Spirit
Experience
Solutions
Expertise
Talent
Know-how
Thinking
Doing
Insight
Enthusiasm

Higher Education Bulletin

June 2016

AHUA

SHAKESPEAREMARTINEAU

Contents

Strategy, Students & Governance

Commercial

Estates

Human Resources

Higher Education and Research Bill – some key points

The Office for Students (OfS)

The guiding principles under which OfS must operate are that there must be more quality and choice for students, competition between providers, value for money and equality of opportunity in access and participation.

The OfS is to be guided in the discharge of its functions by the Secretary of State, who, while having regard to broad concepts of institutional autonomy, academic freedom and the sanctity of academic judgment, may issue guidance by reference to "particular courses of study", an express reversal of the position under the Further and Higher Education Act 1992 where grant conditions were not permitted to be framed by reference to particular courses.

The OfS will be run by a board and chief executive appointed by the Secretary of State and capable of being removed by him for, amongst other things, "such [other] grounds as the Secretary of State considers appropriate, and thus accountable to him. The members of that board must wherever possible reflect the desirability of having experience of: the interests of students, providing HE across the full range of provider types, employing graduates, promoting choice and competition in other sectors, regulating other sectors, and management and finance.

A statutory register for HE

The OfS will have a wide range of functions, centred on the creation of a statutory register of HE providers. Registration will require compliance with a series of initial and ongoing registration conditions, including some that may be specific to individual providers. Aside from certain mandatory conditions, the power to impose conditions is constrained only by an express obligation to ensure that they are proportionate to the regulatory risk posed by the institution, defined as the risk of an institution failing to comply with regulation by the OfS.

Mandatory conditions include: obligations to provide information and notify changes to the OfS; obligations on certain providers to publish admissions data by gender, ethnicity and socio-economic background; regulation of fee limits; and the requirement to have access and participation plans in order to charge higher fees.

An area where the power to impose conditions is expressly stated is in relation to quality and standards, including the power to require particular standards to be applied. "Standards" are defined as "the standards used by an institution to ascertain the level of achievement attained by a student undertaking a higher education sector course provided by it."

Enforcement

The OfS will have a range of enforcement powers: fines for breaches of regulatory conditions, suspension of registration and deregistration principally, but also refusal to renew access and participation plans in appropriate cases. For particularly serious cases of breach of registration conditions, the OfS and/or Secretary of State can apply for a search warrant to enter premises for the purposes of investigating the alleged breach.

All enforcement decisions by the OfS can be challenged in the First Tier Tribunal, a court established to deal with appeals against decisions from various regulators such as the Charity Commission and the Information Commissioner. Looking again at the sorts of conditions that the OfS can enforce, there is the possibility of the Tribunal becoming involved in matters of academic quality and standards in a quite unprecedented way.

Degree awarding powers and university title

The OfS will be responsible for authorising degree awarding powers and university title and revoking DAPs and UT for both new providers and incumbents, except, it appears, where university title was secured through the Companies House "route". The reason for excluding universities registered via this route is clear.

Removal from the register of higher education providers (or indeed not being on it in the first place) appears to be a ground to revoke university title, giving extra teeth to enforce compliance with registration conditions, and perhaps also preventing institutions from deciding to try to operate outside the registered system if at all possible.

Other duties

Other key duties of the OfS include to the duty to assess, or make arrangements for the assessment of, the quality and standards of the education provided by English HE providers. This is a huge departure from FHEA 1992, from which it was clear (notwithstanding some impressively creative and concerted recent efforts to argue to the contrary) that standards were the preserve of institutions.

The OfS will be responsible for the approval of access and participation plans. Again, the Secretary of State can make regulations about what needs to be included in the plan and therefore what institutions should be doing to improve access and participation, including how underrepresented groups should be targeted, and what financial support should be available to them. The scope for erosion of institutional autonomy is clear.The Secretary of State has the power to confer supplementary functions on the OfS. It seems very likely that the Prevent monitoring duty will be transferred to it; less clear is what will happen to HEFCE's principal regulator role for HE providers who are exempt charities.

Deregulation

The promised deregulation for higher education corporations in England is provided by allowing them to set their own instruments and articles of government, subject only to any public interest governance condition that the OfS impose on registered providers. Such a condition may specify different principles of governance to apply to different providers but must include academic freedom for academic staff at all registered providers.

Higher education corporations in England will be given greater control to decide their own futures by asking the Secretary of State to dissolve them and transfer their assets and liabilities elsewhere, although interestingly they have not been given the wider power FE colleges have to dissolve themselves by resolution. FE corporations will be able to be re-designated by the Secretary of State as higher education corporations irrespective of the percentage of their FTE students undertaking HE.

