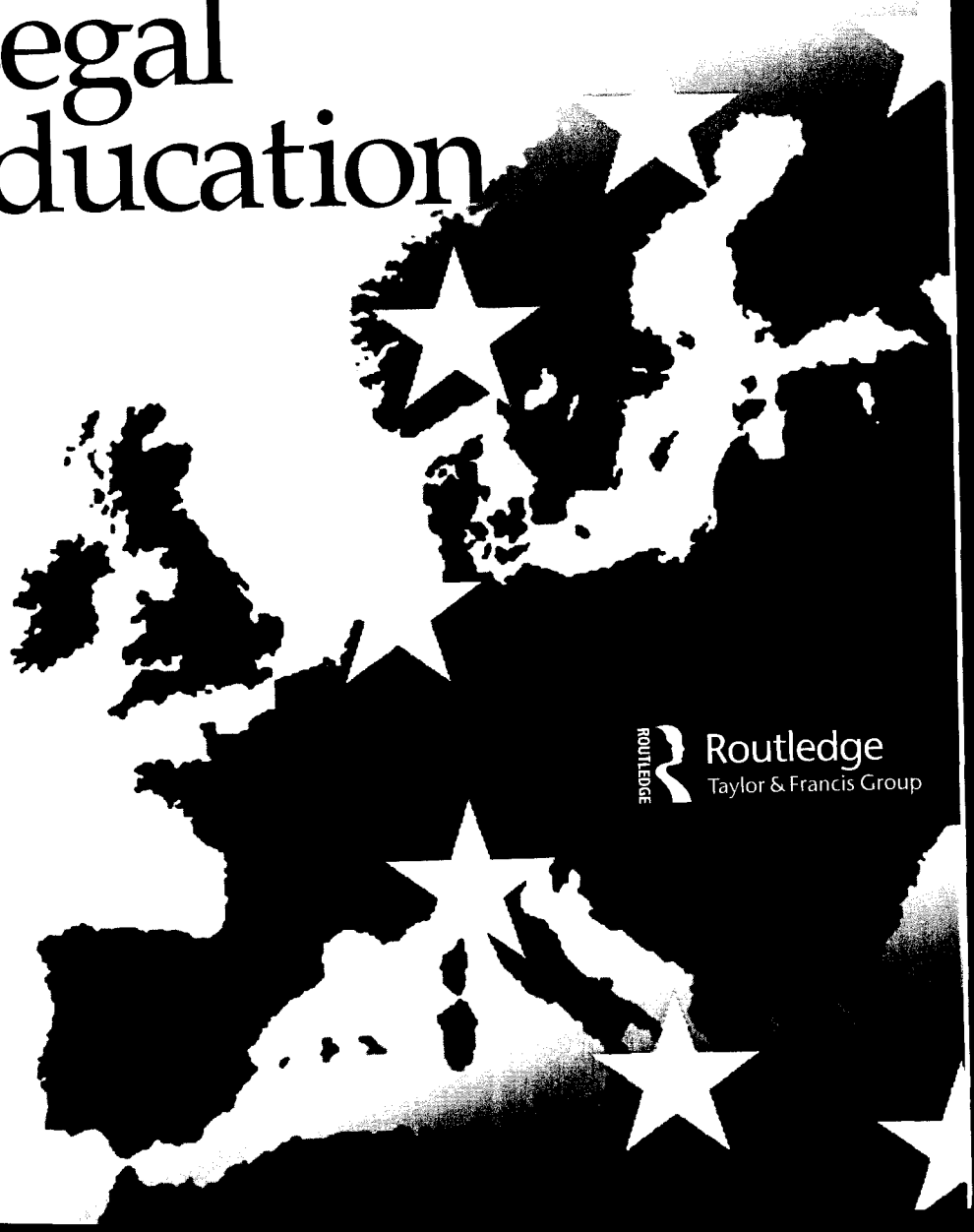
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TEACHING INTELLECTUAL PROPERTY LAW AS A LAW UNDERGRADUATE COURSE IN SCOTLAND

ANDREAS RAHMATIAN*

Abstract

This article gives an account of the author's experiences when designing and teaching the course module 'intellectual property law' within an undergraduate law programme at the University of Stirling, Scotland, UK, in the autumn semesters in the academic years 2003–04 to 2005–06. The module formed part of a business law degree, but was not a compulsory subject. Although relevant pedagogical literature is considered, generally a more practical approach is taken from an academic law lecturer's, rather than an educationalist's, viewpoint. After an outline of the content of the intellectual property undergraduate course, which also discusses the reasons for adopting this particular content, the article deals with teaching methods in lectures and seminars, as well as lecturing aids and their advantages and disadvantages. Finally, the author explains his experiences with the assessment methods which he chose for his intellectual property module, including student peer assessment for presentations. The article also comments on the purpose and validity of several types of assessment.

1. INTRODUCTION

Intellectual property laws have a fairly long tradition; the predecessors of patent laws in the United Kingdom date back to the 17th century,[1] and the first Copyright Act worldwide was passed in the UK in 1710.[2] However, the teaching of intellectual property (IP) law in law schools, both in England and Scotland, is a rather recent phenomenon,[3] and the expansion of teaching IP in law degrees seems to have been prompted particularly by the increased interest in industry in this area in the last 15 years.[4] Yet one cannot quite help thinking that IP law is still not completely established within the conventional disciplines of traditional law schools, at least when one compares its status of recognition to the subjects of contract, property, company law and the like. IP also tends to be viewed more as a postgraduate subject. Nevertheless, the demand for teaching IP law as a separate subject within an undergraduate law degree is growing continually.

