CURIE

Sports Waiver Forms: Injured Martial Arts Student Sues Instructor for Injury In Class

Parker v. Ingalls, 2006, BCSC 942, per Allan, J. [3284]

The plaintiff Parker sued to recover damages from his martial arts instructor Ingalls with respect to an injury that occurred on 23 January 2003. The Plaintiff Parker was the operations manager of a recreational complex who believed in maintaining himself at a high level of fitness and weight training. He had begun sessions in karate and achieved either his blue or green belt. He assisted the Defendant Ingalls from time to time in doing demonstrations and warming up the karate class.

After three or four years, Ingalls introduced shoot-fighting in his class routine. It is a martial art that was described as being more physical than karate, being more hands-on. It involved kick-boxing principles (stand up and striking) with submission ground skills (wrestling). The student must master ten techniques to be proficient. About the time of the incident, Parker had not reached Level 1. Ingalls was a Level 5 instructor.

The Plaintiff testified that he understood that shoot-fighting rules were such that students were to proceed lightly and not hurt each other. He understood that the instructor was to apply very little force in teaching, as the student is watching and paying attention to the lesson. He claimed that he "never thought 'in a million years' that he would be injured in a demonstration". He disagreed with the suggestion that he knew he might get hurt in training, other than by way of a scratch from someone's fingernails. He testified that he specifically decided not to enter competitions because he did not want to get hurt and, for the same reason, he rarely participated in sparring courses. He claimed to be interested in the "art and the physical fitness aspect of martial arts".

On the date of the incident, the Plaintiff Parker and his friend Pearson performed their usual routine of calisthenics and cardiovascular warm up activity. The Defendant Ingalls demonstrated a particular shoot-fighting technique to the class. The class then broke into pairs. Parker and Pearson went to a separate area. They practiced for five to ten minutes before asking Ingalls to assist. Ingalls came and demonstrated the technique with Parker. For this, he had Parker lie down on the floor on his back. Parker tipped his head forward to watch both of his legs in the air. Ingalls demonstrated the technique with his right leg, which ended up in a dislocated right knee with torn tendons. Parker ended up being taken to hospital and undergoing significant treatment including a cast and, ultimately, surgery. It was conceded that Ingalls did not give Parker any warning that force was about to be applied to his knee, or to do or not do anything.

What's inside

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Parker and his friend Pearson testified that Ingalls demonstrated the technique by using both of his hands on Parker's right leg, one on the ankle and on the knee. Ingalls was adamant that he demonstrated the maneuver by putting his left hand on Parker's right ankle to lock Parker's right leg into position, and putting his right on Parker's left leg to position it for the technique being demonstrated.

Ingalls testified that martial arts involved contact so he always discusses the possibility of injury with new students. He claimed to give them a copy of documentation that involves explanation of the risks of injury. He claimed to utilize a system that involved explaining both the financial contract aspects of the matter and the risk of injury to new students. He personally had received many injuries including torn muscles, crushed cartilage and broken bones.

At the trial, the Plaintiff called no expert evidence on the standard of care for a prudent martial art instructed. The defence argued that this should result in a dismissal of the case for failure to prove breach of the standard of care.

In the alternative, the Defendant relied upon a series of waiver clauses:

(a) Student Enrollment Agreement. The Student Enrollment Agreement was executed by the Plaintiff on 8 February 1997. This was a one-page document, with printing on both sides. The Plaintiff denied that he was told to read the back of the page and claimed that the contents of the back page were not explained to him. The first page of the document recorded the name and contact information for the student, and the financial terms of the contract. In bold capital letters, it state the following:

> "STUDENT ACKNOWLEDGES THAT HE/SHE HAS RECEIVED A FILLED-IN COPY OF THIS AGREEMENT AND THAT HE/SHE READ AND UNDERSTANDS THE CONTENTS THEREOF."

Both the Defendant and the student signed on Page 1. Just above the signature line were the following words:

> "STUDENT HAS READ THE ENTIRE AGREEMENT AND UNDERSTANDS AND AGREES THERETO, INCLUDING THE REVERSE SIDE OF THIS AGREEMENT."