*(This article is a summary of a longer article that appeared on the Wonkhe website. The full version of the article can be found **here**)*

Smita Jamdar
Partner & Head of Education
T: 0121 214 0332
E: smita.jamdar@shma.co.uk

Brexit and commercial contracts

The only legal story this month must be on Brexit and what it means for commercial contracts. The practice of contract drafting often reflects the commercial and political risks at the particular time. Insurance clauses were carefully drafted to cover the unavailability of cover for terrorism risks following 9/11, and I can recall a time when it was entirely normal to include "Euro" clauses in commercial contracts in order to cover the exchange rate risk if the UK agreed to adopt the euro as its currency. How things change.

The key impacts for our university clients will be:

(a) Access to research funding streams. Many long-term projects are funded through EU research programmes and structural funds for innovation and capacity-building. The Royal Society has recently published a report on the role of the EU in funding UK research and capacity building, which is well worth reading, not least because it is accompanied by the actual data and sources on which it is based: https://royalsociety.org/topics-policy/projects/uk-research-and-european-union/role-of-EU-in-funding-UK-research/

(b) People. The driving issue throughout the Brexit debate is immigration. The freedom of EU nationals to move across borders and work or study in schools, colleges and universities in the UK underpins many assumptions on growth in the education sector for our clients, whether on fee income or revenue generated from accommodation. With Brexit, there will no longer be any obligation to provide EU students with access to student finance on the same terms as "home" students, which might challenge some of those assumptions. Similarly, any government might impose rules which impose a burden on employing non-UK nationals, adding time and costs for employers.

(c) Consequences for dispute resolution and the enforcement of judgments within the EU. The rules on the choice of forum and the choice of law in commercial disputes are governed by EU regulations. The legal position for clients to sue, be sued and to have judgments enforced in an EU member state following Brexit is unclear and is subject to academic debate.

Other direct commercial risks and costs are pretty hard to quantify at this stage: much has been made of the risks of potential currency devaluation. Devaluation of the pound sterling might prove as much of a blessing as a curse, as it might increase the numbers of customers taking advantage of education services in or from the UK. Whether Brexit will immediately increase any trade barriers is, similarly, entirely speculative. There may be increased customs costs, but as the formal mechanism for withdrawing from the EU envisages a two-year period of negotiation, it is too soon to identify the commercial trading costs of any post-Brexit settlement.

It is unlikely that the UK will immediately take advantage of any freedom from the EU to immediately abolish rules which regulate health and safety in the workplace, permissible chemicals in our food or prevent discrimination against female employees. Similarly, after the four and a half-year gestation of the general data protection regulation, it would seem unlikely that the UK would drop those rules providing a common framework for digital services within the EU market precisely one month after they have come into force.

The good news (for procurement lawyers at least) is that, as the procurement rules have been implemented by way of a statutory instrument under the UK legal system and are backed up by general obligations under the Government Procurement Agreement under the auspices of the World Trade Organisation, it does not look like they will disappear quite yet.

Uddalak Datta
Senior Associate, Commercial
T: 0121 214 0598
E: uddalak.datta@shma.co.uk

HaloSongs Inc v Ed Sheeran: the fight for a chorus

Last week the papers were full of the news that Ed Sheeran is being sued for an alleged $20 million copyright infringement. The songwriters Martin Harrington and Thomas Leonard claim that Sheeran's Photograph copies 2010 X-Factor winner Matt Cardle's 2009 single, Amazing, "note-for-note". Whilst the media hype has a temporary lull before Sheeran's defence is issued, we thought we would take a whistle-stop tour through this copyright claim and the law behind it.

Musical buffs out there will know that the borrowing of conceptual ideas, motifs and chord patterns is nothing new, and typically a song or piece of music will combine a number of pre-existing influences that have provided inspiration for the composer. The main question in terms of infringement is how much inspiration is a step too far. As YouTube videos have demonstrated in recent years, a good deal of popular music revolves around the same four-chord pattern, but most still manage to create an original enough melody to steer clear of potential infringement claims. However the claim against Sheeran uses a breakdown of the chords and alleges that the chorus uses "substantially the same chord progression"[1].