In some respects, IP law is somewhat different from the older legal disciplines. IP laws are an example of a 'historic' international harmonisation of laws that started in

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1 Statute of Monopolies 1623 (21 Jac. 1 c. 3).

2 Statute of Anne 1710 (1709) (8 Anne c. 19).

3 Lahore, James, 'University Teaching in Intellectual Property', 1986, 8 *European Intellectual Property Review* 67. The first chair of intellectual property in a British university (Queen Mary College, London) was established in 1980.

4 See Soetendorp, Ruth, 'Intellectual Property Education – In the Law School and Beyond', 2005, 1 *Intellectual Property Quarterly* 82.

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the 19th century with the Paris Convention,[5] the Berne Convention[6] and the Madrid Agreement,[7] and which gradually grew, now reinforced by EU-legislation[8] especially in the last 20 or so years.[9] It seemed to have been obvious from the inception of the IP laws (long before the establishment of the European Community) that IP rights can only have any meaningful power if they are not restricted by national borders, and if there is agreement and mutual recognition in the industrialised world in respect of the broad principles on which these rights are founded.[10] This more international aspect of IP law may contribute to the fact that there is a fairly international spectrum of people teaching and researching in IP law in the UK, with training and practical experience from different jurisdictions (eg Australia, Canada, Continental Europe, South Asia, East Asia), and also with different cultural and language backgrounds. Law lecturers with a non-English (or non-Scots) law background may convey a more comparative approach to law and be able to highlight particular features of English law that are typically more conspicuous to those coming from a different system. They may also have the necessary knowledge that enables them to stress a certain relativism of legal rules: the present system may provide one solution to a legal problem but that may not necessarily be the only or best one. Some of their teaching methods may be influenced somewhat by their own legal education which often differed considerably from the teaching approach in the UK.[11] The present author is no exception to this and certain traces of this phenomenon might also be detected in this article.

The following gives an account of my experiences when designing and teaching the course module 'intellectual property law' within an undergraduate law programme at the University of Stirling, Scotland, in the autumn semesters in the academic years 2003–04 to 2005–06. The module formed part of a business law degree, but was not a compulsory subject. In this article, the pedagogical literature is considered, where appropriate, but generally, a more practical approach is taken, from an academic lecturer's point of view. As I am an intellectual property lawyer, not an educationalist, the following discussion contains to a significant extent observations and opinions that are the result of practical experience from teaching intellectual property law in higher education. These observations and opinions often have been enriched and complemented by the educational literature, but they sometimes

5 Paris Convention for the Protection of Industrial Property 1883, latest amendment 1979.

6 Berne Convention for the Protection of Literary and Artistic Works 1886, latest amendment 1979.

7 Madrid Agreement concerning the International Registration of Marks 1891, latest amendment 1979.

8 An earlier draft version of the EU's Directive on the Enforcement of Intellectual Property Rights (now Directive 2004/48/EC, O.J. L 195/16) even made references to the need for intellectual property education in draft Art 19a; see Soetendorp, fn 4, p 88.

9 EC-Trade Marks Directive 1988 (89/104/EC), Software Directive 1991 (91/250/EEC), Copyright Term Directive 1993 (93/98/EEC), Database Directive 1996 (96/9/EC), Information Society Directive 2001 (2001/29/EC) etc.

10 For example, if one compares the trade mark infringement provisions of otherwise unconnected countries, such as the UK and Austria, even before the implementation of the EC-Trade Marks Directive, see Rahmatian, Andreas, 'Infringement of Trade Marks in the United Kingdom and in Austria, 1999, 21 *European Intellectual Property Review* 354, p 363.

11 Compare Nollent, Andrea, 'Legal Education in France and England: A Comparative Study', 2002, *The Law Teacher* 277, p 290.

also depart from it. This appears as the typical divergence of theory and practice of teaching, but one could perhaps consider, following Immanuel Kant,[12] that if something works well in theory but not in practice, this may suggest that the theory itself has shortcomings: a good theory always works in practice, that is its purpose. Some of the discussion may be relevant to teaching of any legal subject in higher education or even to teaching in general, but my focus remains on intellectual property law within an undergraduate course.

2. WHAT TO TEACH AND WHY: CONTENT

When planning a course in IP law, there are inevitably certain limits as to the possible course design options as a result of the overall degree programme.[13] Thus, in line with the semester system of Stirling University, the IP law course I taught lasted for one semester which equals about 10 weeks of teaching. There was no IP course in place immediately before my arrival at Stirling University. In the design of the course syllabus, I decided to cover all traditional areas of IP law, patents and breach of confidence, trade marks and passing off, copyright and designs. I also teach them in this order. This appears to me the most natural and pedagogically easiest sequence: patent law, as far as the law is concerned (not the technical facts relevant to engineers and patent attorneys), gives a rather clear insight into the concept of intellectual property rights; trade mark rights are again more commercial IP rights, less so is (in theory) copyright, which is arguably the IP right that is most difficult to understand. Designs need some understanding of patents and especially copyright as a prerequisite. Students tend to perceive patents (wrongly) as most difficult, but come to terms with it more easily if they are exposed to it at the beginning of the course when they have more energy and enthusiasm. The complexities of copyright law are generally underestimated, but more easily understood conceptually after having gone through two types of IP rights already. It would also be possible to teach, say, only patents, trade marks and copyright, and more emphasis could instead be put on EU and competition law aspects, personality rights, etc. A combination of both approaches is unrealistic in view of the available time. Students have been taught in a large group (lectures) two hours (2 classes of one hour) per week, and, for one hour per week, in small group seminars (usually three groups). The general university organisation gives little flexibiliy in this teaching arrangement.

