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INSTITUTIONAL REGULATION OF EMPLOYEE EXPRESSION: WRITING AS A CONFLICT OF INTEREST WITHIN MUSEUMS AND RELATED NONPROFIT INSTITUTIONS

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A museum is an educational institution and a center for learning. In this environment writing and other creative pursuits should be fostered and encouraged. However, when writing is produced by an employee, a museum is faced with a number of concerns. These concerns differ, depending on the institution's status or role in relation to the issues presented. A museum is an employer, an educational institution in a broad sense, a tax exempt charitable organization, and sometimes a governmental entity. Each status initiates a separate set of concerns regarding the creation, ownership and publication of writings produced by those who work for the institution. Although much of the text and analysis of this article relates to a museum context, the discussion and authorities apply to many other organizations and institutions.

This article analyzes institutional concerns. Among the issues addressed are the need to encourage writing while simultaneously protecting the reputation of the institution, the misuse of institutional resources, copyright ownership, conflicts of interest, and various procedures and remedies available to protect the museum's interests. The possible difficulties discussed below are not presented to discourage writing as an outside activity. Instead, they are presented to emphasize the need to plan ahead and neutralize or manage problem areas which arise when an employee engages in writing. Any understandings reached by the employee and the institution con-

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cerning problem areas should be reduced to a written agreement. That agreement, in turn, should be based upon an institutional policy that addresses writing by employees.

All writing, whether or not for profit, presents possible conflicts of interest or appearances of conflicts. These concerns are addressed at the beginning of this article. Additional questions arise when the writing is for profit. Those concerns are addressed in a discussion of the need for the employer to review writing projects before they get underway.

I. THE BENEFITS OF WRITING

Writing[1] as an expression of personal and professional interests should be encouraged by an institution's policies.[2] Writing permits an individual to pass on expertise to the public and to elevate skills in the professional community.[3] Society's need for broad contributions to knowledge and culture mandates that persons with the training and ability be aided in their creative efforts. Writing which stimulates professional development and has scholarly and educational value

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1. Here a broad definition of "writing" is used, encompassing all creative expression which can be permanently recorded such as illustrating, designing, printing, drawing, photography, sculpture, print-making, composing and recording music, speeches, letters to the editor, computer programs and literature. *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (defining "writing" as "any physical rendering of the fruits of creative intellectual or aesthetic labor").

2. The museum community strongly endorses written and other creative expression: "Museum staff personnel should be encouraged to teach, lecture, and write, as desirable activities that aid professional development." COMMITTEE ON ETHICS, AMERICAN ASS'N OF MUSEUMS, MUSEUM ETHICS 21 (1978) [hereinafter MUSEUM ETHICS]. The American Association of Museums Board of Directors approved a new Code of Ethics for museums in May 1991. However, the new code is a set of broad, general principles that must be implemented by specific codes for each museum. It is expected that many of the provisions of MUSEUM ETHICS will remain in force in existing codes for museums, or be reinstated as new, specific codes are drafted for individual museums. "It is in the public interest for museums to encourage the intellectual development of their professional staffs and to look with favor upon their making significant literary and scientific contributions." Alfred P. Knoll & Daniel Drapiewski, *Knowing Your Copyrights*, 55 MUSEUM NEWS, Mar.-Apr. 1977, at 69.

3. In doing so, the employee is fulfilling one of the museum's primary purposes, education. COMMISSION ON MUSEUMS FOR A NEW CENTURY, AMERICAN ASSOCIATION OF MUSEUMS, MUSEUMS FOR A NEW CENTURY 31 (1984). "In fact, many consider public education to be the most significant contribution this country has made to the evolution of the museum concept." *Id.* at 55.

should be particularly encouraged and, to the extent possible, nurtured by the parent institution.

A policy encouraging staff persons to write and publish in their field should be included in the personnel policies of any organization and genuinely put into practice. The institution and its staff benefit considerably by improving the quality of performance, creativity, commitment to job responsibilities, and by increasing the sense of professional worth.

Not all writing, however, occupies a privileged status in terms of institutional priorities. Museums should actively facilitate writing activities to the extent they aid professional development, do not cause conflicts of interest and do not compromise the museum's integrity.[4] Writing in accordance with these standards would likely have scholarly and educational value. However, if overdone, writing of this nature may be detrimental to ordinary duties. Adequate supervision should solve this management problem.

Some writing is not beneficial to an institution. An employee may detrimentally use the institution's name or the employee's official title in writing created for profit or as an academic exercise and intended for publication to an outside audience. The individual should also avoid, and the institution should guard against, writing activities that result in abuse of an employee's position, profiteering of other conflicts of interest.[5] While writing is not a conflict of interest per se,[6] the concommitant use of resources, the effect upon the author or

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4. "Museums should facilitate such activities so long as there is not undue interference with performance of regular duties, and employees do not take advantage of their museum positions for personal monetary gain or appear to compromise the integrity of their institution." MUSEUM ETHICS, *supra* note 2, at 21.

5. *See In re* Niagara Falls Gazette Publishing Co., 41 Lab. Arb. Rep. (BNA) 899, 902 (1963) (newspaper reporter forced to resign his part-time position as an editor of an official union publication because it gave the appearance of reporter involvement in a conflict of interest with his newspaper employer and exploitation of his connection with his employer).

6.

> A conflict of interest exists whenever a fiduciary is faced with a choice between the interests of his beneficiary and any other interests, including his own. The mainstream of the law of fiduciaries does not punish a fiduciary for having a conflict of interest, but finds him liable only if he actually chooses interests other than those of his beneficiaries.

J.C. SHEPHERD, THE LAW OF FIDUCIARIES 41 (1981).

others during its production, and the marketing or presentation of the completed work may present a conflict of interest.[7]

II. THE NEED FOR AN INSTITUTIONAL POLICY ON PERSONAL WRITING

An institution should establish a comprehensive policy on private writing by its employees because of the variety of concerns accompanying an employee's personal writing.[8] This institutional policy should actively encourage the staff's writing by removing as many obstacles as possible which arise from an employment situation. The policy should address not only the production of written works, but the associated creative fields such as designing, illustrating, editing, and even advising or consulting with publishers on projects as a coordinator or series editor.

Such a policy should deal with the creation of a work, and the promotion of the work once published. Should institutional resources be used to promote the work? Should the institution sell the work? Should the employee-author receive royalties from sales by or at his own institution? Can the employee-author request other institution personnel to promote the book?

Each institution should consider such issues and expressly state its determinations in a written policy.[9] By stating its poli-

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7. Research and writing are particularly susceptible to conflicts of interest in the area of new technologies. The California Institute of Technology and one of its faculty members engaged in a dispute regarding the rights to a complex computer program developed by the faculty member. When the faculty member requested the Institute to enter into a licensing agreement with a company in which the faculty member had a substantial interest, the Institute refused on the ground that the situation constituted a potential conflict of interest. As a result, the faculty member resigned from the Institute. *See* William A. Rome, *Scholarly Writings in the University Setting: Changes in the Works and on the Books*, 35 COPYRIGHT L. SYMP. (ASCAP) 41, 64-65 (1989); Gina Kolata, *Caltech Torn by Dispute Over Software*, 220 SCIENCE, May 27, 1983, at 932.

8. Employers have the right to establish policies which govern the conduct of employees. Employees are required to comply with the policies as conditions of employment provided the policies are not arbitrary, unreasonable, or capricious. Quarles v. North Miss. Retardation Ctr., 455 F. Supp. 52 (N.D. Miss.), *aff'd*, 580 F.2d 1051, 1057 (5th Cir. 1978).

9. "The benefits of publication for museum personnel are many: enhanced professional reputation, dissemination of scholarly ideas, even fees or royalties. As long as the practices of museums in this area are varied, and the law is unclear, it is advisable for a museum to promulgate written guidelines concerning staff

cy in writing, the institution can be more certain that the policy will become an explicit condition of employment with a greater legal effect.[10]

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writings." Rhoda L. Berkowitz & Marshall A. Leaffer, *Copyright and the Art Museum*, 8 COLUM.- VLA J.L. & ARTS 249, 305 n.246 (1984).

10. The modern trend is to view statements in a personnel handbook or an employee policy manual as contractual obligations which govern the employment relationship. Woolley v. Hoffman-La Roche, 491 A.2d 1257, 1263 (N.J. 1985); Ferraro v. Koelsch, 368 N.W.2d 666 (Wis. 1985); Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984). It has even been held that while the publication of an employee manual does not of itself create a binding contractual obligation, a pre-employment reference by the employer to the manual may result in the incorporation of the manual's provisions into the employment contract. Sherman v. Rutland Hosp., 500 A.2d 230 (Vt. 1985). For statements in a policy manual to be considered a contractual condition of employment, they must be specific. MacDougal v. Sears, Roebuck & Co., 624 F. Supp. 756 (E.D. Tenn. 1985). Many courts, however, continue to hold that policy manual provisions do not give rise to any contractual obligation. *Woolley*, 491 A.2d at 1262-63. "[W]hether an employee handbook [is] incorporated into an agreement between an employer and an employee is a question of fact to be determined in each case." Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 786 (Alaska 1989). Courts that may find for the incorporation of a handbook will rely on traditional contract principles to interpret the employment contract. *Id.* at 787 n.2.

In the case of at-will employees, jurisdictions are split as to whether continued employment after the changing of a condition of employment constitutes sufficient consideration to make the changed condition part of the original employment contract. The majority of courts appears to find that the continued performance of the at-will employee constitutes adequate consideration and an acceptance of the new terms. *Id.* at 787; Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983).

> If the employment agreement is for no definite period, or is 'at will,' a new agreement modifying the salary to be paid or work to be done is not invalid for lack of consideration. There is continued performance not required by the first agreement. The same is true where one party, having a power of termination, forbears to exercise it in return for the new promise.