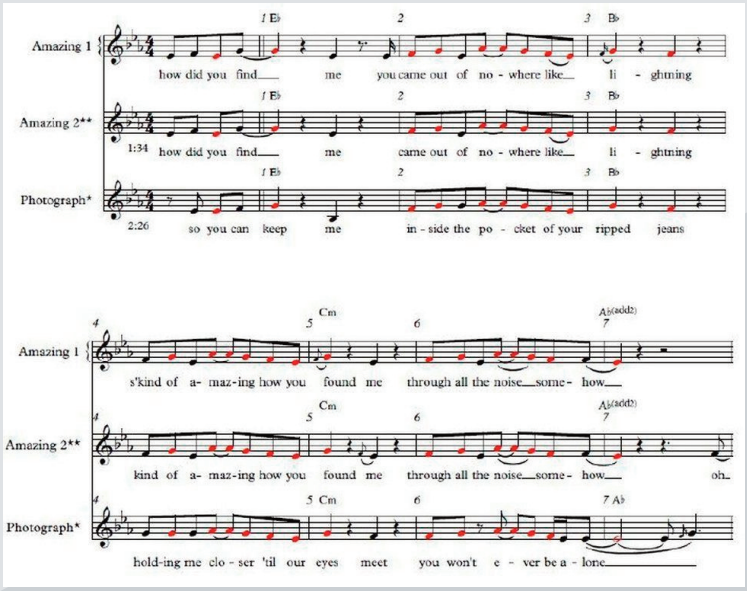
The claim also argues that the chorus in Photograph shares with Amazing "39 notes - meaning the notes are identical in pitch, rhythmic duration and placement in measure" - namely the melody. It argues that the similarities are the "essence of the work" and that these are evident to even to musical novices, and that the similar "words, vocal style, vocal melody, melody, and rhythm are clear indicators, among other things..." as evidence of copying.

Here is a snapshot of the breakdown provided in the papers[2].

1

M	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
A	Eb		Bb		Cm		Ab(add2)		Eb		Gm7		Cm		Ab(add2)	
P♯	Eb		Bb		Cm		Ab		Eb		Bb		Cm		Ab	

2



[Amazing 2 is a derivative of the original created by Matt Cardle with consent of the songwriters]

In the UK, copyright protects the form of expression of ideas (not the ideas themselves). It aims to reward authors who have put in the hours to create original works independently, and protection arises automatically on the meeting of certain requirements and lasts for 70 years. The existence of a similar or identical work is irrelevant if the work has not been copied, although it is easy to see where the arguments can arise. Copyright covers original literary, dramatic, musical or artistic works (which, with the exception of artistic works, are recorded in some way), sound recordings, films or broadcasts and typographical arrangements of published editions. Songs are interesting because they combine both literary copyright (the text of the song) and musical copyright (the melodic and chord construction of the song). Copyright in the sound recording of a musical work is covered by a separate and distinct right.

In practice this can leave composers, songwriters and artists vulnerable, particularly in light of the interpretation in the Blurred Lines case, which, according to Peter Oxendale, a musicologist who worked on the case, essentially allowed "similar feels, similar vibes, similar grooves", such as rhythms and production choices, rather than lyrics, melody, chords etc. to go to trial. Despite this being a US trial, it affects artists everywhere, as the new Sheeran claim demonstrates. Compositions and songs tend to come from music that has gone before, and it is easy to see why the music industry is getting worked up.

Although a lot of the classical world's protection has long expired, musical copyright is alleged more often than might be expected. Marvin Gaye's family recently triumphed over the song Blurred Lines. Robin Thicke and Pharrell Williams, composers of Blurred Lines, were required to pay $7.2 million for breaching the copyright of the 1977 track Got To Give It Up. This was reduced on appeal so that the estate of Marvin Gaye now receives 50% of publishing and song writing revenues from the song. Other alleged infringers have included the Beatles for Come Together, Rod Stewart's Do Ya Think I'm Sexy, and more recently Mark Ronson and Bruno Mars' Uptown Funk and Led Zeppelin for Stairway to Heaven. To add even more clout to their infringement claim hopes, Harrington and Leonard have enlisted the services of attorney Richard Busch who won the legal battle for the Marvin Gaye family against Blurred Lines.

Despite the clear unequal popularity of the two songs - Photograph has sold more than 3.5 million copies worldwide as at 1 June and had 208 million YouTube views, whereas Amazing reached No. 84 in the UK charts and has generated a little over 1 million views, the stakes could be high for Sheeran if Photograph is found to be infringing. Aside from negative publicity (although how much this will actually affect Sheeran's brand is questionable), the songwriters want $20 million damages plus royalties and fees. Whilst Photograph stands apart from Blurred Lines because the allegations refer to the make-up of the music being copied, the ripples from the previous decision around "vibes" have unsurprisingly left the music industry nervous. This is reflected in the rise of pre-emptive strikes, where musicologists are asked if new releases are "too close" to other works.