Not only the available time and the general syllabus structure determine the content of a course to a significant extent, but also whether the course is at undergraduate or postgraduate level. In my experience (both as a practitioner and as an academic), IP law at an advanced level does require a certain 'talent' which goes beyond that of other law subjects; it needs an aspect of creativity, lateral thinking,

12 Kant, Immanuel, 'On the common saying: That may be correct in theory, but is of no use in practice' ('Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis'), in Immanuel Kant, *Practical Philosophy*, Mary J. Gregor (ed) 1996, Cambridge: Cambridge University Press, P 279 (Cambridge Edition of the Works of Immanuel Kant).

13 As to the various considerations when designing a course, see eg Toohey, Susan, *Designing Courses for Higher Education*, 1999, Buckingham: SRHE and Open University Press, p 21.

diverse interests (many of them seemingly unrelated to law), and a feel as to where the actual problem in a certain practical set of facts is. IP law is not an 'easy subject' at all, and IP law is not exactly the right subject for the more meticulous or bureaucratic type with little sparkling ingenuity. However, possible problems typically emerge only at postgraduate level or when embarking on a career in IP law. At an undergraduate level, one cannot expect too much in this respect, but it is amazing how differently students at undergraduate level respond to this subject and how diverse their performance is. I had the opportunity to observe this in 2003–04, and again in 2005–06, when I taught largely the same group of students in banking law in the semester following the IP law course.

An IP course is well suited to convey generic and particular study skills, an aspect of university courses that is generally much emphasised.[14] Beside the general skills, an IP course is in a good position to emphasise law-specific transferable skills because IP law is interrelated with the laws of contract, property and tort, as well as aspects of public law. IP cases are also more topical, which may motivate people to read court cases more closely and interpret them, and that trains and reinforces their skills in general legal methods (distillation of the *ratio decidendi*, appreciation of the relationship between several court decisions, etc). This is probably easier to achieve with passing off and copyright cases than with significantly more complex banking, shipping, trust and restitution cases. The aspect of transferable skills an IP course may provide is also important for the employability of students after graduation:[15] realistically, only a rather small minority of law students who take IP courses will work only or predominantly in the area of IP law when they are in practice.

3. HOW TO TEACH: METHODS

(a) Lectures and lecturing aids

When I started lecturing large classes several years ago, I was not overly impressed by this method of communication; it seemed to confirm views I formed about the effectiveness of lectures when I was a student. This impression has however changed with increased teaching experience, although there may also be an element of accepting the inevitable. In a time of increasing student numbers and decreasing teaching and learning resources, large-class teaching seems to have become more and more the norm in higher education, despite the criticism the lecture has faced as a teaching method in the educational literature in the last 20 or 30 years.[16] The lecture as the standard method for teaching large classes has unquestionably numerous shortcomings, but it is realistic to recognise its dominance. Law is certainly no exception in this respect, and it has been suggested that law lecturers are not normally associated with

14 Biggs, John B, *Teaching for Quality Learning at University*, 1999, Buckingham: SRHE & Open University Press, pp 91–93.

15 Compare Rowntree, Derek, *Assessing Students: How shall we know them?*, 2nd edn, 1987, London: Kogan Page, pp 18, 76.

16 Compare Light, Greg and Cox, Roy, *Learning & Teaching in Higher Education. The Reflective Professional*, 2001, London: Paul Chapman Publishing, pp 97–98.

teaching innovation methods.[17] For whatever reason, the law lecture is tenacious. Johnson describes a project he and his course team carried out from 1983, whereby an 'Introduction to Law' course which faced a strong increase in student numbers, and which had been taught traditionally through lectures and seminars, was redesigned in a way that the new course was based around a series of student workbooks written by the course team together with accompanying seminars or workshops, and with coursework.[18] The course material in the workbooks replaced the lecture as a primary source of transmission of information. Lectures as the medium for the transfer of core information were expected to 'wither away' after a transitional period, and then become 'the icing on the cake'. However, students' confusion forced the team to use the lectures for reinforcement. Students also needed the 'golden epistemological thread' of the workbook writers' thought process, which gave them a much needed idea as to what would be assessed,[19] and in which way ('what do they want us to do?'). Johnson concludes that he was struck and surprised by the 'enduring potency of the lecture', and 'if the lecture scores low on effectiveness it is high on efficiency', although it was exactly the lecture that the project wanted to do away with.[20] Thus, for pragmatic reasons, it is probably most advantageous to seek how the lecturing situation can be used best, especially by taking into account what the lecture can and cannot achieve.[21]

Research has shown that lectures are not more or less effective than other methods for teaching information.[22] Unsupervised reading can be better than attending lectures.[23] However, the lecture situation can be used to convey a learning experience that unsupervised reading is less able to offer. Since a lecture is a live experience, lecturers can inspire, provoke interest and stress the direct relevance of the present discussion.[24] Lecturers can also guide students through the jungle of a new discipline, which a textbook is frequently not able to do because its main aim is exhaustive discussion and completeness.[25] A lecture can also give a perspective or an angle to a certain field of scholarship,[26] an aspect which student textbooks, anxious to reflect the standard or prevalent opinion of experts in a given field, often deliberately seek to avoid. A lecture can also provide auditory and visual stimulation,[27] which increases students' attention more than the reading of a textbook. In this way, lecturing is part of, rather than separated from, learning.[28]

17 Johnson, Nick, 'Introduction to Law: The workbook method' in Graham Gibbs and Alan Jenkins (eds) *Teaching Large Classes in Higher Education*, 1992, London: Kogan Page, p 78.

