

Memorandum

To: CSU Presidents

Date: June 30, 2005

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Subject: Recent Court Decisions

Several important court decisions have recently been issued that are worthy of comment.

Ten Commandments

On June 27, 2005, a deeply divided United States Supreme Court issued two 5-4 decisions dealing with the display of the Ten Commandments on public property. McCreary County, Kentucky v. American Civil Liberties Union of Kentucky (05 C.D.O.S. 5606) dealt with the framed display of the Ten Commandments inside two county courthouses. Concluding that the history and intent behind the postings indicated that they had a predominantly religious purpose, the Court held that the displays violated the Establishment Clause of the U.S. Constitution. The Court noted that the Ten Commandments are "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction" and concluded that "[w]hen the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."

Conversely, Van Orden v. Perry (05 C.D.O.S. 5652) involved a monument inscribed with the Ten Commandments located outside the grounds surrounding the Texas State Capitol, and there the Court concluded that the Establishment Clause had not been violated. Noting that the Texas State Capitol grounds contain numerous monuments and historical markers commemorating the people, ideals, and events that compose Texan identity, the Court stated that the Ten Commandments are part of historical and cultural heritage. Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

Taken together, these cases mean that religious displays on public property will only pass constitutional muster, where their overall intent and purpose is of a cultural, historical and/or secular significance. Each situation will be highly contextual, turn on its specific facts, and therefore will require careful analysis.

Peer-To-Peer File Sharing

That same day, the Court also issued its peer-to-peer file swapping decision in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (05 C.D.O.S. 5620). This case involved two distributors of free software that has legitimate purposes, but also enables computer users to share copyrighted files through peer-to-peer networks, including copyrighted music and video files.

The Court concluded that the software distributors could be held liable for the copyright infringement of their customers, particularly since both companies had actively encouraged their customers to use the free software to download copyrighted works. [O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

While the MGM decision will presumably render software manufacturers and distributors more cautious, it does not directly impact the CSU and is unlikely to have much, if any, impact on students, who will likely continue to copy whatever music and videos are free and available. The decision underscores the continuing need to counsel and warn students that copyright infringement is illegal and can subject them to personal liability, and to actively discourage the practice.

Student Newspaper Censorship

Last week, the U.S. Court of Appeals for the Seventh Circuit issued a decision in Hosty v. Carter [2005 WL 1423263 (7th Cir. (Ill.))], holding that an earlier decision that permitted high schools to regulate the content of a subsidized student newspaper to further legitimate and reasonable pedagogical purposes is also applicable to colleges and universities. So long as the regulation is regular, the censorship may include material that is ungrammatical, poorly written, inadequately researched, and "biased or prejudiced, vulgar or profane, or unsuitable for immature audiences, as well as material that associates the school with any position other than neutrality on matters of political controversy.

The Hosty Court ruled that academic freedom includes the authority of the university to manage an academic community free from interference by other units of government. If a subsidized student newspaper is a "designated public forum" — meaning that the students have been given sole authority to make all content decisions, then censorship is not permissible. But if supervision and review of content for pedagogical purposes is regularized, then censorship is appropriate.

While the Hosty decision is from another jurisdiction and, as such, does not directly impact the CSU, the case appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers, provided that there is an established practice of regularized content review and approval for pedagogical purposes. It should be noted, however, that exercising control over the content of student newspapers may very well also expose the University to liability for that content against claims of defamation.

Please call the University Counsel assigned to your campus if you have any questions or concerns about these decisions.

CH:pg

cc: Chancellor Charles B. Reed
Chancellor's Executive Staff
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Enclosure