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by means of conditions attached to the expenditure of Government funds is restricted by the

materials or to have them posted according to certain RSU rules. Furthermore, students do have the right to post flyers in various places on campus, such as students' own private bedrooms in residence halls. RSU's *Student Organization Handbook* even names a place where students appear to have a right to post commercial flyers, "the Community posting board in the Student Union." Thus, OARS' flyer is correct to state that "You have the right to post ... flyers." Brown's interpretation of the flyer is incorrect, and banning the poster on the ground that it is false is a violation of OARS' freedom of expression.

Brown's errors highlight the

and the students' speech. Only in genuine instances of potential ambiguity may a university require the student group to make clear whether the students are speaking in the name of the university. That is, all reasonable persons understand that the expression of student groups on Facebook and other social media is their own speech, not that of the university. Again, any restrictions on such private speech by RSU must be "narrowly tailored" to serve substantial governmental interests.

In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called "Bally Sucks," which included a modified Bally logo on the front page and used the term "ballysucks" in the URL of the website. In that case, Bally argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that "[a]pplying Bally's argument would extend trademark protection to eclipse First Amendment rights. The courts ... have rejected this approach by holding that trademark rights may be limited by First Amendment concerns." 29 F. Supp. 2d at 1166, citing *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), cert denied, 483 U.S. 1013 (1987). At RSU, an argument similar to Bally's would fail constitutional muster.

Courts have also determined that so-called "cybergripping" websites, which are generally dedicated to harsh criticism of an organization and which often use its marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the court determined that "any expression embodying the use of a mark not 'in connection with the sale ... or advertising of any goods or services,' and not likely to cause confusion, is ... necessarily protected by the First Amendment." In that case, the defendant had established five different websites, such as *taubmansucks.com* and *willowbendmallssucks.com*, that criticized plaintiff Taubman and his business, "The Shops at Willow Bend," with the purpose of hurting his business and reputation. *Id.* at 772. Similarly, names of "cybergripping" social networking accounts that use RSU's name are protected by the First Amendment.

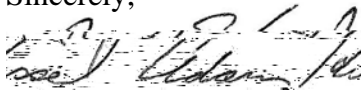
Preventing "multiple [Facebook] accounts for the same [student] organization," as stated by Brown, is far from a substantial interest within the purview of RSU. Furthermore, any restriction on "social media accounts ... that contain the name of the university in any format" must be narrowly tailored to serve a substantial governmental interest, such as ensuring that a group does not falsely pretend to be speaking in the university's name and does not use the university's name for commercial purposes. The vast majority of possible social media accounts that use RSU's name in any format, however, have no commercial purpose and do not tend to confuse or mislead readers into believing that they are officially sanctioned or endorsed by the university.

FIRE is committed to using all of its resources to uphold the First Amendment at RSU. We request that you (1) remind the SGA of its First Amendment responsibilities when voting on whether to approve new student organizations; (2) make clear to all students that they have the right to distribute non-commercial flyers on campus without prior review; (3) use only

narrow, objective, and definite standards for prior approval of flyers intended for posting on designated bulletin boards (including OARS' flyer), standards which shall be clearly stated and which shall not rely on the perceived truth of the flyers; and (4) ensure that any new restrictions on students' social media accounts accord with the First Amendment.

We request a response by September 13, 2010.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Kissel", written over a horizontal line.

Adam Kissel

Director, Individual Rights Defense Program

cc:

Tobie R. Titsworth, Vice President for Student Affairs

Lynn Brown, Coordinator of Student Activities

Larry Green, OARS Advisor

Adrean Shelly, President, Student Government Association