1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 175 (1963)

Other courts have found that such a continued performance may not be sufficient to enforce the modification. *See, e.g.*, Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (because an employment handbook was a unilateral statement of company policies and procedures, there was no "meeting of the minds" between the employee and the employer sufficient to create a contract); Kadis v. Britt, 29 S.E.2d 543, 548 (N.C. 1944) (promise of continued employment illusory as the employer retains a right to discharge the employee); Richardson v. Charles Cole Memorial Hosp., 466 A.2d 1084, 1085 (Pa. Super. Ct. 1983) (employer's unilateral act of publishing its policies did not amount to a "meeting of the minds" required for a contract). *See generally Jones*, 779 P.2d 783.

III. SEPARATION BETWEEN PERSONAL IDENTITY AND INSTITUTIONAL IDENTITY

The employee should separate his or her personal writing life from his or her work life. An employee's privately published opinions seldom cause problems for the institution if the work is scholarly, non-political, or non- controversial. However, a distinct separation between the person's personal identity as a writer and the official position within the institution insures that the author's work appears as a personal statement and is not attributed to the institution. This is especially true if the work is controversial or political in nature.[11]

If management does not want an employee's personal views imputed to the museum, the institution and the employee should enter into a written agreement which requires the employee-author to include a disclaimer in any published work or promotional material.[12] A disclaimer is a printed statement appearing with the work's credits, stating that the views expressed are solely the individual's, do not represent any official statement by the institution with which the writer is connected and may not necessarily reflect the institution's views.

Although a disclaimer may have little psychological effect,[13] it constitutes a published statement of the writer's sin-

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11. An employee's statements or letters may have a long- lasting impact due to their possible publication in the media or inclusion in legislative proceedings. It may prove difficult, if not impossible, for certain high-ranking individuals in the institution to be able to express private opinions, at least within areas related to their job responsibilities. These individuals must understand that the public's inability to divorce the private person from the institution requires that these individuals be careful not to reveal their personal views. Such a restriction is one of the burdens of status. An employee, lower in the organization's hierarchy, is in a better position to express private opinions, even about matters of great concern to the employer.

12. The need for divorcing an individual view from that of the institution may be particularly necessary when the individual is engaged in activity which can be viewed as an attempt to lobby or to campaign in a race for public office, activities from which the institution is prohibited. *See* PAUL E. TREUSCH, TAX-EXEMPT CHARITABLE ORGANIZATIONS 289-90, 313, 317 (3d ed. 1988).

13. The effectiveness of disclaimers, traditionally used in the area of trademark law, has been questioned. *See* Jacob Jacoby & Robert L. Raskopf, *Disclaimers in Trademark Infringement Litigation: More Trouble Than They are Worth?*, 76 TRADEMARK REP. 35 (1986); Mitchell E. Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59 (1986). The use of a disclaimer, however, is preferred to the alternative of precluding the

cere intent to protect the parent institution by divorcing personal views from the writer's official position within the organization. A disclaimer thus provides a foundation for the staff member to assume personal responsibility for any written statements and opinions and reduces problems that arise when the author's personal views differ from the views or official positions of the institution.[14]

Less restrictive protections are also available. Out of deference to staff professionalism the institution may permit employees to use their own discretion regarding when disclaimers are necessary. Another approach is to allow staff writing to be published with management requiring disclaimers when appropriate, with the understanding that employee-authors keep management informed about their publishing activities. This allows cooperative decisions to be made regarding disclaimers. If the employee cannot maintain a separate identity apart from his or her official role as a component of the institution, the employee should refrain from making such statements simply

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statement entirely. *See In re* R.M.J., 455 U.S. 191, 203 (1982) ("if the information also may be presented in a way that is not deceptive . . . the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation"); Consumers Union of United States v. General Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983) ("The First Amendment demands use of a disclaimer where there is a reasonable possibility that it will suffice to alleviate consumer confusion."), *cert. denied*, 469 U.S. 823 (1984).

14. A writer should use caution when establishing a business relationship with an outside publisher. Publishing houses vary in their integrity and professed goals of diffusing knowledge versus making a profit. Publishers frequently give the author little or no control over the end product, its marketing or the manner in which the author's statements are presented. The final editorial authority typically rests with the publisher and the author may find he or she is embarrassed by the printed product. Additionally, the editor who originally initiated the project with the author may be replaced with an editor whose understanding of the work or publishing philosophy differs from the original editor. The printed product and the employee's relationship with that publisher may also embarrass the writer's institution. Therefore, the employee and the institution should reach an understanding before the employee signs an agreement with a publisher. Similarly, any restrictions imposed by the institution, such as the use of a clear disclaimer, should be agreed to in writing by the publisher.

as an implied condition of employment[15] or as part of the basic duty of loyalty owed the employer.[16]

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15. Under basic contract principles, each party to a contract owes a duty of good faith and fair dealing in the performance and enforcement of the contract. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* § 205 cmt. a.

The obligation of good faith and fair dealing was only recently applied to employment contracts. A number of courts have now "endorsed the view that each party to an employment contract may be obligated under certain circumstances to treat the other fairly and in good faith." WAYNE N. OUTTEN & NOAH A. KINIGSTEIN, THE RIGHTS OF EMPLOYEES 34 (1983). *See* Cleary v. American Airlines, 168 Cal. Rptr. 722 (Ct. App. 1980); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). *But see* Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 494 (W.D. Ark. 1982) (court refused to imply a covenant of good faith and fair dealing in all employment contracts but did permit the employee to show the parties intended a specified term of employment in the contract).

The employment relationship "arises by contract either express or implied." American Ins. Group v. McCowin, 218 N.E.2d 746, 749 (Ohio Ct. App. 1966).

> When an employment contract is entered into, an implied condition of such contract if not otherwise expressed, is that the employee must act in good faith and is to exercise reasonable care and diligence in the performance of his duties. Failure to so act in the interest of his employer constitutes a breach of his contract.

Ohio Casualty Ins. Co. v. Capolino, 65 N.E.2d 287, 290 (Ohio 1945) (employee obligated to indemnify employer's insurer for monies paid out to third party due to employee's negligence).

An employee is liable to an employer for injury to the employer, caused by the employee's failure to abide by an implied duty of reasonable care. *Id.* at 290.

> An employee owes his employer the duty of exercising a reasonable degree of care, skill and judgment in the performance and discharge of his employment duties. This duty is implied from the employment contract and does not depend upon any express obligation assumed in that regard by an employee. It is a recognized rule that an employee is liable to [her] employer for whatever injury or damage is occasioned by the employee's failure to exercise reasonable care and diligence due to [her] misconduct. It does not matter whether such damage is direct to the employer's person or property or is brought about by compensation which the employer must make to some third person who sustained injuries due to the employee's act.
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> *Id.*

A contract of employment implicitly contains an agreement that the employee will act in good faith and will not act to the detriment of the employer. This implied condition requires the employee, as an agent, to exercise the utmost degree of fidelity and loyalty in dealings with the principal, as a condition of payment. Once that condition is broken, the employee is in breach, and the principal employer's duty to compensate is excused. Roberto v. Brown County Gen. Hosp., 571 N.E.2d 467, 469 (Ohio Ct. App. 1989) (employee breached implied condition of good faith by stealing money from employer).

16. The employer has the right to assume its employee is not engaging in

IV. CONFLICTS OF INTEREST INVOLVING USE OF INSTITUTIONAL RESOURCES

Whether or not a personal writing project is entered into for financial gain,[17] using resources necessary to carry out per-

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some activity inconsistent with employment duties. The law of agency, which underlies the employment relationship, requires an employee to devote himself or herself to the responsibilities imposed by the employer and not to undertake activities which are injurious to the employer. Outside activities can be curtailed if they conflict with the employee-agent's primary obligation to devote time and energies to carrying out duties for the employer. "An agent is also a fiduciary with respect to matters within the scope of his agency." RESTATEMENT (SECOND) OF AGENCY § 13 (1958). The agent's duties of loyalty to the interests of the principal are the same as those of a trustee to the beneficiaries. *Id.* § 387 cmt. b; *see also* RESTATEMENT (SECOND) OF TRUSTS § 170 (1957).

Additionally, the agent has a duty not to act or speak disloyally of matters connected with the agent's employment, except in the protection of the agent's own interests or those of others. WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 142 (1964); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958). An agent is also held to a duty of good conduct. "Unless otherwise agreed, an agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged." RESTATEMENT (SECOND) OF AGENCY § 380 (1958).

The requirements of this duty are determined by the nature of the business and the position of the agent. Even though the employee may act on his or her own time, the employer may have such an interest in the general integrity of its business that such an act may constitute a breach of the duty of good conduct, subjecting the employee to discharge. RESTATEMENT (SECOND) OF AGENCY § 380 cmt. a (1958).

> The relation of principal and agent requires that friendly relations be maintained between the two, and an agent who owes a duty of service violates it by acting in such a manner that this is impossible. He need not render cheerful obedience, but he must not be insubordinate in speech or by other manifestation, either to the principal or to third persons.

Id. § 380 cmt. a. *See* Jarboe Bros. Storage Warehouses v. Allied Van Lines, 400 F.2d 743 (4th Cir. 1968), *cert. denied*, 393 U.S. 1020 (1969); Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954), *cert. denied*, 348 U.S. 944 (1955).

An employee, as an agent, is required to act in accordance with the duties for which he or she was hired. Unsatisfactory work performance may result in the employee being liable for breach of the employment contract. RESTATEMENT (SECOND) OF AGENCY § 377 (1958). The principal's interests are to be preferred to those of the agent. *Id.* §§ 387, 393 cmt. b (1958). This is true even when the agent does not use the employer's facilities or time. *Id.* § 393 cmt. c (1958). An agent can, however, properly act on his or her own account in matters in which his or her interests are not antagonistic to those of the principal. *Id.* § 393 cmt. a (1958).

