



THE LEGAL ISSUE

Winter 2008

Volume 2, Number 1

FERPA and Campus Safety

By Jennifer Watson, Assistant University Counsel and Chief Privacy Officer, System

The Family Educational Rights and Privacy Act ("FERPA") is a federal law that applies to educational agencies and institutions that receive federal funds under any program administered by the Secretary of Education. FERPA generally requires prior written consent from the student before an educational agency or institution may disclose personally identifiable information from the student's education records to a third party. On October 30th, 2007, the U.S. Department of Education ("DOE") released guidance addressing the balance between protecting students' privacy rights and the need to disclose information in order to maintain campus safety and security. The DOE issued this guidance in response to concerns raised by colleges and universities in the aftermath of the Virginia Tech tragedy. The DOE's guidance does not reflect a change of position regarding when protected information may be disclosed, but instead reinforces the exceptions to FERPA which allow disclosure without student consent. In its guidance, the DOE notes that while FERPA "generally requires institutions to ask for written consent before disclosing a student's personally identifiable information, it also allows colleges and universities to take key steps to maintain campus safety." This article summarizes DOE's guidance and the pertinent exceptions that would allow institutional officials to disclose personally identifiable information from student education records when campus safety or security is at issue.

Disclosure During a Health or Safety Emergency

The health or safety emergency exception permits school officials to share relevant information with those parties whose knowledge of the information is necessary to provide immediate protection of the health or safety of the student or other individuals. Typically, law enforcement officials, public health officials, and medical personnel are the types of parties to whom information may be disclosed under this FERPA exception. This exception does not allow for a blanket release of protected information; rather, the release must be limited to the period of the emergency and to those individuals who have a need to know. This exception also allows school officials to disclose protected information to parents if a health or safety emergency involves their child.

Disclosure of Disciplinary Records

Generally, student disciplinary records are protected as education records under FERPA. However, in certain circumstances, student disciplinary records may be disclosed without the student's consent. An institution may disclose to the victim of an alleged crime of violence or non-forcible sex offense the results of a disciplinary proceeding brought against the alleged perpetrator of that crime, regardless of whether the institution concludes a violation occurred. An institution may disclose to anyone – not just the alleged victim – the final results of a disciplinary proceeding, if it determines "the student is an alleged perpetrator of a crime of violence or non-forcible sex offense, and with respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies."

Campus Crime Disclosures

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") requires institutions to provide timely warning reports to the campus community of certain crimes that represent a continuing threat to students and employees. The Clery Act also requires institutions to collect, report, and disseminate campus crime data to the campus community. Such disclosures are permitted under FERPA.

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FERPA and Campus Safety

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Disclosure of Law Enforcement Unit Records

FERPA excludes from its definition of "education records" records created and maintained by a campus law enforcement unit for a law enforcement purpose. Accordingly, investigative reports, security incident reports, and other records created and maintained by campus law enforcement units may be disclosed to anyone, including outside law enforcement, without student consent.

Disclosure to Parents

FERPA rights transfer from parents to student when the student turns 18 years of age, or enters a postsecondary institution. However, the institution may share information with parents without the student's consent in the following circumstances:

- If the student is a dependent of the parent for income tax purposes.
- If a health or safety emergency involves the child of a parent.
- If the student is under the age of 21 and has violated an institutional law or policy concerning the use or possession of alcohol or a controlled substance.

In addition, a school official may share information with a parent that is based on that official's personal knowledge or observation of the student.

Disclosure of Student Health Information

Campus health center records, counseling records and other student health records are subject to the privacy provisions of FERPA. Such records are specifically exempt from the Health Insurance Portability and Accountability Act's ("HIPAA") Privacy Regulations. Accordingly, student health records maintained by the institution may be disclosed in health or safety emergencies to those officials who have a need to know and/or parents as discussed above.

Disclosure of Student and Exchange Visitor Information System ("SEVIS") Records

FERPA allows institutions to comply with information requests from the Department of Homeland Security ("DHS") and its Immigration and Customs Enforcement Bureau ("ICE") in order to comply with the requirements of SEVIS. Other requests for records or information concerning international students must be assessed on a case-by-case basis to determine whether FERPA permits disclosure.

University officials who have questions concerning the disclosure of student records should contact their campus office of University Counsel. DOE's guidance, as well as other security related resources, may be accessed at www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html.



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Edited by Emilia Negrini, System Counsel Office

Contracts 101 – The Anatomy of a Contract

By Manuel R. Rupe, Senior Assistant University Counsel, UCD

The University of Colorado enters into thousands of contracts each year to employ its faculty and staff, to construct and maintain its facilities, and to procure the necessary goods and services to sustain a world-class public higher education institution. The contracts often have many and varied titles, such as Contract, Agreement, Memorandum of Understanding, Letter of Offer, Grant, License or Lease, Terms and Conditions, and other similar titles. The title of the document, however, is often less significant than its contents, which typically defines the relationship and responsibilities of the parties and explains to what extent the agreement is binding between the parties.

Many of CU's contracts have been standardized to provide significant efficiencies and to ensure uniform business practices. CU has a Procurement Service Center within the system administration that is responsible for administering CU's procurement and payable services. Additionally, campus Grants and Contracts Offices manage thousands of federal and state research and sponsored programs and projects. However, frequently CU administrators are placed in the position of having to review or draft contracts as new academic programs or other collaborative relationships are established with higher education institutions, businesses, and industry. University Counsel attorneys are outstanding resources to assist you in preparing such contracts.

A general understanding of the anatomy of a contract is helpful for non-lawyers participating in contract negotiation and preparation. Many contracts follow a general framework, but regardless of how the language is organized or structured, a contract should clearly tell a story, explaining why the parties are entering into an agreement, what the parties intend to accomplish, and the responsibilities of each party.

Preamble. The preamble introduces the parties to the agreement and often identifies the effective date of the agreement. CU should be identified as "The Regents of the University of Colorado, a body corporate, for and on behalf of [the full name of the campus entering into the agreement]." Other parties should be identified using their correct legal name (which, for corporations, may often be found through the Secretary of State).

Recitals. The recitals, often referred to as the "whereas" paragraphs, provide the parties an opportunity to explain background information related to the contract. For example, often the recitals explain why the agreement is being entered into, and what the parties bring to the agreement that will facilitate the performance of its terms.