18 *Ibid*, p 78.

19 The 'backwash' phenomenon in the context of assessment, compare Biggs, fn 14, pp 141, 167; Ramsden, Paul, *Learning to Teach in Higher Education*, 1992, London: Routledge, p 187, see also section 4.

20 Johnson in Gibbs and Jenkins, fn 17, pp 78, 79, 82–83, 86.

21 Biggs, fn 14, p 98; Bligh, Donald A, *What's the Use of Lectures?*, 2003, San Francisco: Jossey-Bass, p 3.

22 Bligh, p 4.

23 Biggs, fn 14, p 98.

24 Light and Cox, fn 16, p 100.

25 Kenny, Phillip H, *Studying Law*, 5th edn, 2002, London: Butterworths LexisNexis, p 28.

26 Biggs, fn 14, p 99.

27 Bligh, fn 21, p 47.

28 Ramsden, fn 19, p 88.

This is at least the theory. In my observation, the practical results of a lecture situation depend on several factors which prevent generalising findings, one being the very subject taught: law is often regarded as dry, abstract and tedious (except perhaps in the more 'spectacular' areas, like criminal law), and this attitude can widely be found among the general public, but also many law students, non-legal academics and, notably, even among many legal practitioners. In fact, law is part of every aspect of human life and society and therefore not only more relevant, but also by far more interesting, than its reputation suggests. A law lecture can and should stress, as often as possible, the practical impact of any abstract rules discussed. One would expect that law is particularly suitable for being lectured in a problem-based way, and educationalists seem to favour this approach.[29] However, in my experience 'problem-based' or 'case-based' lectures[30] must be regarded with some reservations. Being topical, eg by taking an issue currently reported in the press, for example copyright piracy on the internet, may be appealing as a starting point for a lecture series, but large areas of IP law are not normally noticed by the public and the press. In addition, many 'real-life' problems are legally so complex that even law graduates cannot always be expected to solve them, let alone beginners in IP law: often legal issues reach the press because they are so complex and controversial.

Practical experience can also be deceptive. Students' experience at undergraduate level in the area of IP law is normally very limited, but not necessarily in other areas. However, I had some startling experiences in this respect when I was teaching tutorials on the law of mortgages in land law in my previous post, when I could already expect the students to have some systematic knowledge of mortgages from lectures and their reading. Since many people have a mortgaged property, increasingly often also students, one would think that their practical experience will assist them in their learning, and a lecture/tutorial could make use of that. I realised soon that this is not necessarily so: people often believe, from practical experience, and irrespective of what they have heard in the lectures, that 'when they buy a house they get a mortgage from a bank if they do not have enough cash available'. They see this event as one unit, and socially it often is. From a legal analytical point of view, the matter is, as is well known, quite different: the loan of money, which need not necessarily be granted by a bank, is secured by a property (but there are also unsecured loans) which does not necessarily have to be a dwelling house, but can be another type of land. That property constitutes the mortgage (thus the borrower/house-buyer does not 'get a mortgage', but exactly the opposite, they grant the mortgage[31]). The security of the loan does not have to be made through the very property that is to be purchased with the loan money. Thus it is perfectly possible that A gives their house as a security for a loan B obtains from a bank for the investment in a business that B runs in partnership with C. Such a situation generally seems to be grasped more easily by someone

29 Boud, David and Feletti, Grahame (eds), *The Challenge of Problem-Based Learning*, 2nd edn, 1997, London: Kogan Page, pp 2, 6; Biggs, fn 14, p 105; Bligh, fn 21, p 72; Savin-Baden, Maggi, *Problem-based Learning in Higher Education: Untold Stories*, 2000, Buckingham: SRHE & Open University Press, p 18, with more details.

30 An interesting example of a case method/problem-solving model in IP teaching, though for non-law students, is set out by Soetendorp, fn 4, pp 99–100.

31 Eg Gray, Kevin and Gray, Susan F, *Elements of Land Law*, 4th edn, 2005, Oxford: Oxford University Press, pp 1616 *et seq*.

with no previous practical knowledge at all, and I had to spend quite a bit of time, especially with mature students, to correct certain 'empirical' conceptions. The fact that legal institutions appear typically combined in a social setting which forms a common experience of students is in such a case decidedly unhelpful to any analytical discussion of the legal issues involved. Therefore, a law lecturer needs to be very careful when using a 'topical' or a 'problem-centred' approach if they does not want to create a muddle in the minds of the students from the start.