17. While all types of writing projects may involve use of nonpublic institutional resources, the use of such resources for a personal writing venture for pay-

sonal writing as an adjunct activity of the regular job requires caution. The use of institutional resources[18] is a crucial concern. It may not be possible to accomplish the personal writing without recourse to the institution's library facilities,[19] collections or support apparatus, or the occasional use of colleagues' time. The more a personal writing project uses the human and material resources of an institution, the greater the chance the project will conflict with institutional interests.

A. *Use of the Institution's Name*

Perhaps the greatest resource an institution has is its name and reputation. Serious problems can arise when an employee fails to avoid involving the name and reputation of the employing institution with the employee's personal projects.[20] Apart from a basic reputational interest, many institu-

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ment should be minimal or nonexistent.

18. The term "institutional resources" is broadly defined, and includes the use of office machines, such as copiers, word processors, or FAX machines; the use of scientific equipment and supplies, such as microscopes and chemicals, laboratory materials or specialized analytical equipment; the employee's official working time; and the time of colleagues and support personnel.

19. To the extent that institutional resources such as library materials are available to the public, employees are free to use them under the same rules as apply to the public.

20. An institution has a legally recognized reputation whether it is a profit-making corporation or a non-profit organization. *See, e.g.*, Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Planned Protective Servs. v. Gorton, 245 Cal. Rptr. 790 (Ct. App. 1988); Gorman v. Swaggart, 524 So. 2d 915 (La. Ct. App. 1988); Kirkman v. Westchester Newspapers, 39 N.E.2d 919 (N.Y. 1942); Thomas Merton Ctr. v. Rockwell Int'l Corp., 442 A.2d 213 (Pa. 1981). *See* American Gold Star Mothers v. National Gold Star Mothers, 191 F.2d 488, 449 (D.C. Cir. 1951); Trans World Accounts v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Washburn v. Wright, 68 Cal. Rptr. 224, 226-27 (Ct. App. 1968) ("The rule generally accepted is that an unincorporated association has a cause of action for defamation in those circumstances in which a corporation has such a cause of action. A corporation, even though not engaged in business, being organized for social welfare work, may maintain an action for libel without proof of special damage, where it is dependent for its support on voluntary contributions the number and amount of which are likely to be affected by the publication of which complaint is made."); Di Giorgio Fruit Corp. v. American Fed'n of Labor and Congress of Indus. Orgs., 30 Cal. Rptr. 350, 356 (Ct. App. 1963) ("While a corporation has no reputation in the personal sense to be defamed by words, such as those imputing unchastity, which would affect the purely personal reputation of an individual, it has a business reputation, and language which casts aspersions upon its business character is actionable.") *See generally* 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 9:2 (2D ED. 1984); RODNEY A. SMOLLA, LAW OF DEFAMA-

tions claim a proprietary interest in their names and license use of their names on merchandise.[21] Permitting unrestricted and uncontrolled use of the institution's name by employees may result in the dilution or loss of such institutional property rights.[22]

B. *Use of the Employee's Official Title*

Difficulties may arise with an employee's personal writing if the publisher wants to use the author's institutional affiliation and official title to augment the project's credibility and authority or to merely increase its commercial appeal.

The publisher and its promotional agents may feel pressure to convey an impression that the writing bears the official endorsement of, or is sponsored by, the institution which employs the writer. This is not the case when the employee's reputation as an individual surpasses that of the institution; however, the institution's name usually outranks personal celebrity in the eyes of the purchasing and reading public. Occasionally, a publisher has used an employee (or even a former employee) as an editor, consultant or author to enable the publisher to use the institution's name, purportedly through the identification of the employee's job description. This has occurred when

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TION §§ 2.24, 4.11[3] (1990); George E. Stevens, *Private Enterprise and Public Reputation: Defamation and the Corporate Plaintiff*, 12 AM. BUS. L.J. 281 (1974).

21. *See, e.g.*, Boston Athletic Ass'n v. Sullivan, 867 F.2d 22 (1st Cir. 1989); University of Ga. v. Laite, 756 F.2d 1535 (11th Cir. 1985); University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372 (Fed. Cir. 1983); International Order of Job's Daughters v. Lindeburg and Co., 633 F.2d 912 (9th Cir. 1980), *cert. denied*, 452 U.S. 941 (1981); University of Pittsburgh v. Champion Prods., 566 F. Supp. 711 (W.D. Pa. 1983); United States Jaycees v. San Francisco Junior Chamber of Commerce, 354 F. Supp. 61 (N.D. Cal. 1972), *aff'd per curiam*, 513 F.2d 1226 (9th Cir. 1975); University of Notre Dame v. 20th Century Fox, 256 N.Y.S.2d 301 (App. Div. 1965), *aff'd*, 259 N.Y.S.2d 832 (1965). *See* David A. Anderson, *Licensing of College and University Trademarks*, 8 J.C. & U.L. 97 (1981-82); Sheila T. Bell & Martin F. Majestic, *Protection and Enforcement of College and University Trademarks*, 10 J.C. & U.L. 63 (1983-84); Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62B N.C. L. REV. 603 (1984); Michael G. Schinner, *Establishing a Collegiate Trademark Licensing Program: To What Extent Does an Institution Have an Exclusive Right to Its Name?, in* INTELLECTUAL PROPERTY IN ACADEME: A LEGAL COMPENDIUM 327 (Edward O. Ansell ed., 1991).

22. *See* MCCARTHY, *supra* note 20, §§ 17:5, 18:15; 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 6.01[6] (1991).

the institution would not license its name or demanded too high a license fee for its use.

An individual's professional identity may be closely linked to the job and the position which is held within an organization; therefore, when preparing materials for publication the individual may desire to use the individual's official title to provide indentification to the readers. Unfortunately, members of the public may lack the sophistication to understand the difference between a person's job title appearing on a publication and the institution's endorsement of its content.

How the employee's official title will be publicized in connection with personal writing is a legitimate concern of the institution. Use of the official title should be regulated by institutional policies. Although an individual has a basic right to use his or her job title as a means of personal identification in describing employment history in personal resumes,[23] uses of that title for commercial or promotional purposes may be improper.[24] When a commercial or promotional use of a job title may conflict with the institution's interests, or can result in public confusion or deception, the use can be restricted or prohibited.[25] Generally, an employee has a right to identify himself or herself by listing his or her present position and institutional affiliation. However, the employer can place limitations on the use of that title and institutional affiliation by anyone who might be promoting the product.[26] The same

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23. *Cf.* Cerberonics v. Unemployment Ins. Appeals Bd., 199 Cal. Rptr. 292 (Ct. App. 1984) (employee cannot be denied right to circulate her resume).

24. *See* Cornell Univ. v. Messing Bakeries, 138 N.Y.S.2d 280, 282 (App. Div. 1955) ("[A]n educational institution which has won large public prestige by hard effort and at high cost ought not, against its will, have that prestige diluted by a commercial use of its name."), *aff'd*, 128 N.E.2d 421 (N.Y. 1955).

25. The basic issue is whether the employee's use of the institution's name will create a likelihood of public confusion as to the institution's affiliation, endorsement or sponsorship of the employee's statements or commercial endeavor. *See* MCCARTHY, *supra* note 20, § 306 ("If the distinct identity of such non-profit organization is lost through a confusingly similar use of a name by another, then it is obvious that the organization will have serious difficulty in raising funds and attracting members and support.").

26. *See* N.Y. GEN. BUS. LAW § 135 (McKinney 1988) (use of a charitable organization's name for personal or business purpose, benefit or advantage constitutes a misdemeanor and may be enjoined); *id.* § 397 (McKinney 1984 & Supp. 1992) (use of any non-profit organization's name for advertising or trade purposes without its written consent constitutes a misdemeanor and can be remedied by injunction and damages).

holds true for former employees who continue to owe a duty to their employers even though the formal employment relationship has ended.[27]

In theory, the writer's listing of his or her institutional title for indentification merely tells the reader the author's position and place of employment. In practice, however, use of a job title solely for identification can be difficult to separate from the use of the job title for commercial or promotional purposes. Information is used for commercial or promotional purposes if the publisher implies that the work is sponsored, approved or endorsed by the institution.

Policies concerning the use of official titles vary greatly among institutions. Universities tend to be the most relaxed, while government agencies the most severe.[28] Traditionally, statements by non-administrative members of the academic community, which historically have been protected by the respect given to academic freedom, have not been attributed to the academic institution. The same is not true for statements by those engaged in government service which are more likely to be attributed to the governmental employer. Although museums tend to follow the academic model[29] as to their personnel, such as curators, those outside of the institution generally do not view museum personnel as academic. Therefore, great

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27. *See, e.g.*, BPI Systems v. Leith, 532 F. Supp. 208, 211 (W.D. Tex. 1981) (enjoining former independent contractor from using name of former employer where it created confusion as to sponsorship of a product).

28. Some government entities do not permit any personal writing which could have an official connotation. The principle, at least for those holding high positions in the organization, is that statements made in an official capacity cannot be separated in the public mind from those statements made as a private person. In such a situation, private writing could be prohibited if at all related to the person's duties as a government official.

29. The concept of university faculty employment has historical derivation from the medieval *Universitas Studiorum*, a community of scholars of which the faculty is an integral part, or *Studium Generale*, a place where all students are received. Historical practice has given certain aspects of the governing of the university to the faculty, allowing them autonomy and a privileged status. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 680 (1980). Many museums were founded and have continued as part of a university or college, with few distinctions made between faculty and museum staff. Indeed faculty often serve as museum staff. Others have been founded and are operated on the normal business pattern, with all personnel, including the professional staff, expected to be working exclusively on official projects during certain prescribed hours. The predominantly government museum tends to follow the more restrictive business pattern.

care must be taken to separate the individual's views from those of the institution. This is particularly true for an institution which receives direct government funding. In this case, statements made by institutional personnel will likely be understood as statements on behalf of the institution because it is a government entity. Hence, statements have more of an official aura.

To safely insure against the possibility of an implied institutional endorsement, the author should use a disclaimer. The disclaimer should state that the individual's official job title appears only to identify the present place of employment and does not imply endorsement of either the individual's activities or the content of the writing.