Agreement. The paragraphs that follow the recitals define the responsibilities of the parties and typically address the performance obligations of each party and when such obligations must be satisfied or accomplished. The language used by the parties is of particular importance. Often mandatory terms such as "shall, must, and will," are used to convey specific obligations, while permissive terms such as "should and may" are used to convey general intentions that do not bind the parties. Importantly, the parties should make clear when terms are not binding.

Standard Provisions. The paragraphs that discuss the performance obligations of the parties are typically followed by standard paragraphs that address matters such as severability, governing law, assignment, notice, and similar matters. Typically contracts include a paragraph entitled "entire agreement," which explains that the entire agreement between the parties on a particular matter is set forth in the contract. If the entire understanding of the parties is not set forth in the agreement, the agreement should be revised to include the entire understanding, or this paragraph should be removed.

Signatures. Although often overlooked, the signature page may be the most important. The Administrative Policy Statement on Contracting Authority provides guidance as to who may sign contracts: if an employee does not know whether they have the authority to sign a contract, they should not sign it. If in doubt, confirm with University Counsel who may sign a contract.

Special Provisions. Many contracts are required by law to include the Special Provisions: 10 paragraphs that include provisions regarding indemnification, governmental immunity, and choice of law, and provide important protections for CU.



Introductions

Rhonda Thornton
Senior Associate University Counsel, UCD

Rhonda Thornton has joined the University Counsel's office as Senior Associate Counsel on the University of Colorado Denver campus. Rhonda previously served as legal counsel to the University of Arkansas for Medical Sciences (UAMS), which is Arkansas's only comprehensive academic health center and one of the state's largest public employers. Rhonda's duties at UAMS included developing campus policies, responding to federal agency inquiries, handling litigation, appearing before legislative and administrative bodies, and reviewing and drafting contracts.

Prior to her stint at UAMS, Rhonda spent seven years in the University of Arkansas System's legal counsel's office.

Rhonda has also done defense-side medical malpractice and products liability work for the law firm of Mitchell, Williams, Selig, Gates & Woodyard; served as an assistant attorney general for the State of Arkansas; and taught law and coached the trial team at University of Arkansas at Little Rock.

Rhonda has just moved to Denver with her 10-year-old daughter, Mattie, and her two Boxers, Cooper and Chloe.

Inspired by her love of reading and her concern for literacy, Rhonda served on the Steering Committee and as Children's Author Liaison for the Arkansas Literary Festival and on the Board of Directors for the Arkansas Literacy Councils, Inc.

Rhonda also helped found and co-chaired the Arkansas Chapter of the Foundation of the American Academy of Pediatrics to raise support for pediatric public health issues. She has also been an officer in her daughter's school's Parent's Association, for which she served as chair of the Annual Fund Campaign.

Rhonda received her undergraduate degree from the University of Arkansas at Fayetteville and her law degree from the University of Arkansas at Little Rock (UALR), where she served as executive editor of the UALR Law Journal. Rhonda is a member of the Arkansas and Pulaski County Bar Associations, of the National Association of College and University Attorneys, and of the American Health Lawyers Association. She is licensed to practice law in Arkansas, the District of Columbia, the 8th Circuit Court of Appeals, and the U.S. Supreme Court.

Catherine Shea
Associate University Counsel, System and Tech Transfer

Catherine Shea started November 5, 2007 as CU's new Associate Counsel for Technology Transfer and Research Compliance. In her role at TTO, Catherine will help the licensing team in negotiation and review of agreements, as well as managing any other legal issues that arise. As part of her research compliance responsibilities, she will focus on research misconduct and export control law. Catherine joins us from the National Center for Atmospheric Research; she's also held positions with Qwest Communications, the U.S. Department of Commerce and the National Oceanic and Atmospheric Administration. Her practice focus is in intellectual property law, technology transfer, licensing and related service agreements, and procurement of cutting-edge technologies for research programs. She graduated with a B.A. from the University of Notre Dame and received her J.D. from the Catholic University Columbus School of Law in 1990.

Robert Shikiar
Legal Staff Associate/Researcher, UCD

Robert Shikiar received his B.A. from Brandeis University in Massachusetts in 1987 and earned his J.D. from George Washington University School of Law in 1990. Following graduation from law school, he worked as an attorney for five years for the U.S. Federal Trade Commission in Washington, DC handling civil consumer protection cases. Subsequently, he served as the Deputy General Counsel for the Inter-American Foundation, a U.S. Government agency that provides grants to support poverty alleviation and community development programs in Latin America. Upon moving to Colorado in 2000, Mr. Shikiar taught International Law as an adjunct professor at the University of Colorado Law School in Boulder. Subsequently, he served as the Deputy Director of the Human Rights Advocacy Center at the University of Denver, where he mentored law students in representing asylum seekers in immigration court and related proceedings and also taught courses as an adjunct professor at the Law School and Graduate School of International Studies. Between 2002 and 2005, Mr. Shikiar worked as an attorney for Colorado Legal Services, where he represented migrant farm workers throughout the state in employment cases and in immigration court proceedings. Between 2005 and 2007, he served as an Assistant General Counsel for the U.S. General Services Administration regional office in Denver. He joined the Office of University Counsel in August 2007.



THE LEGAL ISSUE

Spring 2008

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Reprise: “You’ve Got Mail” – And We May Ask You to Keep It

By Manuel R. Rupe, Senior Assistant University Counsel, UCD

In the Winter 2006 edition of the *Legal Issue*, the Office of University Counsel introduced the University of Colorado to changes in the Federal Rules of Civil Procedure that created new obligations for the University to preserve “electronically stored information” that is reasonably accessible by the University. This article will update that information and explain the University’s obligations under the rules to preserve and produce electronic records. This new obligation was an extension of the existing obligation to preserve and produce, if requested, paper documents under discovery, the process in litigation through which the parties request and obtain information from each other regarding the legal disputes between the parties. Under the new federal rules the University has an obligation to preserve and produce electronic information or records unless to do so would be an “undue burden or cost” to the University.