So there is something to be said in favour of the traditional, hierarchic form of lecture organisation. In this way, the separate legal elements are considered separately right from the beginning,[32] and not as an accidentally combined heap of actually separate, but apparently non-distinguishable, institutions. A problem-centred approach is not necessarily contrary to the hierarchic one, but can be considered a subcategory of the hierarchic form.[33] However, a structured and analytical approach is vital to any systematic legal consideration of facts, otherwise no proper legal discussion is possible. The downside of a more systematic style is that it is potentially less engaging, more detached from the students' own experiences, may be less inspiring and stimulating, and there is the danger that a lecture performance slips into the classical perception of a lecture as a fairly unpopular event.[34] Nevertheless, one aspect where the lecture is, in my opinion, irreplaceable, is that it can convey emphasis on language and precision in expression, and demonstrate in outline the craft of legal reasoning in action. In this way, students also become part of the process of scientific discovery, at least in a wider sense.[35]

I therefore tend to opt for a rather conventional approach to lecturing IP law. As IP law is typically taught towards the end of a degree programme, the problems lecturing may involve are generally less relevant (although still important) because advanced students can be expected to make use of a lecture more efficiently in their own individual way. A scholarly approach would be an introduction as to the nature and characteristics of an IP right in general terms at the start of the course. I do not do this at all because an abstract treatise on something that students have no idea of at this stage is unexciting to them and will generally be forgotten, so there is little point in teaching it at this point in the course. I do a little quiz instead, where people are asked which phenomena they think are protected by which IP right (eg a different type of bicycle brake, a novel, a computer program, the sign Coca-Cola, and so on). Usually the students get these right. When starting lecturing on one of the actual areas of IP rights, I give the students a brief structural overview of the *whole* IP right (eg patents) in about half an hour, so that they do not lose sight of the overall framework of this part of the subject when moving on to the details in the next two or three weeks.[36] Perhaps unusually, I spend relatively much time on assignment and

32 Invariably, that involves a somewhat reductionist approach, see Nuttall, AD, 'Is there a Legitimate Reductionism?', in Arthur R. Peacocke (ed), *Reductionism in Academic Disciplines*, 1985, Guildford: SRHE & NFER-NELSON, p 113.

33 Bligh, fn 21, p 69.

34 Compare Bligh, *ibid*, pp 16, 54.

35 Compare McLeish, John, *The Lecture Method*, 1968, Cambridge Monographs on Teaching Methods No. 1, Cambridge: Cambridge Institute of Education, p 42.

36 This approach has also been taken in the fairly recently published book by Hays, Thomas E and Milne, Claire C, *Intellectual Property Law in Practice*, 2004, Edinburgh: Thomson/W Green, pp 5–16.

licensing, especially in the context of copyright law, and little time on moral rights, because assignment and licensing issues are areas students may reasonably often be confronted with later on, while moral rights do still not play an important role in the UK in practice. I appreciate that this decision may be considered as somewhat controversial. The constraints within the syllabus do not permit addressing the doctrinal IP law more in a socio-legal context, which would be desirable.

My lectures are supported by handouts which reduce pressure on lecture time, but from a pedagogical viewpoint it is difficult to decide each time how detailed these should ideally be. If the handout is too extensive, then students may not benefit from the positive effects of note-taking.[37] Evidence shows that note-taking improves course grades.[38] Research has also shown that a handout containing a mere lecture outline tended to lead to better learning results than a more detailed handout.[39] But while handouts, whether long or short, are unquestionably an important lecture aid, I have doubts in this respect about the PowerPoint software package[40] that has become increasingly popular in higher education. Wherever possible, I only use overhead projector (OHP) transparencies which give a broad skeleton overview of the structure of the lecture, which is shown in more detail on the handout. OHP acetates also allow me to make notes and graphs during the lecture itself which permits a teaching and learning *process* that is more effective than the presentation of the product of a final text in a textbook or, especially today, a PowerPoint slide.

The seemingly appealing aspect of PowerPoint is that it permits the production of high-quality, professional looking presentations, together with speaker's notes and handouts. This is deceptive. Especially in the area of IP law, the PowerPoint slide is not as suitable as information carrier as one would think (leaving aside the problem of not infrequent failure of the technical equipment). While the OHP transparency is in the size of an A4 page, which allows the display of a good overview of a lecture structure with headings, subheadings etc that guides the listener through the lecture, and therefore comes closer to the handout, the size of a PowerPoint slide does not permit more than at most the equivalent of a third of an A4 page: thus a complete structural overview cannot normally be given. In addition, law is a very good example of an abstract subject, where a visualisation of the subject matter is in many cases impossible: economists have graphs, art historians have paintings, biologists can display drawings or photographs of a cell structure. A company lawyer may at least be able to show the organisational structure of a company. However, as is typical of most areas of the law, IP lawyers have in the vast majority of situations 'only' got the word, whose only appropriate visual representation is the written text.[41] IP lecturers may (and should) show a trade

37 Bligh, fn 21, p 130.

38 Locke, EA, 'An empirical Study of Lecture Note Taking among College Students', 1977, 71(2) *The Journal of Educational Research* 93, p 98.