The real question for the future of music is where this leaves the creative flair of composers, who have traditionally found their inspiration and influences in what has gone before, and how this tradition can be incorporated into the new world of escalating musical copyright claims. Although the Sheeran claim has a long way to go before a decision, this may signify the beginning of the swelling tide in a post-Blurred Lines world.

For more information, please see the court documents.

Lydia Stone-Fewings
Trainee Solicitor, Commercial & IP
T: 0121 214 0315
E: lydia.stone-fewings@shma.co.uk

You will surrender... properly!

It is widely known that a lease can be surrendered either formally by documenting the surrender in writing, or informally by the operation of law (handing back the keys).

It is important to remember that a tenant is unable hand back the keys to its landlord in order to bring its lease to an end without the landlord accepting the keys as an act of surrender. A surrender cannot take place by way of a unilateral act and there must be mutual agreement to bring about the same.

This has been reinforced in the recent case of *Padwick Properties Ltd. V Punj Lloyd Ltd ([2016] EWHC 502 (Ch))*. In this case, the tenant's administrators vacated the premises and surrendered the keys to the landlord stating that they had no use for the premises. The landlord accepted the keys to secure the premises only. The landlord marketed the premises thereafter, but did not enter into a new tenancy.

The landlord then gave notice to the guarantor requiring it to enter into a new tenancy as required by its obligations under the guarantee. However, the guarantor argued that the lease had already been surrendered by the administrators when they handed back the keys.

The court held that no surrender had taken place. The return of the keys by the administrators was a unilateral act. The landlord did not accept a surrender of the lease at that time. The security measures taken by the landlord to change the locks were to protect its asset only and not to accept a surrender of the lease. Further, the landlord marketing the property did not amount to an acceptance of a surrender, but merely indicated that the landlord had retaken possession of the premises.

This case highlights the need for clarity on the part of both parties when a surrender is envisaged. It is important for a tenant to remember that is unable to unilaterally terminate a lease by way of surrender by vacating the premises. A tenant must seek acceptance from the landlord, because in the absence of such acceptance a landlord will be entitled to continue to rely on the lease provisions and enforce its ongoing rights.

From a landlord's perspective, this case is a useful reminder that acceptance of the keys from a tenant will not amount to a surrender. However, the landlord must make clear to the tenant that accepting the keys is not an act accepting a surrender, but to protect and secure its asset only.

Justine Ball
Solicitor, Real Estate
T: 0121 214 0309
E: justine.ball@shma.co.uk

Can settlement negotiations prevent a constructive dismissal claim?

If an employee willingly enters into negotiations about a possible exit, does this prevent a claim of constructive dismissal? The High Court recently considered this question in *Gibbs v Leeds United Football Club ([2016] EWHC 960 (QB)).*

What was the case about?

The claimant was assistant manager at Leeds United Football Club. He was offered the position of head coach after the manager left the club in May 2014, but declined. The claimant then expected to be dismissed, as a new manager would normally bring in his own assistant.

Although the claimant was happy to remain in post, there were some exploratory discussions about the terms on which the claimant might leave the club. If terms were not agreed, he intended to stay and work out his contract.

The claimant complained to the club chairman that he was not being given anything to do - he was not assigned work which fell within his contract, although he was willing to do it; he was not invited to meetings, training or matches that, as an assistant manager, he would expect to attend; and he was excluded from taking any meaningful part in the first team's training.

In a phone call and a subsequent email he was informed that, from that point onwards, his role was limited to looking after the under 18 and under 21 players and that he was to have no further contact with the first team. As a result, the claimant resigned on the basis that the club was not prepared to honour his contract.

What did the court say?

The High Court held that requiring a manager who had previously worked with the first team players to have no contact with them, but instead to work only with under 18s and under 21s, was not reasonable and that the email informing him of the new arrangement was a repudiatory breach of contract. The loss of status would be obvious, not just to the parties, but to others with whom the claimant had to deal. The claimant resigned in response to that email and was therefore constructively dismissed.

The High Court also held that it was not a breach of contract on the claimant's part to initiate a discussion about consensual termination. The fact the claimant had said he was prepared to leave if suitable terms were agreed was beside the point. He had remained ready and willing to fulfil his duties and was, therefore, entitled to succeed in his claim for notice pay.

What should employers do now?

Just because an employee enters into settlement negotiations does not necessarily mean that he/she is unwilling to fulfil the terms of his/her contract. Even where settlement negotiations are in progress, employers should tread carefully and ensure that they act fairly and abide by the terms of the contract. Otherwise, they risk being in repudiatory breach of contract and being exposed to possible claims for constructive dismissal.

Susannah Nicholas
Professional Support Lawyer, Employment
T: 0121 214 0439
E: susannah.nicholas@shma.co.uk