What are electronic records? The vast majority of University business and communications are completed through the use of electronic records or media. Electronic records may include electronic mail, voice mail recordings, Microsoft Word documents, spreadsheets, calendars, digital photographs or recordings, and other records or information maintained in an electronic or digital form. Electronic records, in many respects, are rapidly replacing the paper world in the same manner as electronic mail is replacing snail mail. Just as many different forms of electronic records exist, the hardware that is used to store, manage, and transmit such electronic records is continually expanding. Electronic records may be stored or maintained on University servers, desktop or laptop computers, compact disks, flash drives and other portable devices, disks, and other electronic data storage devices. The federal rules, importantly, compel the University: (1) to have a clear understanding of the type of electronic records that may be relevant in a particular case; and (2) to know where to locate such electronic records so that they may be preserved (this is a significant responsibility shared by all University employees). University Counsel continues to work closely with our information technology professionals to identify and maintain (if necessary) electronic information at the University.

What triggers or creates an obligation to preserve electronic records?

The University’s obligation to preserve and produce electronic information or records may be “triggered” or created based on certain events, such as when the University receives a summons and complaint (including from state or federal agencies), certain types of subpoena, a notice of claim under the Colorado Governmental Immunity Act, a demand letter from an attorney, or when a serious event takes place on campus. These may be generally referred to as “triggering events.” Under the federal rules, “[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’” Committee Note to Federal Rule 37. Therefore, upon receipt of any of the documents that may be considered a “triggering event,” an employee should immediately call a University Counsel office so that University Counsel may determine whether it is appropriate to place a litigation hold on relevant electronic records. All University employees should be prepared to assist University Counsel in identifying and retaining relevant electronic records.

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“You’ve Got Mail”

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What didn’t the federal rules change?

The changes in the federal rules create obligations to preserve and produce electronic records, but the changes did not eliminate or modify common protections for communications, such as the attorney-client privilege or the work product doctrine. Additionally, the federal rules did not expand the ability of opposing parties in litigation to receive records or information from the University as part of discovery. Opposing parties must still demonstrate that the records or information they seek are relevant to the case, or are reasonably likely to lead to the discovery of records or information relevant to the case.

Moreover, the federal rules do not prohibit the routine deletion or destruction of electronic records, provided such destruction is conducted in “good faith.” Therefore, automated electronic record destruction completed in accordance with routine University practices (or in accordance with the University’s Record Retention Policy, upon its adoption) are permissible, *provided* that University Counsel has not specifically requested that such electronic information or records be preserved, which is typically done through a litigation hold letter or memorandum. Additionally, the federal rules do not dictate how individual employees must manage (including how they preserve or destroy, i.e., delete) their electronic records.

However, routine deletion or destruction of electronic records must be done in “good faith” under the federal rules. “The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” Committee Note to Federal Rule 37; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Therefore, if University Counsel directs you to save or maintain electronic records, you (and the University) may not rely upon your prior practice of deleting similar records to excuse the deletion of records you were specifically directed to preserve. Simply put: if you wonder whether you should keep an electronic record once you’ve been directed by University Counsel to retain certain records, please call University Counsel to obtain direction. If in doubt – save!

What happens if an electronic record central to a case is destroyed?

If an electronic record central to a case is accidentally or intentionally destroyed after a triggering event the University may be sanctioned. This may include monetary sanctions, denial of certain testimony favorable to the University, or even an “adverse inference” ruling, which means that the judge could instruct a jury that it should infer that the lost or destroyed electronic record (which the University believes would support the University’s case) supports the opposing side’s case. Maintaining electronic records includes preventing a records’ deletion. Therefore, ensuring that electronic records are maintained on a system that is continuing backed up is important. If you have questions about where your electronic records are or should be maintained, contact your campus University Counsel office.

Aren’t My Paper Copies Good Enough?

A question that is often presented after an employee receives a litigation hold letter is whether keeping only paper copies of documents is good enough. For example, if an employee maintains paper copies of a Microsoft Word document, they may desire to delete the electronic versions of the document. However, electronic versions of documents may contain important information regarding the creation of the document and its revision. For example, changes offered through “track changes” in a Microsoft Word contract document may be relevant in determining the course of a contractual negotiation and whether parties intentionally added/removed relevant language. The Committee Note to Federal Rule 26, for example, provides: “Production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image.” Therefore, if you’re asked to keep electronic versions of documents through a litigation hold letter or memorandum, please do so.

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More Questions? Let us Know.

If you have questions after you receive a litigation hold letter or memorandum, please contact your campus or system University Counsel office. We're here to help.

Fair Use & U

By Erica Weston, Legal Staff Associate/Researcher, Litigation

Have you ever wondered if you can:

- Post a course-related article on your course website?
- Tape a news broadcast to show in class?
- Use a course pack instead of a textbook?

Each of these scenarios involves copyright-protected materials.¹ Generally, you need to get permission and attribute the source when using copyright-protected materials. However, under copyright law's fair use exception, you may be able to use these types of materials in limited ways without getting permission and attributing the source.²

The fair use exception promotes the progress of knowledge. This purpose is consistent with the University's purposes, but not every University use will be within the fair use exception. To determine whether a use is within the fair use exception, you should consider four factors. Since no single factor is determinative, you should assess the cumulative effect of all four factors. If you have any questions in applying the factors, please contact the Office of University Counsel or get permission and cite the source.

Factors to Consider in Assessing Fair Use

First, you should consider the purpose and character of the use. Is it non-profit or commercial? At the University, materials are usually used for non-profit educational purposes. This reflects the fair use exception's purpose and weighs in favor of fair use.

Second, you should consider the nature of the copyrighted work. Is it factual or creative? The fewer ways there are to express an idea, the more likely you can use it. A table depicting census data would be more likely to be fair use than a poem.

Third, you should consider the amount and substantiality of the use. How much of the material is used? Using a smaller percentage of a work is more likely a fair use. On the other hand, a small use may weigh against fair use if the excerpt is the heart of the material.

Finally, you should consider the effect of the use on the material's market value. How widespread is the use? The more widespread the use, the more likely it is to cut into the publisher's market. If the use cuts into the publisher's market, it would weigh against fair use.

Applying the Factors to Common Scenarios

- Can you post a course-related article on your course website?