39 References in Bligh, fn 21, p 150.

40 On that see Bligh, *ibid*, p 119.

41 Flowcharts may be useful but often tend to require an already existing, and rather detailed, understanding of the matter in order to be meaningful to the learner. Besides, there is also the issue of whether it is pedagogically always advantageous to try to visualise a subject which is by nature non-visual and abstract.

mark or a patent (application) as examples of IP rights, but that alone does not help to explain the underlying law. What frequently happens, when it comes to the discussion of the actual law, is the chopping-up of the lecturer's text into 'bullet points', three or four per PowerPoint slide, where the previous ones have gone, once the next slide is shown, although the previous ones relate to the presently shown ones. For reasons of space, font size, etc, the bullet points tend to be an over-simplification of the information transmitted. However, law occurs in 'analogue' *processes* of argumentation observing the legal art and techniques, not in discrete 'digital' points or products, and the human mind does not function 'digitally' either, unlike a computer. The actual narrative of a reported case, for example, with facts, (conflicting) arguments and the details of the court ruling are frequently assigned to the blank space *between* the bullet points, because there is no satisfactory way to depict this process. What students usually write down, are these rather unconnected bullet-pointed scraps of text without listening to the essential information in between, an example of what educationalists call (either retroactive or proactive) interference.[42] Obviously, following the process of the logical steps in the actual reasoning in the relevant court cases (and not only there) is essential in IP law, as in any other legal discipline. But I have noticed that the visual image prevails so strongly over the acoustic discussion that the note-taking (and even learning) tends to be confined to the bullet-pointed passages only. It is of course possible to prepare PowerPoint slides in a very considerate way to prevent these effects, but that can be achieved (often more quickly) with any other medium and with less technical equipment. Teaching without PowerPoint also avoids the temptation to generate handouts easily by printing off a reduced version of the PowerPoint slides. In my view, the standard PowerPoint layout for handouts is markedly unattractive, and lack of aestheticism does presumably not induce students to look at such handouts ever again, let alone learn from them. However, not surprisingly, the layout of a handout is not at all immaterial for its impact.[43]

(b) Seminars

The normal length of an undergraduate Honours degree in law at a Scottish university is four years, and on completion of year three, students may be admitted to an Honours programme, leading to an Honours degree (instead of a standard, ordinary or a general degree). IP law is normally taught at Honours level which encompasses seminars rather than tutorials (in practice the difference may not always be too great[44]). I usually enjoy running seminars. The interaction with students, the need to think on one's feet when confronted with challenging questions and the ability to twist, usually within seconds, even a disastrously wrong answer in a way in which it becomes rectified without discouraging the student from contributing ever again – all that is a stimulating experience. Students quickly get the idea that the main purpose of a seminar is not necessarily to follow my opinion, but to learn critical

42 Bligh, fn 21, p 32.

43 *Ibid*, p 159.

44 Discussion as to what 'seminar' can mean in Eble, Kenneth E, *The Craft of Teaching*, 2nd edn, 1988, San Francisco: Jossey-Bass, p 99.

thinking on the basis of a thorough knowledge of the subject matter and its methods – in fact only someone who is particularly well-versed in a subject is able to express criticism effectively and that also furthers the development of knowledge. It is well known that two lines of legal argumentation which lead to divergent or even conflicting results can be perfectly acceptable if they are supported convincingly by the relevant law, and if the reasoning follows the rules and art of legal reasoning; conflicting legal opinions are in fact an everyday scenario before the courts. Consequently, there is often not only one right answer; but there are still many wrong ones. Thus the nature of the law encourages a more divergent approach in respect of teaching and assessment.[45] This 'exact inexactitude', which I try to convey to the students, gives students a true picture of the working of the law. However, in my experience that also puzzles, confuses and irritates many students who have often obtained preconceptions of 'one-way-one-answer methods' in their secondary education. When students get to know me better, the teaching of seminars and lectures come together to some extent in that students start asking questions in lectures as well and the whole session becomes more interactive.[46] This, however, is very much dependent on the class in question.

My seminars in IP law typically consist of two parts: part one is a short presentation to the class[47] because that provides an effective method to assess functioning knowledge and understanding.[48] The task is assigned in advance to a group of two individual students on a topic (usually a court case or an academic article in relation to the subject taught the week before); part two is a discussion in class of a problem question provided the previous week. Problem questions can train students in problem-solving and analysis which is essential for the understanding of the law.[49] These problem questions have a format similar to that expected in the examination. The discussion is often in the form of a 'Socratic dialogue',[50] although that invariably depends on the students' preparation. Students who prepare well obviously benefit more from these sessions.[51]

4. ASSESSMENT: SOME CONSIDERATIONS

The assessment format of my IP course followed the assessment regulations of the University of Stirling, which reflect the usual undergraduate course assessment regime of many law schools in the UK: one course work essay (2,000–2,500 words in length), worth 30% of the final mark, class participation in the seminar, worth 10%

45 Biggs, fn 14, p 154.

46 Compare Biggs, *ibid*, p 81.

47 Brown, George and Atkins, Madeleine *Effective Teaching in Higher Education*, 1990, London: Routledge, p 64.

48 Biggs, fn 14, p 180.

49 Garrett, Helen, 'Key Aspects of Teaching and Learning in Social Sciences and Law' in Heather Fry *et al*, *A Handbook for Teaching and Learning in Higher Education*, 2000, London: Kogan Page, pp 319–20.

50 Rowntree, fn 15, p 204. On the tactics of questioning, see Brown and Atkins, fn 47, p 72.

51 Students' contributions also depend on the conversational roles that the students are prepared to take, see Brookfield, Stephen D and Preskill, Stephen, *Discussion as a Way of Teaching*, 1990, Buckingham: SRHE and Open University Press, p 90.

of the final mark, and an end of semester examination, accounting for 60% of the final mark.