The Plaintiff testified that he had not read these provisions. On the reverse side of the document there were nine paragraphs which the Court described as "legalese" and which the Court considered a student would be "unlikely to read through". The last sentence of the second paragraph contained the only provision relating to a waiver of rights:
"Student further acknowledges the existence of some risk of personal injury in participating in the prescribed course of instruction and expressly agrees to assume the risk of all injuries, death or property damage and agrees to indemnify and save harmless Studio from and against any and all liability, including all expenses, legal or otherwise, incurred by Studio in the defense of any claim or suit."

The Student Enrollment Agreement was a contract for a twelve-month course, which expired on 8 February 1998. The Plaintiff was not required to make a further deposit, and there was "no evidence of any continuation of the terms of that time-limited contract".

(b) Sign - In Sheets. The Defendant testified that students attending sessions had to execute sign-in sheets which contained the words **"Liability Waiver"** and which contained the following wording:

> In consideration of receiving instruction in the Martial Arts (Kung Fu, Karate, Jujitsu, etc.) and in other physical culture activities and being aware of the possibility of injury, I hereby, for myself, my heirs, executors and administrators, waive and forbear to exercise and all rights and claims for damages against *Pure Self Defence Studios*, its officers, employees, instructors or their representatives or

At the trial, the Plaintiff called no expert evidence o the standard of care for a prudent martial art instructed.

members of its classes or organizations for all damages, injuries of losses that I may sustain or incur, if any, while participating in activities or instruction sponsored completely, or in part, by *Pure Self Defence*.

There was space for students to sign and date their signatures next to that wording. The Defendant could not say that the Plaintiff signed such a document on the date of the incident, noting that the form may have been introduced after the incident . The Plaintiff testified that when the martial arts studio first opened, students used to sign a sign-in sheet for class attendance but he did not recall any text printed on it. Miss Pearson recalled signing sign-in sheets when they did sparring classes.

The Plaintiff testified that he had not read the waiver.

(c) **December 2002 Enrollment Form.** By 2002 the Defendant changed Enrollment Forms for new students. Such a document was signed by the Plaintiff and his friend Pearson in December, 2002. The top ¾ inches of the document contained things like the student's name, the Defendant's name, contract information, etc. Under that information there was a heading **"Liability Waiver"** and the following words in small print, all of which occupied 3 ¼ inches of the length of the page:

> In consideration of receiving instruction in the Martial Arts (Kung Fu, Karate, Jujitsu, etc.) and in other physical culture activities and being aware of the possibility of injury, I hereby, for myself, my heirs, executors and administrators, waive and forbear to exercise any all [sic] rights and claims for damages against Pure Self Defence Studios, its officers, employees, instructors or their representatives or members of its classes or organizations for all damages, injuries or losses that I may sustain or incur, if any, while participating in activities or instruction sponsored completely, or in part, by Pure Self Defence. In the event that emergency medical care is needed, I authorize it to be provided understanding that any such care will be the "First Aid" treatment type only. IF THE APPLICANT IS UNDER THE AGE OF 18, THIS RELEASED [SIC] AND CONSENT FORM MUST ALSO BE SIGNED BY A PARENT OR GUARDIAN.
>
> To the right of the above-quoted words was a space for signatures where both the Plaintiff and his friend Pearson signed. The bottom 6 ½ inches of the document contained other contractual and financial provisions. This form of document did not have a second copy that could be given to the student. The Plaintiff testified that he had not read the waiver. He claimed that he understood its purpose to be ensuring that he would be responsible for paying for his classes. He testified that after the incident he had signed a release for a white water rafting expedition where it was made clear to everyone that they were releasing the rafting company from liability. The Plaintiff acknowledged his signature next to the waiver wording. Pearson acknowledged his signature next to the waiver wording, but he claimed that there was no discussion about a liability waiver. He did not even recall seeing this document.

Shortly before trial, the Plaintiff served a new medical expert report on the defence, too soon to trial to comply with the B.C. pre-trial expert report disclosure rules. The defence sought an adjournment but the Court had directed that liability issues only would proceed at trial and quantum issues would be tried separately.