First, consider the purpose and character of the use. This factor weighs in favor of fair use because the article would be posted for educational purposes. Second, consider the nature of the work. If the article is heavily fact-based, this factor weighs in favor of fair use. If the article is more creative, this factor weighs against fair use. Third, consider the amount and substantiality of the use. Since the entire article would be posted, this factor likely weighs against fair use. Finally, consider the use's effect on the article's market value. This depends on how often you do this. Would you post the article every time the course is taught? Eventually, repeated use may cut into the article's market value and weigh against fair use.

Depending on these factors, this may be fair use. Instead of posting the article on the course website, you could check with the library to see if the University subscribes to a scholarly or news database that includes the article. If the University subscribes to a database containing the article, the course website could link to the database and students could access the article through the database.

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¹ See 17 U.S.C. § 101 *et seq.*

² See 17 U.S.C. § 107

Fair Use

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- Can you tape a news broadcast to show in class?

First, consider the purpose and character of the use. This factor weighs in favor of fair use because the broadcast would be taped and shown for educational purposes. Second, consider the nature of the work. If the broadcast is strictly fact-based reporting, this factor weighs in favor of fair use. If the broadcast is more creative, like an opinion-based interview, this factor weighs against fair use. Third, consider the amount and substantiality of the use. This depends on how much of the broadcast is shown. A shorter clip of a broadcast would weigh more in favor of fair use. Finally, consider the use's effect on the broadcast's market value. This depends on how often you do this. Would you show the broadcast every time the course is taught? Eventually, repeated use may cut into the broadcast's market value and weigh against fair use.

Depending on these factors, this may be fair use. If you show a brief fact-based clip once, the use would probably be fair. If you plan to show the broadcast regularly, consider purchasing the broadcast from the media source.

- Can you use a course pack instead of a textbook?

Courts assessing the factors have determined that you must obtain permission to use copyright protected materials in course packs.³ The Book Store's Campus Publishing Department can assist you in obtaining permission to use copyright protected materials in course packs.

For additional information about copyright in general and fair use in particular, visit the University's copyright information website: <https://www.cu.edu/ip/copyright/>. For assistance with a specific fair use or copyright issue, contact your campus counsel's office or Catherine Shea (catherine.shea@cu.edu) or Maggie Wilensky (maggie.wilensky@cu.edu) in the System Counsel's office.



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³ *Princeton Univ. v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991).



THE LEGAL ISSUE

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Political Activities on Campus during Election Season

By Maggie Wilensky, Assistant University Counsel, System &
Jeremy Hueth, Managing Associate University Counsel, System

In anticipation of the upcoming election season, this article summarizes relevant state and federal laws and University policies that both protect and regulate the political activities and expression of members of the University community, especially those activities related to political campaigns and elections. The article reviews: (1) the limitations on and protections afforded to University employees' political expression under state and federal law; and (2) the parameters for use of University property and facilities by the general public for political activities and expression. The article then offers guidance for members of the University community on conducting political activities within the limits of applicable law and University policy.

Political expression by University employees

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech." This constitutional prohibition against governmental infringement of free speech, which includes expression, extends to the actions of the University as a public institution.¹ Political expression is at the core of the activity the First Amendment is designed to protect, and infringement of such expression receives the greatest scrutiny by the courts. *Virginia v. Black*, 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). However, government employees, including University employees, have more limited rights under the First Amendment when speaking in the workplace than when speaking as citizens. Furthermore, several federal and state laws circumscribe the political speech activities of the University and, by extension, its employees.

Limitations on political expression in the University workplace

University employees do not have an unfettered right to engage in political expression in the workplace or in the course of their official duties. In general, the University may impose reasonable rules that limit the free speech rights of employees in order to further its educational mission or achieve an efficient workplace. *See, e.g., US DOJ v. FLRA*, 955 F.2d 998 (5th Cir. 1992) (dismissing challenge to federal Border Patrol's prohibition on its agents wearing pro-union pins); *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001) (upholding police department regulations that prohibited an officer from wearing a cross on his uniform). To that end, the Regents have adopted a policy of "institutional neutrality" in social and political matters, with narrow exceptions. Regent Policy 2-I. In accordance with this policy, employees must ensure that their political expression does not create the impression that the University is endorsing an employee's favored issue or cause.

More importantly, in certain circumstances, the expressive activities of employees who are carrying out official duties or using University resources are curtailed by law. First, because the University is exempt from federal income tax as a 501(c)(3) entity under the Internal Revenue Code (26 U.S.C. § 501), it is prohibited from engaging in certain political activities. Under federal regulation, a 501(c)(3) entity may lose its tax exempt status if it "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." 26 C.F.R. §

¹ The First Amendment governs many aspects of the interactions between University students, faculty, administrators and staff. This article does not offer a comprehensive overview of the First Amendment or the contours of academic freedom in classroom activities, but provides some basic principles that explain how the University regulates political expression both as a public institution and as a public employer.

Political Activities on Campus

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1.501(c)(3)–1(c)(3). Campaign intervention is broadly defined as any activity that favors or opposes one or more candidates for public office, and includes:

- making contributions to political campaign funds or public statements of position in favor of or in opposition to any candidate for public office;
- distributing statements prepared by others that favor or oppose any candidate for public office;
- allowing a candidate to use an organization's assets or facilities without receiving consideration or giving other candidates an equivalent opportunity. *Id. See also* Rev. Rul. 2007–41.

Second, the Colorado Fair Campaign Practices Act (a/k/a Campaign Reform Act, C.R.S. § 1-45-117) generally prohibits public entities, including institutions of higher education, from expending any public money from any source for contributions to a campaign for elected office, or to urge electors to vote in favor of or against any ballot issue or referred measure. The term "public money" is broadly construed, and includes in-kind contributions such as services or non-monetary resources such as computers, facsimile and copy machines and University-hosted email accounts. The funds and resources of the University of Colorado are considered to be public money, regardless of the amount of state support the University receives.¹

Protections afforded to political expression by University employees

Regent Policy declares that the University looks "with favor on political participation by all citizens and accordingly encourages all members of the University community, as citizens to engage in any and all forms of campaign activity traditional in American election campaigns." Regent Policy 10-I. When acting as private citizens, University employees enjoy the same broad First Amendment rights afforded to any other citizen. University employees acting in a private capacity are generally free to engage in all manner of protected expressive activities. However, they should take care not to represent themselves as speaking on behalf of the University or otherwise compromise their ability to carry out their official duties.