To avoid institutional endorsement, a written agreement should be required between the institution, the writer and the publisher, limiting the use of the employee's official title to personal identification according to the institution's policies.[30] These agreements can be in letter or contract form. They should clearly prohibit the publisher from involving the author's institution through implications of endorsement within promotional materials or in the publication itself. This prohibition should include clever uses of type sizes or page layout creating the appearance of an official work of the organization.

C. *Use of Institutional Time*

A key institutional concern regarding employee private authorship is the possible neglect of the employee's regular responsibilities resulting from the private writing. Writing can require a substantial time commitment, so an outside writing project can seriously interfere with an employee's regular responsibilities during the work day. For this reason, unless the institution allows an employee to work on the project during work time, it must be done during off- duty hours. While a liberal institutional writing policy requires cooperation between the institution and its employees, the employees must pledge

30. It is not recommended that the institution be a party to such agreements, since by definition the venture is a private one between the writer and the publisher. The burden should be on the employee to ensure that the publisher and its promotional agents conform to institution policies. The institution's role is to explain the policy and perhaps to provide sample language for the employee to include in the contract with the publisher.

not to let personal writing impinge on job time or interfere with regular duties. Cooperation begins with the premise that work claimed as the employee's own must be accomplished primarily on personal time.

This question should be addressed before an employee begins working on a personal writing project. The time and effort a personal writing project will demand is a crucial point which may determine whether the institution should permit the project. This factor should be considered realistically by the employee and the employee's supervisor before any substantial writing commitment is undertaken. It must be determined whether the employee can manage and complete the project while still meeting regular job responsibilities. If the employee refuses to make the personal time commitment and to sacrifice leisure hours, the personal project will tend to encroach upon the regular duty hours to complete the work. The regular work of even a highly motivated person may suffer because of the increased drain on his or her energies.[31]

Research time necessary for a personal writing project must be considered as well as actual writing time. An employee may be tempted to use all official research time for collecting materials to complete a personal project to the detriment of the institutional research. In many museums and other scholarly institutions organized under the academic model,[32] an indi-

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31. Any time the personal activities of an employee, including the production of scholarship or other writing, substantially interferes with his employment obligations, the institution may find it necessary to discipline the employee or terminate the employment relationship. Ordinarily, the liability of the agent who commits a breach of the duty of good conduct extends only to discharge, loss of compensation, or possibly liability for the ascertainable loss to the principal's business caused by such a breach. RESTATEMENT (SECOND) OF AGENCY § 380 cmt. c (1958). For more detail, *see also* RESTATEMENT (SECOND) OF AGENCY §§ 401, 409, 456 (1958). Also, immediate dismissal of the employee would deprive the employee of the use of an employment title.

32. The typical employer establishes requirements as to when employees should perform their work, and specifies how vacation, sick leave, or other paid personal time is accounted for. The basic structure of the workday is typically 9:00 a.m. to 5:00 p.m., Monday through Friday. For some professional staff employed under arrangements modeled after those used for faculty at universities and colleges there may be more flexible rules. University faculty employees have considerable freedom as to when, and where, they do their work. In the nonprofit world outside universities and colleges, museum curators, for example, may be allowed some of the flexibility in setting work hours allowed to faculty. In exchange, they are expected to complete assigned work no matter how much of

vidual is allowed a certain amount of time to do private research. Generally that research must be oriented toward better performance of regular duties, such as research on a museum collection for which the employee is responsible. In some institutions, due to the non-specific requirements for research, research time may be spent on personal projects.[33] In other

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their personal time it takes.

It is not customary to specify which hours of the day or week a faculty member must do his or her paid work. The faculty member only must meet scheduled classes and fulfill other assigned responsibilities. Thus, faculty enjoy considerable freedom to engage in personal activities and pursue personal interests. A teacher is only "on university time" when performing a task the university demands of him or her as a condition of continued employment. The traditional "other" interests and activities of university personnel have been scholarly pursuits, but obviously these can extend beyond pure scholarship to many kinds of paid research, writing, and consulting, or even to the operation of private businesses. University faculty also can pursue a broad range of personal activities to fulfill civic or professional duties, or for pure pleasure or personal interest.

Individuals employed under a university employment model do not have a lesser commitment to their professional obligations. Indeed, they may need a more sensitive and responsive conscience to assess situations in which personal activities overlap or conflict with professional duties, since no simple yardstick of whether the work was done during the 9:00 to 5:00 duty day exists.

The museum field contains examples of university employment status, examples of regular salaried hours and some hybrids. Most government-supported museums are operated, at least in theory, by the time clock. The hybrid situation provides more or less autonomy or self-choice regarding the schedules personnel keep in which to complete their assigned tasks. Similar to the academic model, members of the curatorial staff have greater autonomy as to when they work. Administrative personnel are expected to keep specified hours, similar to the regular work day.

Since academic characteristics of flexibility in the scheduling of duty time pervades museum employment, this autonomy should reflect a recognition of the corollary—a professional's duty is to provide full value to the client museum—so that time spent on personal business must be scheduled in accordance with professional obligations. Thus the employees of cultural institutions who have more flexibility in setting their own work hours have an even greater obligation to act responsibly in terms of what they do on their own.

33. Even with the academic model, it is understood that the employee's duty toward the institution is paramount.

> As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON PROFESSIONAL

situations, the institution may allow the employee to use research time for personal work, even when specific requirements for institutional research exist, as long as the employee makes a full disclosure and the institution believes that the project is worthwhile and for a scholarly purpose. Such allowance is appropriate, particularly if the employee's expected fee is modest: a small monetary incentive to compensate for the personal time and extended commitment to complete the writing. This research time spent by the employee represents the employing institution's contribution to the project. Government institutions generally are prohibited from allowing employees to use official time for research that results in paid writing because of dual compensation statutes[34] and the prin-

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ETHICS, *reprinted in* 55 AAUP BULLETIN 86-87 (1969).

34. Dual compensation laws, like gift and gratuity laws, prohibit the acceptance of extra benefits or income by a government employee. The purpose of dual compensation laws is to prohibit an individual from receiving payments from outside sources while on the government payroll for work the government already has paid the employee to perform. The operating principle is that one cannot be paid twice for work done during the same specific hours. Some dual compensation laws focus on salary or honoraria-type payments; others include general prohibitions on receiving anything of value.

The federal dual compensation law is severe, making it criminal for an employee to be paid or to receive anything of value, "from any source other than the Government of the United States" as compensation for work which the employee already has been paid to do by the federal government. 18 U.S.C. § 209 (1988). State laws regarding dual compensation may be equally severe. *See, e.g.*, ALA. CODE § 36-25-7(a) (1991): "No public official or employee or his family shall solicit or receive any money in addition to that received by the official or employee in his official capacity for advice or assistance on matters concerning the legislature, an executive department or any public regulatory board, commission or other body."; ARIZ. REV. STAT. ANN. § 38-505 (1985); DEL. CODE ANN. tit. 29, § 5805(b) (1983); LA. REV. STAT. ANN. § 33:713 (West 1988); MASS. GEN. L. ch. 268A, § 4(a) (West 1990); NEV. REV. STAT. §§ 281.125, 281.127 (1987); OHIO REV. CODE ANN. § 102.04 (Anderson 1990); W. VA. CONST. art. VI, § 38 ("No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made . . . ."); WYO. CONST. art. III, § 30. *See also* 5 U.S.C. § 5533(d)(2) (1988) ("pay consisting of fees paid on other than a time basis" permitted); IDAHO CODE §§ 59-512 (1976) ("Whenever the public interest may be served thereby, an employee of any department, with the written approval of the employing [director or department], may be permitted to accept additional employment by the same, or another department, in any educational program conducted under the supervision of the state board of education or the board of regents of the University of Idaho, when such additional employment is not in the ordinary course of the employment of such employee and will be performed in addition to, and beyond the hours of service required in the ordinary course of employment . . . and will be performed in addition to the statutory hours of employment."). *But see* NEV. REV.

ciple that one cannot use public office for private gain.[35]

Other concessions might be made in privately supported institutions that have no governmental affiliation. Management might allow the employee to carry a lighter work load to permit completing the work on his or her own time. In many non-profit organizations individuals work in excess of forty hours, and in certain situations, management may lighten the load for a reasonable period of time to allow the employee to complete a writing project that has scholarly or educational merit.

As noted, the dual compensation statutes[36] may prevent such de facto contributions by the employer to the employee's personal writing venture in organizations which are part of governmental units. The employee may violate dual compensation laws when doing outside work on duty time and drawing full salary, while still earning fees or royalties from an outside source.[37]

A special situation arises when writing is produced during a sabbatical. A few large organizations have a sabbatical policy allowing an individual with accumulated service to take a specified period of time to do research and writing free from regular duties, or simply to re- energize one's intellectual batteries. Sabbatical policies vary as to their expectation for a tangible product to be produced during the sabbatical, as well as to their allowance of remuneration outside of institutional payment.

STAT. § 281.127(2)(b) (1987) (dual compensation statute does not apply to salaries for "teaching during off-duty hours in an educational program sponsored by a governmental authority if he is not regularly employed in such program by that governmental authority").

35. *See* City of Coral Gables v. Weksler, 164 So.2d 260, 263 (Fla. App.), *aff'd*, 170 So.2d 844 (Fla. 1964).

36. *See supra* note 34.

37. *See, e.g.*, ALA. CODE § 36-25-7(a) (1991) (prohibits the receipt of "any money" in addition to that received by the official or employee in his or her official capacity); CAL. CODE REGS. tit. 2, § 18728 (1990) (honoraria and awards as income and gifts); IND. CODE ANN. § 4-2-6-5 (West 1991); KY. REV. STAT. ANN. § 196.230(2) (Michie/Bobbs-Merrill 1991) ("Officers and employees shall not be entitled to receive any compensation for their services other than the salary paid to them by the state."); OR. REV. STAT. § 244.040(1) (1989) ("No public official shall use official position or office to obtain financial gain for the public official, other than official salary, honoraria or reimbursement of expenses, or for any member of the household of the public official, or for any business with which the public official or a member of the household of the public official is associated.").