At trial, a causation issue arose. The defence argued that the Plaintiff had not proven that his knee injury resulted from the martial arts accident as opposed to have been caused by a pre-existing injury. The Plaintiff sought to introduce this new expert report, over the objection of the defence. That expert report contained the opinion that the martial incident had caused the knee damage, seeing as the patient had not disclosed a history of significant injury prior to that date. The defence argued that the Plaintiff's clinical records referred to

some evidence of previous damage to the knee. However, the Defendant's counsel had not served notice that he intended to cross-examine the Plaintiff's orthopaedic surgeon, because he understood that the medical expert evidence would be called on the issues of damages, which were to be tried at a later date. The orthopaedic surgeon was not available to give evidence during the trial (being out of town) so as to allow defence counsel to cross-examine. The parties agreed to proceed on the basis that the trial would determine all issues of liability except for causation, for which the trial would be adjourned.

HELD: For the Plaintiff; action allowed.

(a) The Court held that the Defendant had been negligent. It was conceded that the Defendant martial arts instructor owed a duty of care to the Plaintiff student, although this did not amount to the instructor becoming an insurer so as to guarantee that the student would not sustain injury while training. With respect to the Plaintiff's testimony that he did not expect to get hurt in demonstration, the Court concluded, "it is obvious that competitions and professional bouts create a large risk of serious injury". However, her Ladyship held that "in this case, the issue is the risk, if any, that is inherent to students during instruction, and specifically, the risk of injury from their instructors". The Court rejected the defence argument that the Plaintiff had failed to prove a breach of the standard of care by not calling any expert evidence as to the standard of care that ought to be exercised by a prudent martial arts instructor on the following basis:

[25] Karate and shoot-fighting are not comparable to medicine, either in terms of their inherent complexity or as vulnerable professions deserving of particular protection. Further, the standard of practice here is easily identifiable: the duty of an experienced karate instructor such as Mr. Ingalls when utilizing a student to perform a demonstration is not to inflict physical harm."

COMMENTARY: With all due respect, this logic is circular and facile. Of course a martial arts instructor who is not acting in bad faith does not intend to injure a student. However, injuries can occur without negligence. To hold that the duty is simply not to cause injury, full stop, is to hold that the mere fact of an injury proves negligence. With respect, the Court completely sidestepped the question of proving a standard of care.

(b) The Court also held that the Plaintiff had established causation. This was notwithstanding that it had been agreed that causation issues would be tried more completely at a later date because of the Plaintiff's calling of expert evidence not intended for the liability portion of the trial in circumstances where the expert was not available for cross-examination. The Court concluded as follows:

[33] However, in his submissions, Mr. Sinnott concedes, as he must, that Mr. Parker sustained an injury to his right knee as a result of the demonstration performed by Mr. Ingalls. I conclude that causation, as an element of negligence, has been proven: ***Athey v. Leonardi*** [1996] 3 S.C.R. 458. The real issue is whether the damages suffered by Mr. Parker resulted solely or partly from that negligence. That issue, which arises from Mr. Ingalls' allegation that Mr. Parker had a pre-existing knee injury or condition relates to the quantum of his damages rather than to the issue of causation.

COMMENTARY: With respect, it seems somewhat untoward to allow a trial to proceed in the absence of the Defendant's ability to cross-examine an expert witness (on the basis that this would occur later) and for the Court to then come up with a decision on causation without that subsequent trial on the issue taking place.

(c) The Court held that the Student Enrollment Agreement signed by the Plaintiff on 8 February 1997 did not operate to insulate the Defendant from liability. The Court noted that there was no evidence that the time-limited contract terms were extended and found that the waiver provisions could not apply to the accident because the Student Enrollment Agreement had expired in February 1998.

It was conceded that the Defendant martial arts instructor owed a duty of care to the Plaintiff student, although this did not amount to the instructor becoming an insurer so as to guarantee that the student would not sustain injury while training.