Within the University setting, University employees enjoy a more limited First Amendment protection. In some circumstances, the First Amendment protects a public employee's right as a citizen to speak on matters of public concern. Where a public employee is disciplined or fired for protected speech, courts will balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

It is not always clear what amounts to a "matter of public concern." Generally, such matters are those that are of interest to the public at large (e.g., an individual's political or religious views). By contrast, personal disputes and internal operational decision of the employer generally do not rise to the level of public concern. The Supreme Court has found that the following varieties of speech touch on a matter of "public concern":

- A public school teacher's letter to the editor opposing his school district employer's allocation of financial resources. *Id.*
- Negative remarks made to a co-worker about the President of the United States. *Rankin v. McPherson*, 483 U.S. 378 (1987).
- Speeches on a variety of subjects, including the Quaker religion and African-American history, for which federal employees had received honoraria prohibited by a federal ethics statute. *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995).

By contrast, the Supreme Court has rejected employees' claims of First Amendment protection for the following types of speech because they did not involve a matter of public concern:

- A questionnaire circulated internally within an office that communicated problems with employee morale and supervision. *Cornick v. Myers*, 461 U.S. 138 (1983).

¹ There are several important exceptions to the Fair Campaign Practices Act, not discussed here, that allow the Regents and, in some cases, executive policy-makers to express a position on ballot measures that concern the University. These exceptions are technical, however, and require legal guidance.

Political Activities on Campus

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- A pornographic video that a police officer made of himself wearing his uniform while off duty. *City of San Diego v. Roe*, 543 U.S. 77 (2004).
- A district attorney's memo disagreeing with his supervisor's view of a case, when the memo was written pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Once a court determines that the speech in question addressed a matter of public concern, it will inquire whether the employer was justified in treating the speech differently than it would speech by a member of the public. That is, for a government employer to discipline an employee for his or her speech, the employer must show that the speech had some effect on its operations. To pass constitutional muster, the public employer must show that limitations on employee speech in the workplace satisfy a legitimate interest, including the efficient operation of the workplace.

Use of University property and facilities for political expression

As a public institution with facilities open to the public, the University may regulate, but may not prohibit, the use of its property for speech activities, including rallies, protests, and speeches. The University's obligation to open its property to expressive activities depends on the type of "forum" where individuals seek to exercise their speech rights.

A traditional public forum is a public space like a park or a street, where citizens have historically been free to speak and debate. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45. In such areas, the government may not altogether prohibit communicative activity and may only restrict speech on the basis of content if the restriction is narrowly tailored and serves a compelling purpose. However, the government may adopt and enforce regulations on the time, place, and manner of speech in traditional public forums, so long as those restrictions are both content-neutral and narrowly tailored and leave open alternative channels of communication. The government may also "designate" a public forum (e.g., meeting rooms on a college campus) subject to the same constraints on limiting speech as in traditional public forums, except that the government may limit the category of purposes for which a designated public forum may be used. *Id.* at 45-46 and n.7. Different rules apply to property which is not by tradition or designation a public forum. Therefore, the University has more latitude to regulate speech in non-public areas of its property, including many interior office workspaces and dormitories. In those non-public areas, the University's actions in restricting speech need only satisfy a reasonableness test, which considers factors such as whether the regulation comports with the property's intended use. *See id.* However, a public official may not suppress speech in non-public areas simply because the official disagrees with the speaker's views. *Id.* at 46.

Use of University property by a candidate or campaign must also comply with the Internal Revenue Service regulations discussed above. In general, the University may not donate the use of its property or facilities to a candidate or campaign unless it offers equivalent opportunities to other candidates. The University may rent its facilities to a campaign, provided that it does not offer special treatment that could be construed as supporting the campaign. Accordingly, any use of University facilities for political purposes must comply with all applicable University policies in addition to the First Amendment parameters outlined herein.

Regent Policy 10-I expresses a commitment to the "rights of the open forum" and states that the University "will welcome speakers on campus of all shades and hues of opinion." Policy 10-I expressly welcomes advocates of political candidates and contested public policies and student political organizations. Furthermore, Article 14.B.3, *Laws of the Regents*, requires that the chancellor of each campus adopt policies regarding the use of University grounds, buildings, and facilities, and each of the University's three campuses has adopted such a policy.

University policy on student and employee political participation

Regent Policy 10-I(2) provides that the University calendar will not be altered to accommodate political activity. Therefore, students who wish to participate in campaigns must make prior arrangements with their professors, and employees may participate in political activities so long as that participation does not interfere with state services or cause loss of work time. Employees must take personal leave before engaging in political activities during work hours. Faculty members and other employees without regularly scheduled work hours or leave should ensure that private political activities do not interfere with time spent on University duties.

University leave policies *may* afford employees two hours of leave time to vote in an election if an employee does not have three hours of unscheduled time during the time the polls are open. There is no requirement that classes be rescheduled to afford students time to vote. Requests for individual accommodation should be handled on a case-by-case basis in consultation with legal counsel.

GENERAL GUIDELINES FOR MEMBERS OF THE UNIVERSITY COMMUNITY

Multiple laws and regulations govern employee political expression and conduct in the workplace. Application of the law depends on the particular facts of the situation, and legal counsel should be consulted when questions arise. However, the following guidelines may be used when trying to determine whether particular conduct is appropriate in the University setting.

General principles:

- Employees have the right as private citizens to freedom of expression and participation in the political process.
- When expressing their political views, University employees should endeavor to prevent the appearance of University partiality in political campaigns.
- Private political activities must be conducted on personal time and without using University resources.

Employees should refrain from the following activities while at work:

- Sending emails from University-hosted email accounts in support of or in opposition to candidates or ballot initiatives;
- Using University office supplies (including computers, copiers, and fax machines) to create campaign materials;
- Making calls on University phones in support of or opposition to a political candidate or ballot initiatives;
- Using University computers to make monetary contributions to political campaigns;
- Placing campaign materials in locations not designated for general signage.

In general, employees may engage in the following activities while at work:

- Discussing political issues and political campaigns with one another while on break;
- Wearing buttons or clothing promoting a particular candidate or issue, provided that the employee does not regularly interact with the public as part of her job duties;
- Placing a bumper sticker on a personal vehicle.