When the sabbatical's purpose is purely regenerative, particularly if the employee's pay is reduced, the sabbatical period should be viewed as personal vacation. Under this view, no restrictions should be placed on the employee's ability to engage in personal writing projects.[38] However, if the sabbatical is treated as a publication or research leave, the sabbatical is not strictly personal time. The individual is still supported by the organization, especially if pay continues at the same rate during the sabbatical.

If the personal writing project is in addition to other official research or writing for which the sabbatical specifically was granted, it might be crucial to know the hours in which the personal work was done to determine ownership and royalty rights to work created while on sabbatical. An employee wishing to write for extra compensation during the sabbatical may need to document that the institution's work was done during the periods or hours wherein the employee was on salary, and that writing for extra compensation was done on personal time.

D. *Use of Institutional Proprietary Information*

Individuals working in the museum community are often privy to information not yet released to the public that may have considerable commercial value. This information can range from an institution's plans to acquire a particular object or begin collecting or exhibiting in a certain area, to the institution's list of members, contributors or donors. Such "proprietary information" need not be information affirmatively claimed by the institution as a trade secret. It may be merely information gained by the employee through association with the institution.[39] Such information, which is not available to

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38. However, using a sabbatical to produce a major commercial product, leaving the employee exhausted upon returning to the institution, would seem counter-productive and detrimental to the institution.

39. Several factors are considered in determining whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of the person's business who asserts the trade secret; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing

> the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

In a confidential relationship, such as employer-employee or principal-agent, trade secrets are not to be divulged, even in the absence of an express agreement that the trade secret be held in confidence. *See* Allen v. Johar, Inc., 823 S.W.2d 824, 827 (Ark. 1992) (former employee, not subject to a written non-competition agreement, prohibited from utilizing a memorized customer list); Hyde Corp. v. Huffines, 314 S.W.2d 763, 770 (Tex. 1958); RESTATEMENT OF TORTS § 757 cmt. j (1939). One who receives confidential information while in a confidential relationship, even though the information is not technically a trade secret, may be under a duty not to disclose or use that information. RESTATEMENT OF TORTS § 757 cmt. b (1939).

> Confidential business information has long been recognized as property. 'Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.

Carpenter v. United States, 484 U.S. 19, 26 (1987) (quoting 3 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 857.1 at 260 (rev. ed. 1986) (citations and footnote omitted)).

The confidential information of the employer is treated as a trade secret. *See Hyde Corp.*, 314 S.W.2d 763, 769; RESTATEMENT OF TORTS § 757 (1939); RESTATEMENT (SECOND) OF AGENCY §§ 396 cmt. g (1958) ("trade secrets and other similar private information constitute assets of the principal").

> Unless otherwise agreed, an agent has a duty to the principal not to use or communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

RESTATEMENT (SECOND) OF AGENCY § 396 (1958). *See* ABKCO Music v. Harrisongs Music, 722 F.2d 988, 994 (2d Cir. 1983) (an agent has a duty not to use confidential knowledge acquired during employment in competition with the principal; however, the use of information based on general business knowledge or gleaned from general business experience is not covered by this general rule); Snepp v. United States, 444 U.S. 507, 519 n.7 (1980) (citing Herbert Morris, Ltd. v. Saxelby, [1916] 1 App. Cas. 688, 704):

> [T]he employer's interest in protecting trade secrets does not outweigh the public interest in keeping the employee in the workforce:
> "[A]n employer can[not] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no

the general public, might be commercialized for private profit or appear to be improperly used,[40] and an employee engaged in such activity could legally be disciplined.[41]

The use of such proprietary information in any personal writing must be prohibited.[42] A disclosure might endanger the institution's plans or result in increased costs to the institution.[43] Further, even though the institution may not suffer a

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right to reveal to any one else . . . ."
Snepp, 444 U.S. at 519 n.7.
The employment relationship between a museum and its curator can be deemed a "confidential relationship" under the Restatement that imposes a duty on the curator not to disclose confidential information. Alternatively the curator, through the course of employment, may be privy to information such as acquisition plans for a new collection, that puts him or her under a general obligation not to disclose such information.

40. *See* RESTATEMENT (SECOND) OF AGENCY § 395 (1958). *See, e.g.*, Smithsonian Standards of Conduct 1 (rev. May 9, 1983) (on file with the *Santa Clara Law Review*) [hereinafter *Standards of Conduct*] ("Employees shall not directly or indirectly make use of or permit others to make use of, for the purpose of furthering a private interest, information obtained through their Smithsonian employment which is or would be unavailable to scholars or the general public."). It is axiomatic that any institutional information which is made available to the public must also be made available to the institution's employees.

41. An agent is prohibited from taking unfair advantage of his or her position in the use of information or things acquired by him or her because of the position as agent or because of the opportunities which the position affords. RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958). Employee statements regarding confidential information may lead to discipline, including dismissal. *See* Pickering v. Board of Educ., 391 U.S. 563, 570 (1968).

42. As an example, a museum curator might be asked to contribute a regular column to a newsletter serving a limited clientele such as art dealers or others having a vested interest in the fluctuations of the art market. If allowed to write such a column, the curator must not include information proprietary to the institution, since the clientele may benefit financially from the curator's position of trust. The curator only could comment upon the current scene from the viewpoint of his or her position in the field without any reference to nonpublic information obtained through association with the institution. In the authors' view such writing ventures are unwise, since no matter how careful the curator, the situation allows for the appearance of the use of insider information.

43. Release of information that the institution is planning a show featuring a particular artist may increase the price of the works of that artist. If the institution were planning on purchasing works of that artist to include in the show, the institution will now have to pay a higher price. Release of information that the institution is planning to acquire objects in an entirely new area may increase the price of objects to such a degree that the institution may have to discontinue its plans.
For example, in 1984 the J. Paul Getty Museum acquired nine collections of 18,000 images from the 19th and early 20th centuries. The photographs, worth approximately $20 million, were purchased secretly through a New York City art

financial loss due to such a premature or unauthorized disclosure, the institution's reputation could be tarnished. The use of such inside information by an institutional employee opens the institution to criticism that it cannot maintain necessary secrecy in its dealings or that it shows favoritism to its employees by allowing them to act upon nonpublic information.[44]

Even when no proprietary information is actually disclosed by the employee, some media, such as newsletters, inherently present themselves as providers of special information for which the subscriber is paying. Writing in such a medium has the earmarks of misuse of official position for private profit. Although the problem is one of appearance rather than content, it is one which would require a lengthy explanation,[45] rather than a simple disclaimer,[46] and, therefore, is injurious to the institution. There is little possibility of avoiding misinterpretation under the circumstances, and staff personnel should refuse personal writing ventures of this sort.

E. *Restricting Public Use of Objects and Information*

It is common in many museums for curators and other staff members engaged in personal writing to remove items

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dealer. By keeping its planned creation of a new department of photographs a secret, the Getty Museum obtained the photograph collections at a more modest cost than it would have had the institution's interest in photographs become known. *See* Suzanne Muchnic, *Getty Museum Lands Major Photo Collection*, L.A. TIMES, June 8, 1984, § II (Metro), at 1; Suzanne Muchnic, *The Getty's New Portfolio*, L.A. TIMES, June 17, 1984, Calendar, at 3.

44. *See, e.g., Standards of Conduct, supra* note 40, at 13:

> Unless specifically authorized to do so, employees will not disclose any official Smithsonian information which is of a confidential nature or which represents a matter of trust, or any other information of such character that its disclosure might be contrary to the best interests of the Institution, e.g., private, personal, or business related information furnished to the Smithsonian in confidence. Security and investigative data for official use only shall not be divulged to unauthorized persons or agencies.

Standards of Conduct, supra note 40, at 13.

45. The operative principle in appearance of conflict of interest situations is that if any activity requires a lengthy explanation to justify it, then that activity is best avoided.

46. The writer might append a disclaimer to each column explaining that any information conveyed is public and not confidential to the institution, but this alternative is cumbersome, not particularly effective, and likely to be ignored or disbelieved by most readers.

from the collections for their study.[47] In this situation, a balance must be struck between the need to sequester materials normally available to the public for a personal writing project, and the public's normal access to these materials.[48]

Such sequestering of materials causes few problems when the outside writing project is of a reasonably short duration. However, the sequestration becomes more problematic when collection materials are removed from public access for extended periods of time for use in long- term or "life's work" projects. A work of great scholarly potential obviously deserves the institution's support. Nevertheless, removing portions of the collection entirely from public access for months or years for one person's exclusive use cannot be justified in a nonprofit organization.

Institutions should have policies on such sequestration of material. Staff members, if allowed to take material out of general circulation, should do so only for an explicitly stated

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47. "Some parts of the collections may be set aside for the active scholarly pursuits of staff members, but normally only for the duration of an active research effort." MUSEUM ETHICS, *supra* note 2, at 14.

48. The removal of material from public availability has both ethical and legal implications. Museums, which are collections of works of artistic, historical and scientific value, are public institutions, which owe a moral duty to make their collections, and their services, available to the public. *See* Jeanette A. Richoux et al., *A Policy for Collections Access*, 59 MUSEUM NEWS, July-Aug. 1981, at 43. "A painting has no value except the pleasure it imparts to the person who views it. A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well not exist." Commonwealth v. Barnes Found., 159 A.2d 500, 502 (Pa. 1960).

> The art of collecting and preserving objects is at the center of the museum domain. Just as important is the use of collections to advance knowledge and understanding, and thus it is through research, education and exhibition that museums make their collections available. The balance among these activities differs from museum to museum. Some museums use their collections primarily for research, while others mount ambitious exhibition programs . . . . But all museums share their dedication to the object as tangible evidence of our artistic, cultural, natural and scientific heritage.