(d) The Court also held that the sign-in sheets signed by students at the beginning of each class also did not insulate the Defendant from liability. Her Ladyship concluded that, on the evidence, this sign-in sheet with waiver was not introduced until after the Plaintiff's injury.

(e) The Court held that the waiver defence came down to a consideration of the December 2002 waiver form. Her Ladyship noted the law with respect to such waiver forms.

> [58] In ***Karroll v. Silver Start Mountain Resorts Ltd.*** (1988), 33 B.C.L.R. (2d) 160 (S.C.), Chief Justice McLachlin stated that the plaintiff was bound by a release unless she could establish:
> (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the contents of the release to her attention.

Her Ladyship noted that such waivers will not exonerate a Defendant from his/her own negligence unless that is specified, given that such waiver forms are to be "strictly construed against the party making it and requiring its execution".

Her Ladyship noted that such waivers will not exonerate a Defendant from his/her own negligence unless that is specified, given that such waiver forms are to be "strictly construed against the party making it and requiring its execution". In the end, the Court held that this waiver did not apply as it had not sufficiently been brought to the attention of the Plaintiff:

> "[70] I conclude that the liability waiver does not release Mr. Ingalls from liability. I do not accept the evidence of Mr. Ingalls that he brought the waiver to the attention of Mr. Parker and Mr. Pearson when they enrolled for shoot-fighting or that he warned them of the risks of injury in that activity. I have no doubt that Mr. Parker did not read the waiver "hidden" in the Student Enrolment Agreement in 1997 and that there was no discussion about any risk of injuries.
>
> [71] The cases that the defendant relies on are all distinguishable. The liability waiver itself constitutes a very small portion of the 2002 document. It appears in extremely small print with no emphasis to direct the reader to its importance or to the fact that he or she is giving up all rights to sue the Studio. It does not refer to negligence. There is a space for the student to place his or her signature. There is no provision that draws the student's attention to the fact that by signing, he or she is waiving any legal rights."

It appears in extremely small print with no emphasis to direct the reader to its importance or to the fact that he or she is giving up all rights to sue the Studio.

Additionally, it was held that the content of the waiver form was not sufficiently broad to cover the accident:

> "[72] In any event, I find that an injury such as that experienced by Mr. Parker does not fall within the scope of the waiver. In my opinion, Mr. Parker, by engaging in shoot-fighting lessons accepted certain risks of injury but he did not accept the risk of injury at the hands of his instructor who he trusted not to harm him. It is reasonable for Mr. Ingalls to seek a waiver from accidents occurring in the case of a student injuring himself as a result of falling or doing a move incorrectly, or being injured by another student in the course of an exercise. However, it is not reasonable for Mr. Ingalls to seek to exclude himself from his own negligence where he is conducting a demonstration in which he has complete control over the safety of the student. Mr. Parker was not asked to consent that risk and he did not do so.■

?? Questions & Answers ??

Q. When do we report new buildings to either American Appraisal or CURIE?

A. Technically new buildings added mid-year don't have to be reported until the next American Appraisal annual property values update. If they are not added at that time, going forward they will not be covered in the event of a loss. There are two exceptions to this rule. One is any new building with a value in excess of $50 million. These must be reported to CURIE immediately as we have a duty to notify our excess insurers of any such additions to the program. The other exception is the addition of any time element coverages: Business Interruption; Loss of Rents; or Blanket Extra Expense. We need to endorse your institution's property policy in order to put these coverages in force.
That being said, CURIE would appreciate being informed of the addition of any building at the time of acquisition regardless of the value. This assists in the claims handling process by avoiding surprises when a loss is reported on a building we know nothing about.

Q. When do we report the acquisition of equipment/contents to either American Appraisal or CURIE?

A. All Changes to building contents must be reported to American Appraisal during the annual update. Individual pieces of equipment with a value of $100,000 and above must be identified separately as indicated in the annual update procedures on the forms provided. CURIE does not need to be informed of equipment acquisitions between American Appraisals updates.

LOSS CONTROL TIP

During the holidays many people like to use candles. Here are some helpful hints to follow when you burn candles.