University employees should always be aware that, as public employees, their activities may be subject to heightened scrutiny by the media and members of the public. Accordingly, they should take care to ensure that their private activities do not compromise their ability to carry out their official duties.

The Recording Industry's Campaign against Illegal Filesharing on College Campuses

By Maggie Wilensky, Assistant University Counsel, System

The companies represented by the Recording Industry Association of America (RIAA) are currently engaged in an aggressive nationwide campaign to monitor and combat illegal music filesharing by college students.¹ This campaign involves two tactics: 1. Contacting university information technology departments to report filesharing that RIAA claims to have detected; and 2. Suing students who may have engaged in illegal filesharing. Following is a brief summary of both prongs of the RIAA strategy.

Monitoring and notification

The RIAA has hired a computer investigation firm to monitor network traffic in search of illegal filesharing. When this firm detects activity that looks like illegal filesharing, it sends the University, as its students' Internet service provider, a notice specifying the activity that was detected, including the song that was uploaded or downloaded, the time at which the activity occurred, and a specific Internet Protocol address with which the activity was associated.

The University receives these complaints at a central email address that it has designated with the United States Copyright Office.² The University's legal obligation to forward such a complaint to the user depends on whether the complaint alleges that illegally downloaded music rests on the University's computers or has merely passed over its networks.³ However, the University has adopted a practice of passing along all complaints where it can identify a user, as the University views these complaints from the industry as an opportunity to educate its students about illegal filesharing. Additionally, these complaints generally contain allegations that, if true, would indicate that students have violated campus computer use policies; campus IT officials therefore have adopted procedures to allow a student to answer the allegations in an RIAA notification, after which an RIAA notification may be counted as a first violation of campus computer use policy.

Litigation

In addition to emailing notifications to colleges and universities, record company members of the RIAA also bring lawsuits where they believe that students have used university networks to engage in illegal filesharing, alleging that unauthorized filesharing amounts to copyright infringement. The RIAA initiates the litigation process by requesting that universities transmit pre-litigation settlement letters to student users, who the industry identifies only by their Internet Protocol addresses.⁴ When students do not accept pre-litigation settlement offers, the record companies that own the allegedly illegally shared songs then bring a "John Doe" lawsuit, in which the plaintiff record company sues the student users as unknown defendants.

Along with the complaint in a John Doe suit, record company plaintiffs typically file an "Application for Leave to take Immediate Discovery" requesting that the Court order the student defendants' university, as a non-party and the defendants' Internet service provider, to comply with plaintiffs' discovery requests. If the district court grants that discovery motion, plaintiffs then subpoena the student defendants' university for the identities and contact information of the Doe defendants, again based on their Internet Protocol addresses. Before a university complies with such a subpoena, federal privacy law requires that it contact the involved students to give them an opportunity to challenge the

¹ Other content owners follow similar procedures to those described in this article. However, the RIAA's complaints account for approximately 90% of those the University receives, and the RIAA is the most active association in litigating filesharing claims. Other associations and companies that have adopted similar tactics include the Motion Picture Association of America, the Electronic Software Association, NBC, HBO, and Paramount Pictures.

² This address is DMCA-agent@cu.edu.

³ *Compare* 17 U.S.C. 512(a), *with* 17 U.S.C. 512(c) (granting Internet service providers blanket immunity where copyright infringement is the result of a user's "transitory digital network communications," but more limited immunity where material actually resides on the service provider's system or network). The overwhelming majority of the complaints which the University receives appear to involve transitory communications.

⁴ See RIAA Press Release, RIAA Pre-Lawsuit Letters go to 22 Campuses in New Wave of Deterrence Program (Dec. 6, 2007), available at www.riaa.com.

Illegal Filesharing

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subpoena. If the Doe defendants do not bring a successful challenge to the subpoena, the university must identify them, and the RIAA's copyright infringement lawsuit will proceed against the defendants as named.

The RIAA's law firm has recently notified the University that several record companies have brought a John Doe lawsuit along the lines outlined above against four current or former Colorado Springs students.

Conclusion

The RIAA has employed the procedures described above against students at dozens of institutions. The RIAA has indicated that it intends to continue employing its notification-and-litigation tactics, as Internet-based filesharing has steadily eroded music sales figures in recent years. In response to these content industry tactics, the Office of University Counsel and campus IT officials are working to develop strategies to educate the University community about RIAA tactics and about illegal filesharing, with the goal of minimizing both the number of RIAA complaints that the University receives and the risk of future lawsuits against the University's students.



Introductions

Michelle Krech
Legal Staff Associate/Researcher, UCB

Michelle Krech is a Legal Staff Associate/Researcher for the University of Colorado at Boulder. Michelle graduated summa cum laude from the Honors College at Arizona State University receiving a B.A. in Anthropology and the Alumni Award. She went on to earn her J.D. from the Sandra Day O'Connor College of Law at Arizona State University. Before joining the Office of University Counsel in April 2008, she practiced law, with an emphasis on corporate, real estate, and business transactions for three years with a private law firm in Arvada, Colorado.

Katherine Goodwin
Legal Staff Associate/Researcher, UCD

Katie Goodwin is a native of Houston, Texas. She received a B.A. in Political Science and Spanish from Trinity University in San Antonio, TX. Following college, she moved to Los Angeles, CA where she worked in fund raising at Occidental College. Katie returned to Texas, graduating from South Texas College of Law in 2007 after spending her final semester as a visiting student at University of Denver, Sturm College of Law. While in law school, Katie successfully competed in several appellate advocacy tournaments and clerked in one of Harris County's civil district courts. Prior to accepting this position with the Office of University Counsel, Katie was working on a contract basis with an attorney in Denver who practices in the area of civil litigation. When not at work, she volunteers with Child Advocates – Denver CASA and spends time with her spirited Welsh corgi, Georgie.



The material contained in this newsletter has been prepared by the Office of University Counsel for informational purposes only. This newsletter does not provide legal advice. By providing this information, an attorney/client or other relationship is neither intended nor established. The Office's client is the University and not any particular employee. We urge you to consult with your advising counsel regarding your individual situation.