In the past, the student presentations in my seminars were peer assessed on a standardised student-presentation mark sheet, thus using lecturer (institution)-set criteria,[52] which included criteria such as content (correct focus, accuracy), argument, organisation, conclusions, presentation techniques, where the appropriate boxes denoting categories between 'poor' and 'excellent' were to be ticked. All students obtained one sample sheet with their course booklet at the beginning of the course. In the seminar, the students listening to their presenting colleagues were asked to tick the relevant boxes and to award marks anonymously between 0 (poor) and 10 (excellent) on the form. I collated the forms and took the average of the awarded marks, which was, together with seminar participation, worth 10% of the overall assessment of the course (summative assessment element[53]). I did not mark the presentations, but I had a monitoring role[54] in case the discrepancy between students' marks and what I would have awarded was too great. In fact, I never had to exercise my discretion in this respect; when calculating the average marks, all marks were exactly, or at least close to, what I would have awarded. My feedback[55] and comments on the presentations (formative assessment element[56]) took place after the assessment in order not to influence the assessing students. Although peer assessment may have a certain appeal in educational circles,[57] one should perhaps be cautious when adopting this assessment method. During my course, students initially saw their involvement in the assessment process through their peer-assessment role as an exciting new thing, enthusiasm diminished during the course and their assessment exercise became a routine towards the end, so by that stage the value of this assessment format became doubtful. Furthermore, the essential objective of providing valuable feedback in relation to the presentation skills was not sufficiently achieved. Although students had the opportunity to look at their feedback sheets and have an individual discussion with me, only a minority of students actually did that. As a result, the peer assessment tended to be reduced to a device of generating marks.[58] There is of course the possibility to redesign the whole peer-assessment aspect of the course to avoid such effects,[59] especially by abanoning institution-set assessment criteria, but that may affect negatively the reliability (consistency) and transparency of this assessment method. There also remains the problem of resources and time constraints. I have therefore dropped peer assessment in future IP courses.

52 Biggs, fn 14, p 157.

53 Example of a definition in Rowntree, fn 15, p 121.

54 Boud, David, *Enhancing Learning through Self Assessment*, 1995, London: Kogan Page, p 70.

55 Negative feedback, however, was only given to the students individually, not in front of the seminar class.

56 Definition in Rowntree, fn 15, p 121.

57 See, however, the balanced discussion by Race, Phil, *A Briefing on Self, Peer & Group Assessment*, 2001, York: LTSN Generic Centre, Assessment Series, especially p 10.

58 See discussion of this problem in Boud, fn 54, p 16.

59 See examples in Boud, David *et al*, 'Peer learning and assessment' in David Boud *et al* (eds), *Peer learning in Higher Education*, 2001, London: Kogan Page, pp 78–79.

Coursework essays now very often form a substantial part of the overall assessment of a law module. I see coursework essays much in contrast with essay questions to be answered in examination conditions, as I will explain further below. Although the assessment format of coursework can be useful for formative assessment, effectively, in most cases, it was summative in my experience. Realistically it is difficult to return the first draft of their essays to every one of 40–50 students (typical class size), give them individual feedback, and ask them to resubmit the amended version for the final assessment of the course work, as a formative assessment would ideally require.[60] However, feedback was provided on the essays which were returned two weeks after the submission date. Students could also discuss their essays independently with me, which was probably the most efficient feedback,[61] but not every student took this opportunity. A somewhat curious side effect of teaching copyright was the students' legally informed increased awareness of the dangers of plagiarism in relation to their coursework.[62]

The end of semester examinations in IP law typically have the following format: they are closed book, timed, classroom examinations, and the students choose a certain number of set questions, for example, three questions out of six. In such a case, four of the six questions would be 'problem questions', that required the discussion of a real life situation and asked the students to give legal advice.[63] The problem questions are modelled on the same format as the problem questions and cases discussed in the seminars. The purpose of the set problem questions is to test the students' learning, preparation and ability to deal with the subject, and the emphasis is on the understanding of the subject, the structure and system, rather than on independent facts.[64] If there are six questions in all, then only two examination questions would be 'essay questions'; hence everybody has to attempt at least one problem question, but it is possible to answer three problem questions only instead of answering any essay question. The students should focus on problem-based learning and on the practical aspects of the subject in their learning and preparation for the examination. That is best catered for if they have to apply their knowledge to a practical scenario. Put differently, the reason for setting the examination paper in this way is to make the inevitable 'backwash effect'[65] work in accordance with the desired learning objectives: students attempt to study the material in ways that they perceive will meet the assessment requirements,[66] and that influences, or even determines, the students' approach to understanding.[67]

60 Light and Cox, fn 16, p 170.

61 Rowntree, fn 15, p 24.

62 On that problem in IP education, see Soetendorp, fn 4, pp 89–90.

63 Definition and discussion in, eg, MacQueen, Hector L, *Studying Scots Law*, 1993, Edinburgh: Butterworths, p 164.

64 'Deep learning', see Biggs, fn 14, pp 16–17.

65 *Ibid*, pp 141, 167; see also Ramsden, fn 19, p 187.

66 This is a rather unsatisfying truism: 'The student is basically concerned with passing the examination.' Horgan, Patrick T, 'Law School Examinations: The Cinderella of Legal Education, in Phil Harris and Roy Lewis (eds) *Teaching the Law*, 1980, Durham: Association of Law Teachers, p 148.

67 Biggs, John, 'Assessing Learning Quality: Reconciling institutional, staff and educational demands, 1996, 21 *Journal of Assessment and Evaluation in Higher Education* 5, p 9.