- Consider flameless candles – These candles are battery powered, made of real wax and flicker like the real thing.
- Take extra care if you are burning candles with more than one wick. Avoid buying candles with multiple wicks that are close together.
- Use well ventilated candle holders that are sturdy and will not tip over. Avoid wooden or plastic holders, as these can catch fire. Use caution with glass candle holders. They can break when get too hot.
- Do not leave candles burning with no one in the room
- Extinguish all candles before you go to sleep.
- Do not burn candles that have lead in the wicks. When you buy candles, ask the retailer if the wicks contain lead.

CURIE UPDATE

Statement of Income and Expenses
For the nine months ended September 30, 2006

	2006	2005
Written Premium	$ 19,756,593	$ 16,028,731
EarnedPremium	14,815,276	12,014,897
Less Reinsurance Costs	1,236,926	2,235,164
Net Earned Premium	13,578,350	9,779,733
Net Incurred Claims	10,757,628	8,625,128
Net Loss Ratio	*79.23%*	*88.19%*
Underwriting Profit (Loss) Before Operating Expenses	**2,820,722**	**1,154,605**
Operating Expenses	1,909,612	1,885,147
Net Operating Expense Ratio	*14.06%*	*19.28%*
Combined Ratio	*93.29%*	*107.47%*
Underwriting Profit (Loss)	**911,110**	**(730,542)**
Income from Investment	1,504,244	1,214,558
Other Income	1,500	1,500
NET PROFIT (LOSS)	**$ 2,416,854**	**$ 485,516**

3rd QUARTER CLAIMS HIGHLIGHTS

We are still awaiting the results of two trials which took place in the spring. We have eleven (11) CURIE II claims remaining open.

CURIE III has had a steady run off.

CURIE IV is showing a trend of more educational malpractice claims being reported. The property program remains good this year.

HOLD THE FOAM

**by John Breen*

Foam parties are becoming increasingly popular among young people. A foam party is a social event in which participants are lathered up with soap-like suds, usually dispensed from a special machine or cannon. The foam is often blown on the dance floor or blown through a finely meshed bag hanging from the ceiling. The distribution of foam will resemble a snowstorm or a bubble bath overflowing. Foam cannons can shoot foam approximately 30 meters at people in the crowd or up in the air. The height of the foam can be anywhere from 10 centimeters to over 2 meters.

Typically bathing suits or beach attire is worn to the events, but it is possible to go fully clothed. However, many people peel down once they get into the spirit of the party and the foam eventually soaks cloths, making them very uncomfortable (foamy clothes feel worse than merely wet clothes). Foam parties have also been known to inspire nudity among some participants and sexual exploration such as groping other participants under the cover of the foam. It has been stated that venturing into a foam pit might some what be like going into a dark room half naked with a group of strangers.

Although the parties can start out as fun unfortunate circumstances can arise. An incident at a Calgary nightclub in 2001 resulted in over three dozen of 500 patrons being sent to hospital for treatment of chemical burns to their eyes. The burns were the result of close contact with chemicals used in the making of bubbles that were spilled from above. It was speculated that the chemicals had been improperly mixed.

In another instance a male tried to leave a dance floor covered with several feet of party foam. Because of the slippery foam adhering to his shoes and the floor he fell and hit his head on a metal bar placed at the edge of the dance floor. He got up but soon became drowsy and retrograde amnesia occurred. Because of the foam nobody could see the circumstances of the fall and he was taken outside to recover. Consequently his transport to an emergency department was delayed. He ended up in the intensive care unit and spent two weeks in hospital. His injuries resulted in the loss of smell and taste perception and his short term memory was still affected six months later.

In one of the most disturbing instances a twenty-one year old senior at Texas A & M International University was found dead by a clean-up crew during the early morning hours at a nightclub on South Padre Island, Texas. The girl apparently went into some type of distress and did not receive the help she needed when she ventured into a foam pit with foam piled 1.2 meters to 1.5 meters high and loud music playing.