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THE LEGAL ISSUE

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The Impact of Federal Regulations on Blood Drives at the University

By Katie Goodwin, Research Associate Attorney, UCD

University units and student organizations periodically sponsor blood drives in collaboration with charitable organizations such as Bonfils Blood Center and the American Red Cross. Certain federal regulations govern the manner in which those blood drives are conducted. While the responsibility for complying with applicable regulations rests with the charitable organization conducting the drive, those regulations may intersect with University policies, particularly those policies related to discrimination. This article considers the intersection of University policy and federal regulation of blood drives.

Federal Regulations Relating to Blood Drives

The Food and Drug Administration ("FDA") regulates the standards for human blood and blood products in order to maintain a safe blood supply. Over 20 million transfusions of blood, red cell concentrates, plasma, or platelets occur every year.¹ Each blood bank or collection center is required to adhere to the FDA policies on donor eligibility, including rules requiring some individuals to defer donation for a limited or unlimited period of time.

There are a number of categories of persons who must defer from donating blood. The list of deferred donors includes: men who have, at any time since 1977 (the date of the beginning of the AIDS epidemic in the United States), been sexually active with other men ("MSM"); intravenous drug abusers; transplant recipients who received animal tissue or organs; people who have recently lived or traveled abroad in certain countries; and people who have engaged in sex in return for money at any time since 1977. Each blood donor is given a questionnaire to complete prior to donation. This questionnaire identifies those who should defer because they are potentially at a higher risk of carrying an infectious disease, are not healthy enough to donate, have taken certain medications that are unacceptable for donors, or possess other characteristics that require self deferral.

Blood Drives and the University's Nondiscrimination Policies

Before a recent blood drive on the Denver campus, a student asked the University to review its practices on blood drives because of his concerns over the FDA regulations, particularly the mandatory deferral for MSM. The student argued that, by hosting the blood drive, the University was allowing discrimination against homosexual men.

Article 10 of the *Laws of the Regents* addresses nondiscrimination. It states that, "The University of Colorado does not discriminate on the basis of race, color, national origin, sex, age, disability, creed, religion, sexual orientation, or veteran status in admission and access to, and treatment and employment in, its educational programs and activities." In 2001, the Board of Regents adopted a resolution to add sexual orientation to the nondiscrimination statement, which is reflected in the quoted text.

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¹ 21 C.F.R. §640 et seq.

Blood Drives

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The Denver campus administration ultimately did not have to take a position on the issue, as the blood drive was cancelled due to a lack of student participation unrelated to this issue. However, the issue remains one that the University's administrators should be aware of, as it has recently arisen at other institutions and has been the focus of criticism by activists and members of the blood bank community.

The FDA Policy on Lifetime Deferrals for MSM

As discussed above, MSM are currently on the lifetime deferral list. One of the reasons cited as justification for this deferral is the statistics, maintained by the Centers for Disease Control ("CDC"), regarding the incidence of HIV and other infectious disease in the MSM population. The CDC research concludes that, as a group, MSM are at a higher risk for transmitting infectious diseases or HIV than are individuals in other risk categories. While HIV can be transmitted in other ways, 71% of the men in the United States infected with HIV and 53% of all new HIV infections in 2006 occurred in MSM.¹

In addition to the up-front questionnaire which eliminates potential at-risk donors, all donated blood undergoes a series of tests for infectious diseases.² The FDA has licensed nucleic acid test systems for HIV screening. These tests are able to detect the presence of HIV more accurately and often prior to the appearance of any symptoms.³

The AABB, a professional body and the standards organization which accredits most blood banks in the United States, has advocated decreasing the deferral period for MSM to twelve (12) months instead of a lifetime ban.⁴ It argues that the lifetime deferral is medically unwarranted because the tests used to detect HIV, such as the nucleic acid test, are much more sophisticated than they were in 1983 (the year the FDA instituted the policy against MSM) and even since 1992 (the year that the FDA substantially revised its policy). However, the FDA counters that the policy serves to minimize even the small risk associated with infectious diseases in the blood supply transmitted through transfusion. The FDA's most recent data states that "the risk of getting HIV from a blood transfusion has been reduced to about one per two million units of blood transfused." The incidence of contracting hepatitis C is roughly the same as HIV, while the risk of contracting hepatitis B is "somewhat higher."⁵

The FDA states that it "would change this policy only if supported by scientific data showing that a change in policy would not present a significant and preventable risk to blood recipients."⁶ Currently, the policy is in effect and MSM must self-defer from donating blood.

Resolution of Controversies over Blood Drives at Other Universities

This Regent *Law* on nondiscrimination discussed above is substantially similar to those at our peer institutions. In the past year, several other universities have received inquiries by their students into the convergence of FDA policies, university antidiscrimination policies, and blood drives on campus. Those universities asked to review the issue have each come to their own conclusions. Following is a summary of some recent controversies over blood drives and the MSM community:

- The President of San Jose State University decided to suspend on-campus blood drives arranged by employees and/or recognized student organizations, after reviewing the FDA policy in conjunction with the university nondiscrimination policy.⁷ The President's decision was based on the strict prohibition of discrimination on campus and his conclusion that the FDA policy was a violation of that prohibition. He stated that he hoped the FDA would take notice and possibly change its policy.

Continued on Page 3.

¹ <http://www.cdc.gov/hiv/topics/surveillance/incidence.htm> (September 2, 2008).

² <http://www.fda.gov/opacom/factsheets/justthefacts/15blood.html> (September 2, 2008).

³ Id.

⁴ http://www.aabb.org/Content/Members_Area/Members_Area_Regulatory/Donor_Suitability/bpacdefernat030906.htm (September 2, 2008).

⁵ <http://www.fda.gov/cber/faq/msmdonor.htm> (updated May 23, 2007).

⁶ Id.

⁷ <http://webcms.sjsu.edu/opencms/president/communications/blooddrives/letter.html> (July 25, 2008).

Blood Drives

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The Stanford Blood Center, which serves the area, criticized the decision as detrimental to the local blood supply.¹ Stanford estimated that it receives 20 percent of its blood supplies through drives at high schools and colleges and stated that those blood drives are critically important in establishing the habit of donating blood at a young age. Stanford has lobbied the FDA to relax its restrictions on donations by MSM but feels that it is critical for blood drives to continue despite the restriction.

