

In separate cases, two public school students used MySpace to post disparaging comments about each of their principals. Each of the students was punished with a suspension from school, and each made a federal case out of it, literally, by suing on the basis of alleged infringement of the right of free speech. Both cases arose in the same state, and the same federal appellate court decided appeals in the cases on the same day. The parallels end there, however, because one student succeeded in his First Amendment argument while the other student did not.

The explanation for the different outcomes in the cases boils down to different conclusions as to whether the speech engaged in by the students had at least the potential to be substantially disruptive of school activities, even though both forms of speech occurred off of school grounds. No doubt, in both cases, the targeted principals had bruised feelings, at the very least, but that was not the pivotal consideration.

Profile Goes Too Far

In the unsuccessful case, an eighth grader's suspension was upheld after she created a personal "profile" of her principal in which she went so far as to suggest that he was a pedophile and a sex addict. The court acknowledged that criticisms of school officials, even when in bad taste, are not to be censored. However, more than simply being critical or disrespectful, the language used by the student was highly offensive, potentially very damaging to the principal and the school, and maybe even illegal. The insinuations, even if made in jest, went right to the heart of whether the principal was fit to serve in his position, undermining his authority within the school.

Parody May Be Allowed

By contrast, the same court found that a school had gone too far when it suspended a high school student after he created a profile of his principal on MySpace, using his grandmother's home computer. In this case, the content of the posting could be described as a parody, as it made fun of the principal because of his large size. The parody used some offensive language, but on the whole it did not disrupt, or have the potential to disrupt, the student's school, even though it was highly embarrassing for the principal.

It bears emphasizing that in both cases the students enjoyed much more freedom of expression, although not without limits, than they would have had while at school or in school-sponsored activities. In those settings, as the court noted in one of the cases, there is no First Amendment protection for lewd, vulgar, indecent, and plainly offensive speech, and school officials do not offend the First Amendment by exercising editorial control over student speech so long as their actions are reasonably related to legitimate pedagogical concerns. In short, the lesson for students from these cases could be not only "don't try this at home," but also, and more emphatically, "never try this at school."

SCULPTOR SLAYS GOVERNMENT GOLIATH

Some 20 years ago, a World War II veteran and prominent sculptor won a government competition to sculpt a memorial to Korean War veterans in Washington, D.C. His creation depicts a platoon of stainless steel, larger-than-life foot soldiers arranged in what has come to be called "The Column." Five years later, another veteran, an amateur photographer, took photographs of the memorial. One of these photographs eventually was used by the federal government on a widely distributed postage stamp, for which the government paid the photographer \$1,500.

As for the sculptor, he had not been informed of the stamp in advance, nor had anyone sought his permission for it or paid him anything for it. He sued the government for copyright infringement. Certainly, there were principles at stake, but there was also potentially a lot of money in play. The Postal Service received more than \$17 million from sales of the stamp, not to mention additional income from the use of the stamp on retail goods such as commemorative panels and framed art. The sculptor wanted a share of that money.

At a trial before the Court of Federal Claims, the court determined that the sculptor was the sole copyright owner of "The Column," rather than a joint owner with the government, and that "The Column" did not qualify for an exclusion from copyright infringement liability as an architectural work under the Architectural Works Copyright Protection Act. However, the court also determined that the government was not liable for copyright infringement because the government's use of "The Column" was a fair use. The fair use doctrine requires courts to avoid rigid application of the copyright statute when it would stifle the very creativity that the law is designed to foster.

On appeal, a federal appellate court reversed on the pivotal issue of fair use, and sent the case back to the court below for consideration of the sculptor's damages. The Postal Service's stamp containing an image of the soldier sculptures did not "transform" the character of the sculptures so as to support a finding of fair use under established copyright law. Rather, both the stamp and the sculptures shared the common purpose of honoring veterans of the Korean War.

While the stamp altered the appearance of the sculptures by adding snow and muting the color, those alterations did not impart a different character to the work. In addition, although the stamp did not harm the market for derivative works, which is another consideration in fair use analysis, the appellate court concluded that allowing the government to commercially exploit a creative and expressive work would not have advanced the purposes of copyright in this particular case.