John Breen is the Manager, Risk Reduction & Loss Control at CURIE

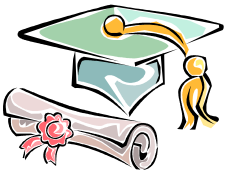
Foam party companies state they do not make their foam from soap but rather special hypo-allergenic, non-toxic, non-staining and non-irritating solutions. The foam will vary from party to party; some will have light and fluffy foam while others will be very thick. In some instances the foams are scented and will smell like pina colada, pineapple or perhaps coconut.

The foams can damage floors and should never be dispensed on wooden floors. Before starting a foam party it should be checked to ensure there is no way for foam to enter electrical equipment. All electrical equipment should be protected by Ground Fault Circuit Interrupters (GFCI's).

People, as was noted in the Calgary club, have had an allergic skin or eye reaction to the foam and also sore throats have been reported. Some clubs have provided shower facilities to cleanse the foam from the body.

Security issues will arise from overcrowding, slippage, obstructed visibility to fire exits, obstacles that can't be seen such as steps, bar seats and tables, especially at high foam level. The edges around the foamed area should be rounded and made of impact absorbing material. Patrons are often in bare feet so glass should never be allowed near the area. The foam may also damage electronic devices such as cell phones, cameras and may cause pay cards to malfunction.

When one considers all the potential dangers associated with foam parties it might just make more sense to "Hold the Foam".■



PROCESS PROCESS PROCESS
The Importance of Procedure in Academic Decision Making

**by Steve Jarrett*

In 1986, a university fired an academic administrator for using university facilities to run a private business. The employee sued. After a six month trial and the expenditure of hundreds of thousands of dollars in legal and expert fees, the trial judge dismissed the claim, finding that the university had cause to dismiss the employee. The employee appealed. The Court of Appeal agreed that the trial judge had properly come to the conclusion that the university had cause to dismiss the employee. Case over? Wait a minute, the Court of Appeal said. What about that paragraph in the university's policies for administrative staff that says the Vice President will meet with the employee before dismissal for cause? Did the university do that? Well no, but it wouldn't have made any difference, because the university had cause and would have fired him anyway. Sorry, said the Court of Appeal, you breached your contract with him and he is entitled to the same damages as if he had been dismissed without cause.

While not involving an academic decision, the case does underline the importance of knowing, and following, written policies and procedures in the decision making process. Many faculty members view such things as policies and procedures as part of a giant

** Steve Jarrett is the Legal Counsel for the University of Western Ontario and a member of the CURIE Board.*

conspiracy by university administrators to tie their academic lives up in a bureaucratic knot, and generally make their lives miserable. Often they see the insistence on following a proper appeal procedure, or giving students a second chance where there has been a procedural error made, as a direct challenge to their academic judgment and a waste of time and resources. Not only are those concerns unfounded, the opposite is in fact true. Adhering to written policies and processes is the best way to protect universities against costly litigation and also ensure that academic decisions are not challenged for irrelevant reasons.

The courts have again and again made clear that, while they will require universities to observe some of the basic principles of procedural fairness in dealing with students, they will respect the expertise of university personnel in dealing with academic matters. In terms of providing procedural fairness to students in the academic decision making process, most, if not all universities have written policies, including appeal procedures, that will satisfy the courts' requirements. And you are not likely to find a court stepping in to alter a grade, or grant a degree where the university has refused to do so.

In terms of providing procedural fairness to students in the academic decision making process, most, if not all universities have written policies, including appeal procedures, that will satisfy the courts' requirements.

So where does the risk lie? It lies in taking shortcuts, in ignoring written policies or established procedures to save time when someone feels they know what the ultimate result will be. It lies in not being prepared to do things over again when a mistake has been made, even though everyone involved knows the result will be the same.

If the ultimate result is going to be the same, and if the courts will not ultimately change an academic decision, why worry? The simple answer is cost, and more specifically, legal cost. If a student is successful in challenging an academic decision because there was a failure to follow the university's own procedures, the court will send the matter back to the university to be dealt with properly. The university will have paid substantial fees to its own lawyers, and will likely be ordered to pay a substantial portion of the students' legal fees. Add to that the waste of time and human resources involved in defending the action, and the effort required to redo the process at a later date, and the total cost to the university and its insurer can easily match that of a personal injury or property damage case.