- The University of Vermont confronted the issue following a Red Cross blood drive on campus in 2007. A student government representative brought the issue to the attention of the administration. The administration reviewed the issue and decided not to suspend blood drives. In response, the student government passed a resolution that strongly encouraged the FDA to review and change its policy.²

- The University of California Berkeley also chose not to suspend blood drives on campus after the issue was brought to its attention. Instead, it held a student-organized drive encouraging gay men to recruit a donor in their place. The university reasoned that it was more productive to call attention in this way rather than to place a burden on the blood supply by denying all donations.

To date, courts have not ruled on the legality of the FDA policies and therefore do not offer our decision makers guidance. Conflicts about blood drives likely will continue at universities for the foreseeable future. Ultimately, the decision whether to sponsor blood drives on campus administered by charitable organizations in accordance with current FDA regulations or to abandon sponsorship is a policy decision for administrators to make.



¹ <http://news-service.stanford.edu/news/2008/february6/med-blood-020608.html> (July 25, 2008).

² http://www.uvm.edu/~uvmsga/documents/resolution_refuting_the_fda_lifetime_deferral_policy_website.doc (September 3, 2008).

A Creative Approach to Copyright

By Annalissa Philbin, Research Associate Attorney, UCD &
Maggie Wilensky, Assistant University Counsel, System

Introduction

Creative Commons is a non-profit organization that provides, free of charge, copyright licenses¹ that copyright owners can use to customize the type of permission that they grant others to use their work. Following is a brief overview of the legal aspects of the creative commons license and the areas in which it might be useful to members of the University community.

How creative commons licenses work

The creative commons website (<http://creativecommons.org/>) offers an easy-to-use set of tools that allow an author to customize a copyright license. When you "customize" a license on the site, you are deciding which sort of rights you want consumers of your work (e.g., readers and viewers) to know that they automatically have, without having to contact you to seek permission to use your work. As the website states, "Creative Commons defines the spectrum of possibilities between full copyright — *all rights reserved* — and the public domain — *no rights reserved*." A creative commons license will let "you keep your copyright while inviting certain uses of your work — a 'some rights reserved' copyright." The creative commons website permits users to mix and match several types of rights and restrictions that copyright owners would like to place on their works. Among these conditions are: "attribution" (requiring other users to include an authorship credit in reproductions of the work); "noncommercial" (permitting other users to freely reproduce and distribute a work for noncommercial purposes only); "non-derivative" (permitting other users to reproduce and distribute only verbatim copies but not derivative works based on it); and "share alike" (permitting only those users who have provided an identical license to reproduce and distribute the work).

Once a copyright owner has selected the license conditions that she would like to generate, the creative commons website will produce a license in three formats: 1. A plain-English summary of the suite of rights that she has selected; 2. A formal license written in legalese familiar to intellectual property lawyers and judges; and 3. A computer code version of the license which allows search engines to identify the work by its terms of use. The resulting license is non-exclusive, in that it works in just one direction. The author has provided rights to the public but has not diminished her own right to use or profit from the work.

Regardless of how a copyright owner customizes her license, the creative commons license comes with two important and non-negotiable caveats that copyright owners should consider before applying the license to their work. First, by its nature the creative commons license is global, meaning that anyone who sees the license and abides by its conditions may take advantage of the rights that the author has provided to content users and consumers. Second, the creative commons license is non-revocable. If an author applies a creative commons license to her work but later changes her mind, the rights contained in the creative commons license are still available to a consumer who has obtained copies of that work under the creative commons license. As will be discussed in the next section, the creative commons license is quite useful to the higher education community.

When a creative commons license might be useful

As a public institution, the University of Colorado's mission includes the dissemination of knowledge, and publishing works created by the University community under an appropriate creative commons license often will aid in the further dissemination of knowledge. Licensing a scholarly or creative work, such as a paper disclosing the results of one's research endeavors, or a poem or short story, or a photograph, under a creative commons license will make that scholarly work available to more people, but without giving up rights in the work altogether, as would happen if one were to put the work directly into the public domain.

Before applying a creative commons license, it is important to first determine what the purpose is for your work before deciding what kind of protection you want to assert for it. If your goal is to make your work freely available to the public with only certain limitations, the creative commons license is an easy and free way to achieve that goal.

¹ "Copyright" protection is available for works of authorship fixed in any tangible medium of expression. A "license" is a written permission that a copyright owner provides to another to use a copyrighted work according to particular terms and conditions.

Creative Commons

(Continued from page 4)

A creative commons license may not be appropriate in all instances, though. For example, software is protected by copyright. However, the creative commons license, as explained on the creative commons website, was not created for the dissemination of software, and it is not advisable to make software available under a creative commons license. Rather, there are other mechanisms available to provide open access to software created at the University. The Technology Transfer Office manages the licensing of software created at the University pursuant to the *Intellectual Property Policy on Discoveries and Patents for Their Protection and Commercialization* and can answer any questions regarding the licensing of software created at the University.

A creative commons license may also not be appropriate where an author would like to maintain exclusive control over the dissemination of his or her work. For example, if you create a photograph that you would like to sell commercially, it might not make sense to make that same photograph available for free under a creative commons license. Additionally, if you write a paper disclosing the results of your research endeavors or a short story that you would like to have published in a journal, you should be aware that most journals would prefer to have exclusive rights to publish that paper or short story and might not accept for publication a paper or short story that has been made freely available under a creative commons license.

Creative commons licenses are also useful for University authors who frequently use other people's copyrighted work in their own creative or scholarly work, such as musicians who incorporate other musicians' work into their own. The creative commons license allows authors to use other authors' work without the time-consuming, and sometimes futile, process of seeking permission or of making the often-difficult determination of whether "fair use" protection might apply. The creative commons license provides users peace of mind and protection in such situations. One important issue to be aware of when using another person's work licensed under a creative license, though: the Creative Commons organization is relatively young, and is still working on defining some of the more nebulous terms included in its licenses. For example, the organization's website acknowledges that whether a use is "commercial" is not always clear; the organization is drafting guidelines to provide more clarity on that issue. Please contact the Office of University Counsel with any questions you may have regarding creative commons licenses, either as an author or as a user of a creative commons-licensed work.

Congratulations, Christy!

The U.S. Senate recently confirmed the nomination of Christine Arguello, Managing Senior Associate Counsel of the Boulder Campus, as U.S. District Court Judge for the District of Colorado. Further information regarding Judge Arguello's nomination may be found [here](#).

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