Essay examinations in law are a phenomenon found more in Britain than in continental Europe.[68] Essay questions tend to be easier to set, especially if they aim at the recall of knowledge.[69] Essay questions may well have their place in the areas of public law, international law, legal history and jurisprudence, but I doubt their suitability in commercial law subjects, such as IP law. Having both an academic and a practitioner's background in law, I do not find much benefit in asking students to write essay examinations under time pressure where they have to engage in a discussion of often quite intricate topics, without having time to reflect on the issues properly, and without doing referenced research,[70] even if the questions may seem to provoke responses of impressively relational understanding.[71] The answers may appear in this way, but what often happens with reasonably good students is the delivery of an effectively regurgitated discussion of *someone else's* relational or extended abstract response,[72] either from a textbook or academic journal, or from a lecture. This is not surprising as students cannot be blamed for 'playing safe' in examination conditions. Furthermore, the weaker students especially tend to twist the question and reinterpret it as something which has not been set but which allows them to provide an answer that is more comfortable to them.[73] Thus, in many cases, essay examinations really assess decontextualised declarative knowledge,[74] and there is little point in testing that at higher education level. If the questions are well phrased, the provoked answers may display purported contextualised knowledge without that knowledge being the result of real, deep understanding. The validity of such assessments is therefore doubtful.[75] Consequently, discussion tasks that require deep understanding of the matter (which invariably grows over time, often prompted, and certainly furthered, by the writing process itself) should be left to coursework as part of the assessment of an IP course and that assessment should have a deadline of several weeks. I am aware that my continental European academic education (both in law and in arts subjects) may shine through in this respect, but I think it is a sustainable argument to say that for a legal academic, essays under examination conditions are of little value since no real academic will ever be asked to write a paper of academic value under these circumstances. From the point of view of a practising lawyer, they are probably rather worthless, for no solicitor or barrister will be asked to write an essay on the virtues and vices of aspects of patent or copyright law for their client or the judge. From a pedagogical view, essay examinations are also unsatisfactory because they do not normally lead to divergent and contextualised learning, unless the student is capable

68 Generally Rowntree, fn 15, p 67.

69 Compare Ramsden, fn 19, p 188.

70 That is hard enough in relation to course work essays; see, eg, Eble, fn 44, p 134.

71 Biggs, fn 14, pp 39, 47.

72 Definitions in Biggs, *ibid*, p 48: *relational approach*: '(a) understanding, using a concept that *integrates* a collection of data; (b) understanding how to *apply* the concept to a familiar data set or to a problem'; (b) presupposes (a); *extended abstract approach*: '(a) relating to existing principles, so that unseen problems can be handled; (b) questioning and going beyond existing principles.'

73 Rowntree, fn 15, p 131; Kenny, fn 25, p 125, with a good practical example.

74 Biggs, fn 14, pp 152, 168.

75 Rowntree, fn 15, p 190; Biggs, fn 14, p 158.

of making a 'workmanlike attempt'[76] in a brief period of time to address and analyse conclusively the hidden issues in a (seemingly) open-ended essay question.

The reason why essay questions are included in the IP law examination paper at all is a purely pragmatic one. Many students are not deep learners,[77] and, in any event, there is a significant proportion of weaker students. Students perceive essay questions as the easier option (probably incorrectly[78]), and an examiner should provide a safety net and reassurance (in case of student nervousness, etc) in the examination situation through the format in which the paper is set. In this way, the examiner can cater for weaker students as well as those who, for whatever reason, find themselves unable to tackle some of the set problems in the moment of the examination, hence essay questions are also provided. Among law lecturers, it is 'axiomatic' that good students answer problem questions, while weak students attempt essay questions,[79] and this is an observation that I can support from own experience; it seems indeed easier to get through an essay question, where a discussion demonstrating analytical ability (if asked for) can be evaded to some extent, but it is much harder to do really well in it than in a problem-type question. Nonetheless, it enables students, especially weaker ones, to obtain an acceptable mark, and recognises the fact that, as long as a certain level of competence is reached, that is satisfactory for the tasks usually encountered in one's professional life. In this respect, the criterion-referenced element is emphasised in the assessment[80] because once the student reaches a certain standard of competence, no matter in which way they choose to have this standard tested (either through problem questions or through essay questions), they should be able to obtain the necessary educational qualification as a first step for a (legal) career. Obviously, such an approach runs counter to the notion of strict standardisation and objectivity of the assessment, but taking this ideal to its logical conclusion would mean that a choice of questions in examination papers would not be permissible at all,[81] which is presumably not conducive to easing examination stress, or even to fostering the culture of motivation through assessment.[82]

5. CONCLUSION

One may be surprised about the rather conventional design of my IP courses. Undoubtedly, one can get many helpful impulses and good new ideas from the educational literature for the setting up and running of undergraduate law courses, and it is certainly very useful to keep an eye on developments of educational research to enrich and improve one's own teaching. However, there remains the difficulty of

76 Kenny, fn 25, p 125.

77 Biggs, fn 14, p 16. The surface approach to learning is at least not discouraged by the way in which certain law syllabuses are set up, especially the professional conversion courses in law; see Prosser, Michael and Trigwell, Keith, *Understanding Learning and Teaching – The experience of higher education*, 1999, Buckingham: SRHE and Open University Press, p 103.

78 Compare Kenny, fn 25, pp 118, 121.

79 *Ibid*, p 120.

80 Rowntree, fn 15, p 178; Biggs, fn 14, p 46.

81 *Ibid*, Rowntree, p 130.

82 This rather idealistic view can be found in Rowntree, *ibid*, p 22.