COMMISSION ON MUSEUMS FOR A NEW CENTURY, AMERICAN ASSOCIATION OF MUSEUMS, MUSEUMS FOR A NEW CENTURY 21 (1984).

To obtain tax exempt status, an organization must serve the public interest by providing a public benefit. One means of providing such a benefit is to make a museum's collection available to the public. *See* 26 U.S.C. § 501(c)(3) (1988); Fellowship of Friends, Inc. v. County of Yuba, 1 Cal. Rptr. 2d 284 (Cal. App. 1991); *Barnes Found.*, 159 A.2d at 502-03.

period of time. Furthermore, they should cooperate to make the material generally available to the public during that time.[49]

F. *Use or Adaptation of Institutional Works*

Pre-existing works which have been produced for the institution by employees or independent contractors constitute another institutional resource. The copyrights in these works, not only the material objects themselves,[50] are the institution's property. These works can be revised or adapted only with the institution's permission. Whenever an employee desires to market a catalog or other publication that contains a work, or is derived from a work, originally prepared within the scope of that or another employee's employment, it is necessary to obtain the institution's permission.[51] This is true even if the new, derivative work may have been changed sufficiently so that it contains new copyrightable elements which would otherwise permit independent protection as a derivative work.[52] As the copyright owner, the institution has exclusive rights regarding the creation, reproduction, public display, public performance and public distribution of such a derivative work.[53]

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49. Such cooperation, of course, would not include public access to the writer's research notes or draft manuscript.

50. Copyright ownership and the ownership of a material object in which the copyrighted work is fixed, such as a manuscript, computer disk, painting, drawing, sculpture, photograph, sound recording, or videotape, are separate things. 17 U.S.C. § 202 (1988). *See* Baker v. Libbie, 97 N.E. 109 (Mass. 1912); Chamberlain v. Feldman, 89 N.E.2d 863 (N.Y. 1949). *See infra* note 70.

51. *See, e.g., Standards of Conduct, supra* note 40, at 12(b). Manuscripts, lectures, and all other materials prepared by an employee within the scope of employment are the property of the institution. *See* 17 U.S.C. §§ 101, 105, 201 (1988). Employees should seek the advice of the general counsel or the ethics counselor before agreeing to author as a private individual any publication that substantially draws upon materials prepared in the course of carrying out Smithsonian responsibilities.

52. 17 U.S.C. § 103(b) (1988) states:

> The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Id.

53. *Id.* § 106. *See* Mirage Editions v. Albuquerque A.R.T. Co., 856 F.2d 1341

The creation or use of an unauthorized derivative work by the staff member without authority of the copyright owner of the underlying work constitutes actionable copyright infringement.[54] It may also prevent the granting of copyright protection of the new elements contained in the derivative work.[55] An institution should take special care to address whether and under what circumstances an employee will be allowed to create and market a derivative work based upon the institution's pre-existing work. If granted, such permission should always be in writing, signed by the institution and the employee.[56]

One conflict of interest concern regarding employee- created derivative works is the possible perception that an employee is improperly capitalizing on his or her official position. To protect against such criticism, the institution should require, as a prerequisite for its authorization to develop the derivative work, that there be substantial independent creative effort by the employee, that the derivative work's creation take place during the employee's personal time, and, possibly, that the institution be given a reasonable royalty for the use of the underlying work. Such steps reduce the possibility of a charge of improper marketing of institutional materials.

G. *Use of Institution's Human Resources*

The staff time of colleagues and subordinates is an institutional resource that may assist in completing a personal writing project. The need for secretarial help and research assistance should be addressed by the employee and the institution prior to the beginning of any personal writing project. If such assis-

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(9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989).

54. *See* Midway Mfg. Co. v. Artic Int'l, 704 F.2d 1009, 1013 (7th Cir. 1983) (licensee who lacks the copyright owner's authorization to create a derivative work is a direct infringer), *cert. denied*, 464 U.S. 823 (1983); Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976) (unauthorized editing of the underlying work constitutes infringement); BPI Systems v. Leith, 532 F. Supp. 208, 210 (W.D. Tex. 1981) (employer's copyright in preexisting material precludes a former independent contractor from using the underlying material to make a derivative work).

55. 17 U.S.C. § 103(a) (1988). *See* Gracen v. Bradford Exch., 698 F.2d 300, 302-03 (7th Cir. 1983); 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 216 (1989); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.06 (1991).

56. If the institution is granting an exclusive right to create a derivative work, copyright law requires that the permission be given in writing. 17 U.S.C. § 204(a) (1988). *See* GOLDSTEIN, *supra* note 55, § 4.5.1.

tance will be needed, the individual should pay for it, particularly when the personal writing is for compensation.

Some institutions following the academic model permit the employee to use staff time for personal writing, including secretarial help and research assistants assigned to the employee-writer as agreed-upon benefits of a position. This, however, is an exceptional situation in any institution outside a university context.

Unless the employment conditions explicitly give an employee the right to use staff time and research assistance for personal work, the practice is unethical and bad personnel management. It represents such an obvious misuse of institutional resources for private gain that resentments arise and the entire staff's morale suffers.

If an employee-writer relies upon staff assistance not expressly assigned to him or her for use in personal writing, a prior written understanding with the institution should provide for the employee to compensate the institution for staff resources used. The staff working for such activities yielding the extra pay should be told about the reimbursement agreement.[57]

H. *Use of Institution's Stationery, Forms or Documents*

Many employees may use official stationery, forms or documents of the institution. An employee wishing to increase both personal and project credibility may write letters on offi-

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57. Reimbursing arrangements may not be permitted in government affiliated organizations. This is due to either the statutory prohibitions against the receipt of compensation in addition to the employee's standard salary, or the private use of public resources. *See, e.g.*, OHIO REV. CODE ANN. § 102.03(D) (Anderson 1990) ("No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties . . . ."); ALA. CODE § 36-25-7(a) (1991) (prohibits the receipt of "any money" in addition to that received by the official or employee in his official capacity); KY. REV. STAT. ANN. § 196.230(2) (Michie/Bobbs-Merrill 1991) ("Officers and employees shall not be entitled to receive any compensation for their services other than the salary paid them by the state."); OR. REV. STAT. § 244.040(1) (1989) ("No public official shall use official position or office to obtain financial gain for the public official, other than official salary, honoraria or reimbursement of expenses, or for any member of the household of the public official, or for any business with which the public official or a member of the household of the public official is associated.").

cial stationery. This conveys the impression of an official project instead of a private venture.[58] The employee may intend only to accelerate acquisition of information by short-cutting the legitimate channels open to him or her, but using official channels for private purposes borders on dishonesty.

Situations may arise where the institution's committment to the project, albeit a private venture, allows the employee to proceed in this manner. If this is the case, however, information sources should be apprised in explicit terms that it is a cooperative venture of the organization and the individual employee making the request.

A cooperative effort by the individual and the institution can be legally and ethically sustained most easily in a private organization if the employer-institution is aware and supportive of the information-gathering activities of its employee. Usurpation of official reputation and prestige to gather information for private gain might be strictly prohibited within the confines of a government affiliated institution.[59]

Utilization of official documents or forms for a personal writing project is also improper without the institution's express approval. An employee who desires to use official documents or forms should be required to request permission and, for most purposes, be treated as any other member of the public who wants the right to include such material in a publication.

I. *The Use of Other Institutional Resources*

Travel reimbursement questions can arise over the propriety of the employee-author's reimbursement by a regular employer for research trips or travel when consulting with co-authors or the publisher. Attempts should be made to have the personal writing project pay its own way.

Some institutions' policies are flexible enough to permit a staff person to use institutional equipment after hours to complete personal writing, if it has a bona fide scholarly or educational purpose and if financial return for the work is likely to

58. *See* Hammerhead Enters. v. Brezenoff, 9 Media L. Rep. (BNA) 1636 (2d Cir. 1983) (city official wrote to department stores on official stationery to complain of board game of which he did not approve).

59. *See supra* note 57.

be modest. Others have stricter policies forbidding even occasional use of office space and equipment for outside writing. An employee may be prohibited from any personal use of official property, or may be required to account for any use and to compensate the organization as if renting office space and equipment. If such a strict policy is in force, permission must be sought before even minimal use of institutional property. An employee may be criminally and civilly liable for use of equipment that is outside the scope of permissive use.[60]

V. COPYRIGHT PROTECTION OF EMPLOYEE AUTHORED OR COMMISSIONED WORKS[61]

The benefit to society provided by creative effort traditionally has been recognized in the copyright laws which protect an author's work product, and stimulate, by legal and economic

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60. One example of current legislation and litigation is in the computer area. Until recently, courts had looked to traditional theft statutes. These statutes were often inapplicable due to the failure to meet the requirement that the defendant have the intent to deprive (permanently or not) the owner of the object. State v. McGraw, 480 N.E.2d 552 (Ind. 1985) (city employee who used a city computer for personal business did not have the requisite intent to deprive the city of its use of the computer system); Lund v. Commonwealth, 232 S.E.2d 745 (Va. 1977). More recently, state legislatures have enacted computer crimes acts which make the unauthorized use of computers unlawful. *See, e.g.*, CAL. PENAL CODE § 502 (West 1988 & Supp. 1991); VA. CODE ANN. § 18.2-152.2 (Michie 1988 & Supp. 1992). Under the California act, an employee enjoys limited immunity for use of computer time, but the limitation does not extend to cases where damage is done to computer systems or where the employee uses supplies costing more than $100.00 as an aggregate of all supplies used. CAL. PENAL CODE § 502(c)(3), (h)(2) (West Supp. 1991). Civil liability is explicitly not preempted by these criminal codes. CAL. PENAL CODE § 502(e) (West Supp. 1991); VA. CODE ANN. § 18.2-152.12 (Michie 1988).