What about the litigious student, the one who is always threatening to appeal or sue in order to get a second chance or gain an advantage. Should we be giving in to them? The answer is an emphatic no. But the best way to deal with them is to make sure that the academic decision is a sound one, that proper procedures were followed in arriving at the decision, and then stand firm. Failure to follow process will only undermine the university's position, and breathe new life into otherwise groundless complaints.

Academic decisions can have significant consequences for students, particularly in professional courses where tuition fees are substantial, and small grade differences can have consequences for placements and employment. When consulted by a student over an adverse academic decision, a lawyer is going to look long and hard at the process followed to make that decision, because he or she knows that that is where universities are most vulnerable. The lawyer knows that the court will not change a B to an A, but if the battleground can be changed from the student's performance to the university's procedures, the chances of success increase significantly.

One last word. Make sure that everyone in the university understands that academic standards will not be sacrificed to avoid litigation. Then stand firm in your insistence that written policies and procedures be followed. Ensure that where mistakes are made, they are corrected at an early stage. You will save everyone time and money.■

IPR in e-learning programmes

This article first appeared in the "In Step" the Education Law Magazine published by European law firm, Eversheds LLP – www.eversheds.com.

In July 2006 HEFCE published its Good Practice Guide on Intellectual Property Rights (IPR) in e-learning programmes (July 2006/20). Much of the guidance is familiar as it expands on HEFCE's (Higher Education Funding Council for England) Report from its working group (2003/08) Although the guidance focuses on e-learning programmes, much of what it covers is equally applicable to other types of distance learning programmes.

The headline issue for every HEI (Higher Education Institution) is to make sure that it has a clear IP policy which should cover at least the following:

- Ownership of e-learning materials by the HEI
- Processes for managing IP which is created including rights clearance of third party rights
- A reward system for staff involved in the production of e-learning materials.

HEFCE stresses the importance of dissemination of the contents of the policy through staff training. Making sure that staff understand issues relating to copyright in the digital environment is particularly important. It is increasingly important that staff understand not only how the best protect their own and the HEI's rights in learning materials, but are also careful to avoid infringing the rights of others. Historically, copyright owners may have turned a blind eye to some misuse of their material. However, now that such material can be disseminated widely by digital means they are much more likely to take action. Think before you cut and paste!

Rights owners are also likely to be far more constraining in relation to the rights they will grant for on-line use. On-line use raises issues such as on-line security.

Different levels of security may need to be set for access to different levels of material, from simple password protection to only providing access to material through the HEI's servers and not allowing download. The HEI will need to police these access limits. Digital rights management will become increasingly important to HEI.

Eversheds has already been involved in updating several HEI IP policies in the light of the original Report of the working party, as well as running in-house training from staff in relation to teaching and learning materials. We are in the process of adding to our well-received series of "Researchers' Guides" with one on Teaching and Learning Materials.

Another key issue relating to teaching and learning materials is to ensure that staff feel comfortable that there is no intention to claim rights over text books, which academics have customarily owned. Whilst it is important that HEIs do own the rights in e-learning materials created by their staff, a balance has to be achieved so that academics can continue to own the rights in certain scholarly materials such as text books.

There is a need, however, to involve staff in the production of materials geared specifically to distance learning use. This raises issues around whether such members of staff should

receive additional rewards from the commercialization of the materials if they were engaged and paid specifically to produce such materials.

Not all HEIs will take the same approach to their e-learning materials. The Report highlights a number of different models used by HEIs including the "open coursework" approach led by MIT, which hopes to make 2000 modules openly accessible by 2008. If an "open coursework" approach is taken then the HEI needs to make sure that its rights clearance process anticipates such open access.

Many HEI IP policies, whilst strong on patents, have not yet fully addressed the issue of copyright and database right, particularly those designed for distance learning programmes. Many HEIs have through custom and practice, let academics own all such materials. That position needs to be readdressed and clarified. The publication of this Report should hopefully act as a spur to all HEIs to get their houses in order.■

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