Civil liability for conversion may also be imposed on an employee. *See, e.g.*, National Surety Corp. v. Applied Sys., 418 So. 2d 847 (Ala. 1982); Veeco Instruments Inc. v. Candido, 334 N.Y.S.2d 321 (Crim. Ct. 1972); *McGraw*, 480 N.E.2d at 555. *See generally*, Elizabeth A. Glynn, Note, *Computer Abuse: The Emerging Crime and the Need for Legislation*, 12 FORDHAM URB. L.J. 73 (1983-84); Beth H. Gerwin, Note, *Computer Related Litigation Using Tort Concepts*, 9 AM. J. TRIAL ADVOC. 97, 119-21 (1985).

61. The importance of copyright law to museums has been widely documented. *See, e.g.*, 1 FRANKLIN FELDMAN ET AL., ART LAW §§ 2.1-2.10.5 (1986); 1 JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 175-213 (2d ed. 1987); Berkowitz & Leaffer, *supra* note 9; Nicholas D. Ward, *Copyright in Museum Collections: An Overview of Some of the Problems*, 7 J.C. & U.L. 297 (1980-81); Knoll & Drapiewski, *supra* note 2, at 49. *See also* David C. Hilliard, *Museums and the New Copyright Law*, 56 MUSEUM NEWS July-Aug. 1978, at 49.

means, the production of art, information and knowledge.[62] United States copyright law provides the owner of a copyright with several exclusive rights[63] at the time of the creation of a work.[64] The author's expression is protected, not the ideas,

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62. Protection for the authors of written works grew out of English common and statutory law. It was enshrined in the United States Constitution, and has been traditionally viewed as an economic right. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954). In the United States, however, the author's economic benefit is not viewed as the ultimate goal of the copyright law.

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

> The copyright law, like the patent statutes, makes reward to the owner a secondary consideration . . . . 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.

Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984) (citations omitted).

63. *See* 17 U.S.C. § 106 (1988):

> [T]he owner of copyright . . . has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

64. "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a) (1988). Federal copyright protection automatically attaches once the expression is "fixed" in a tangible form. This differs significantly from the investing of federal copyright protection under the previous 1909 Copyright Act which required that the work

concepts or systems that the work sets forth.[65] Furthermore, copyright protection extends only to an author's expression of facts, not to the facts themselves, the discovery of facts through research, or the interpretation of historical fact.[66]

In the context of institutional works, the most fundamental issue is copyright ownership.[67] Because federal copyright protection is provided automatically as a matter of law to an original expression which is fixed in a tangible medium,[68] its existence is often overlooked by an author or an author's em-

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be published with a proper copyright notice or registered with the United States Copyright Office before federal protection would attach to a work.

65. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1988). *See* Baker v. Selden, 101 U.S. 99, 100-01 (1879) ("Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way."); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) ("It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself. This principle attempts to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter.") (citations omitted).

66. Feist Publications v. Rural Tel. Serv. Company, 111 S. Ct. 1282 (1991); Miller v. Universal City Studios, 650 F.2d 1365 (5th Cir. 1981); Hoehling v. Universal City Studios, 618 F.2d 972, 974 (2d Cir.1980) ("[T]he cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain."), *cert. denied*, 449 U.S. 841 (1980).

67. "The contours of the work for hire doctrine . . . carry profound significance for freelance creators—including artists, writers, photographers, designers, composers, and computer programmers—and for the publishing, advertising, music, and other industries which commission their works." Community For Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

68. 17 U.S.C. § 101 (1988) states:

> A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.

ployer.[69] To analyze the issue of copyright ownership, it is important to distinguish between the property right in the tangible work itself and the intellectual property rights generated by the copyright in that work.[70] An institution may retain an ob-

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69. As a general rule the legal author entitled to copyright protection is the party who actually creates the work, that is, the person who translates an idea into a fixed tangible expression. An important exception to this rule involves works made for hire, for which the commissioning party is considered the author of the work and is regarded as the initial owner of the copyright in the work. *Community For Creative Non-Violence*, 490 U.S. at 737. *See* 17 U.S.C. § 201(b) (West 1988); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

If, for example, a museum director asks the museum's registrar to produce an illustration for a promotional brochure, that activity would not be within the scope of a registrar's responsibilities. Assume, however, that the registrar was formerly a commercial artist, and can produce such a drawing. The questions to be resolved concern ownership of the drawing, ownership of its copyright and the issue of whether some extra compensation will be given for doing a job outside the ordinary scope of the employee's duties. Although the director may believe the organization owns the copyright in the drawing, this is clearly a "work specifically ordered or commissioned" under the copyright law. The museum would have a license only to use the work for its limited purpose, while copyright ownership would remain with the artist. If the museum wished to obtain the copyright, the employee would have to sign an agreement stating expressly that the work was "made for hire." Any extra compensation probably would depend on the institutional policies governing such instances, or could be negotiated informally between the employee and the museum. *See* 17 U.S.C. § 101 (1988).

70.

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecords in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (1988).

> Even if the museum owns a painting, bought at great expense, it does not hold the copyright on the painting unless it is specifically transferred by the artist. The museum may believe erroneously that ownership of the object includes ownership of the copyright and therefore the right to reproduce the work on a poster or postcard for sale in the museum shop. Many museums make this error because of a fundamental misunderstanding of the intangible nature of copyright, by failing to separate conceptually ownership of the copyright from ownership of the material object. Perhaps they make this mistake because many works of art are unique and valuable. But the museum, absent a specific grant, no more owns the copyright on the painting that [sic] if it were to acquire the copyright in a literary work by buying a paperback book at a bookstore.

Berkowitz & Leaffer, *supra* note 9, at 258. *See supra* note 50.

ject, like a painting or a manuscript, which was created by an employee or independent contractor. However, this does not necessarily mean that the institution also retains the copyright in that pictorial or literary work. It is necessary to determine whether the institution, the employee or the independent contractor is the lawful owner of the copyright to determine the exclusive rights of copyright ownership.[71]

A fundamental principle of copyright law is that an author owns the intellectual property rights generated by the copyright in the author's fixed expression unless it constitutes a work made for hire.[72] A work for hire is made when the author creates the work as an employee acting within the scope of employment[73] or when the author is specially commissioned to produce certain works with the written understanding that the hiring person will be deemed the legal "author" of the work and will solely own the copyright in the work.[74]

United States copyright law deals with copyright ownership of institutional works in one of two ways. An institution, though a separate legal entity, cannot itself create anything. It depends upon an individual to create a work. This individual may be a museum employee or an independent contractor hired for a particular project or to create a specific work. The copyright law deals with these two situations differently.

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71. In addition to the question of the initial ownership of copyright, the determination that a work is a work for hire also affects the copyright's duration, 17 U.S.C. § 302(c) (1988), the copyright owner's renewal rights, 17 U.S.C. § 304(a) (1988), termination rights, 17 U.S.C. § 203(a) (1988), and the right to import certain goods bearing the copyright, 17 U.S.C. § 601(b)(1) (1988). *Community For Creative Non-Violence*, 490 U.S. at 737.

72. Section 201(b) of the Copyright Act provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b) (1988).

73. *See* Siegel v. National Periodical Publications, 508 F.2d 909 (2d Cir. 1974); Scherr v. Universal Match Corp., 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

74. *See* Community For Creative Non-Violence v. Reid, 490 U.S. 730 (1989); Easter Seal Soc'y v. Playboy Enters., 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Const. Co., 542 F. Supp. 252 (D. Neb. 1982).

A. *Employee Created Works*

For the employee, the institution is deemed the "legal" author and hence the initial owner of the copyright in all copyrightable works created or authored by the employee within the employee's scope of employment. Whether an individual author is an employee is determined by using a test developed under agency law.[75] The law uses various factors to determine whether the author was the institution's employee. These factors include the institution's right to control the manner and means by which the work is created; the skill required to create the work; the source of the instruments or tools used to create the work; the location of the work; the duration of the relationship between the parties; whether the institution has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the institution; whether the institution is in business; the provision of employee benefits; and the tax treatment of the hired party.[76]

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75. *Community For Creative Non-Violence*, 490 U.S. at 751-52 & n.31; *Easter Seal Soc'y*, 815 F.2d at 334-35, *cert. denied*, 485 U.S. 981 (1988); NIMMER & NIMMER, *supra* note 55, § 5.03[B][1][a].

76. *Community For Creative Non-Violence*, 490 U.S. at 751- 52. No one of these factors is determinative of whether the creator of the work is an employee. *Id.* at 752. In determining whether the person who created the work is an employee or an independent contractor, the United States Supreme Court has proposed reliance upon the RESTATEMENT (SECOND) OF AGENCY § 220 (1958), which states:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

In general, any full-time salaried member of the institution's staff is likely to be an employee under this multi-factor test. The status of any other person employed by the museum must be determined on a case-by-case basis. Assuming the author of a work is found to be the institution's employee, the question then is whether the actual process of creating the work is found to be within the author's scope of employment.

If it is found that the employee had created the work while working within the scope of his or her employment, the work is considered a "work for hire." In that case, the copyright in the work initially resides with the institution as a matter of law, so the institution is deemed the legal author of the work. If the employee created the work while working outside the scope of his or her employment, the employee retains the copyright in the work.[77]

Whether the employee created the work within the scope of employment is often difficult to determine. The increasing decentralization of the workplace makes the scope of an

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(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

77. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

. The literary efforts of an employee, if not rendered as part of his or her duties to the employer, remain the property of the employee. United States v. First Trust Co., 251 F.2d 686, 687 (8th Cir. 1958) (notes made by Captain William Clark during the Lewis and Clark Expedition were private papers rather than public documents executed in discharge of official duties); Siegel v. National Periodical Publisher, 508 F.2d 909 (2d Cir. 1974); NIMMER & NIMMER, *supra* note 55, § 5.03[B]. The mere fact that the creator of a work happens to be an employee does not allow the employer to claim authorship of every work created by the employee. If an employee creates a work which is unrelated to the employment or is created outside the scope of the employment, the employee is legally considered the author of the work and retains the copyright in the work. "[N]o one sells or mortgages all the products of his brain to his employer by the mere fact of employment." Public Affairs Assocs. v. Rickover, 177 F. Supp. 601, 604-05 (D.D.C. 1959), *rev'd on other grounds*, 284 F.2d 262 (1960), *vacated for insufficient record*, 369 U.S. 111 (1962), *on remand*, 268 F. Supp. 444 (D.D.C. 1967). An institutional policy which attempts to lay claim to all of an employee's written or permanent creative product on the ground that its subject matter is "related" to the employee's regular work duties is overly broad and invariably will discourage any genuine creative effort.

employee's employment responsibilities more uncertain. The scope of employment determination must be made on a case-by-case basis by reviewing several additional factors. These include whether the writing was done during official hours, on institutional premises, using institutional equipment, with the aid of institutional support personnel, using information available to the employee as part of the employee's employment, whether the content had any relationship to the employee's institutional projects and whether it was written on institutional stationery.[78] It is thus necessary, in determining whether a work was produced within the scope of employment, to examine the employee's job description, the customary duties performed by an employee in that position, as well as any other work this particular employee usually performs within the organization.[79]

Also to be considered is the traditional support provided by the employer with respect to assisting the employee in his

78. *See* Scherr v. Universal Match Corp., 417 F.2d 497, 500- 01 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); Berkowitz & Leaffer, *supra* note 9, at 305-06.

79. A museum curator in a natural history museum might have heavy curatorial responsibilities with respect to the preservation, maintenance and organization of an extensive collection of botanical material. To properly do that job, which includes preparation of scientific papers and the organization of conferences, the curator's usual research frequently touches upon the field of environmental preservation. As the curator's study continues in this field, he or she develops an intense interest in writing books for popular consumption to educate the general public concerning ecology and environmental conservation. The curator writes several books on the subject. Being a conscientious person, the curator does private writing completely away from ordinary work hours. During that time the curator performs official responsibilities satisfactorily, including the production of scientific and technical articles and presentations for scientific conferences. Some of the technical research done for this regular work is used as a basis for private writing, but the research materials utilized are accessible to any member of the public, as are the collections under the curator's jurisdiction. Because he or she is able to separate the private life as a writer from the professional position as museum curator, makes no improper use of museum resources and hires private secretarial help to type the manuscripts, the curator is the legal author of the books and owns the copyrights in these publications.

or her writing efforts, by providing resource materials and staff, as well as technical and research assistance.[80] If, for example, a book results from an employee's regular duties in relation to a particular museum collection, and the museum provided the employee complete access to the collection as well as research and secretarial assistance, the museum may own the copyright in the work even though the employee might have done the actual writing during personal time.[81]

The application of this scope of employment test to the museum world is made difficult by the fact that the nature of museum employment is similar to the traditional academic model.[82] Great deference has been given to those employed under the unique employment relationship which exists in the traditional academic model, particularly regarding the creation of copyrightable works by scholars. Whereas the copyright in works created pursuant to administrative or other non-academic duties will most likely be owned by the university as a work for hire,[83] under this "teacher exception" the copyright in lecture notes, articles, books or other scholarly material traditionally belongs to the employee.[84] Due to the

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> [I]f a work would not otherwise be regarded as falling within the employment relationship, the fact that a portion of the work was done during working hours, and that the assistance of the employer's facilities and personnel was obtained in some degree in preparing the work will not necessarily render the work the property of the employer.

NIMMER & NIMMER, *supra* note 55, § 5.03[B].

81. *See* Knoll & Drapiewski, *supra* note 2, at 50-51 (discussing the law under the 1909 Copyright Act). This source includes a useful checklist of questions which should be raised in the context of museum employee writing.

82. *See supra* note 29 and accompanying text.

83. *See* Weinstein v. University of Ill., 811 F.2d 1091, 1093-94 (7th Cir. 1987).

84.

> [I]n unspoken recognition of the professor's sweat-of-the- brow creation and the relatively unlucrative nature of academic copyrights, universities have rarely evinced interest in copyright ownership of scholarly writings. Academic institutions have instead been content to benefit solely from the renown which accrues to them by virtue of the professor-author's association with their institution.

Rome, *supra* note 7, at 41-42.

See Williams v. Weisser, 78 Cal. Rptr. 542, 546-50 (Ct. App. 1969) (professor rather than the university owns the copyright to his written lecture notes, as it was not in the scope of his duties to write his lectures, only to deliver them); *Weinstein*, 811 F.2d at 1094 (permitting a professor ownership of copyright in his

special nature of academic employment, which ordinarily has no fixed duty hours, it does not matter exactly what time of the day the creation of the work is accomplished.[85]

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or her scholarly articles "has been the academic tradition since copyright law began"); Sherrill v. Grieves, 57 Wash. L. Rep. 286, 20 Cr. Off. Bull. 675 (1929) (professor owns copyright in book prepared by the professor based upon the subject matter of academic lectures); NIMMER & NIMMER, *supra* note 55, § 5.03[B] at 5- 17 n.31. *See generally* Mortimer D. Schwartz & John C. Hogan, *Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students, and Libraries*, 17 U.C. DAVIS L. REV. 1147 (1984); Todd F. Simon, *Faculty Writings: Are They 'Works Made for Hire' Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485 (1983); Cory H. Van Arsdale, Note, *Computer Programs and Other Faculty Writings Under the Work-for-Hire-Doctrine: Who Owns the Intellectual's Property?*, 1 SANTA CLARA COMPUTER & HIGH-TECH. L.J. 141 (1985).

Some have taken the view that the changes in the work for hire doctrine brought about by the Copyright Act of 1976 now deprive a professor of copyright protection for his or her scholarly writings. *See* Rochelle C. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54A U. CHI. L. REV. 590, 598-600 (1987); Leonard D. DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y 17, 26 (1984) ("academicians are likely employees, and their publishing activities in their respective fields generally fall within the scope of their employment, thus probably depriving them of the copyright in their scholarly works"); Rome, *supra* note 7, at 42. *But see* Hays v. Sony Corp. of America, 847 F.2d 412, 416-17 (7th Cir. 1988) ("[C]onsidering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act."); *Weinstein*, 811 F.2d at 1094.

This unique "teacher exception" appears to encompass only true academic activity. Where the employee is an administrator or is acting in a capacity other than as a teacher or scholar, the copyright will ordinarily belong to the university. NIMMER & NIMMER, *supra* note 55, §§ 5-26 to 5-28 nn.94-96; *Weinstein*, 811 F.2d at 1094; Manasa v. University of Miami, 320 So. 2d 467, 468 (Fla. Dist. Ct. App. 1975) (copyright in federal grant proposal written by university administrator held to be owned by university as proposal was prepared for benefit of the university). However, recently a dispute arose between the estate of Lee Strasberg and the Actors Studio, for which he was the director from 1949 to 1982. The dispute concerned the ownership of the copyrights in tape recordings of lectures and class sessions conducted at the Actors Studio by Mr. Strasberg. The Strasberg estate argued that Strasberg owned the copyrights, citing the prior case law that upheld the ownership of teaching material by the teachers who developed it rather than the academic institutions which employed the teachers. The parties settled the dispute with the estate retaining the copyrights in the tapes, but granting the Studio the right to make use of the taped material in its classes. *Lee Strasberg Estate Wins Claim To Tapes*, VARIETY, April 19-25, 1989, at 6.

85. *Williams*, 78 Cal. Rptr. at 549; DuBoff, *supra* note 84, at 31-32; Comment, *Copyright-Works for Hire-Common Law Copyright in Lectures Vests with Professor Rather Than with University, Williams v. Weisser*, 45 N.Y.U. L. REV. 595, 601-02 (1970). *See* Weissman v. Commissioner, 47 T.C.M. (CCH) 520, 522 (1983) (for purposes of a home-office tax deduction, a professor's principal place of business is where the

As in the university setting, the museum employee frequently is largely self-directed and is not held to a regimented time schedule. Customarily, the museum employee is encouraged to research and write about subjects which are of personal and professional interest. For purposes of determining who owns the work, it does not matter which hours during a 24-hour day are used to create the work. The important point is whether the activity is actually executed within the employee's scope of employment.[86] If the creation of the work is part of an employee's regular duties for the institution, the organization most likely will own the copyright in the work.[87]

Another possible limitation on the institution's right to claim ownership in the copyright of a work produced by an employee is a requirement that it be the institution "for whom the work was prepared."[88] At least one court has held that the

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dominant portion of the work takes place, not where the work is more visible), *rev'd*, No. 84-4031, slip op. (2d Cir. Dec. 20, 1984).

86. As new technologies decentralize the workplace, the traditional emphasis on the 9:00 to 5:00 scope of employment becomes less valid. Employees can easily complete their tasks on home computers and even can access institutional files and other material while at home.

87.

> Museums are a type of academic institution. Academic institutions treat knowledge as an object. Museums treat an object as knowledge. Both have a social duty to educate. Professors lecture. Museum professionals serve as curators, conservators and lecturers. They all write in the context of their professional roles. However, here a large distinction arises.
>
> In a university setting, the professor's intellectual products (writings, lectures and speech notes) are his or her property and not the property of the institution . . . . The prestige and pecuniary gain involved are personal incentives. At the same time, the professor's work serves an obvious social function. As we have seen, the tangible intellectual endeavors of museum professionals usually are retained by the museum; thus, the public loses the benefit of the incentive provided by the individual retention rights accorded academics. On the other hand, if all proprietary and copyright interest in the writings of museum professionals were retained by them, the incentives of prestige and pecuniary gain would operate with force and effect, as they do in academia.

Knoll & Drapiewski, *supra* note 2, at 69.

88. 17 U.S.C. § 201(b) (1988). The Copyright Act states that "in the case of a work made for hire, the employer or other person *for whom the work was prepared* is considered the author . . . ." *Id.* (emphasis added).

Copyright Act requires "not only that the work be a work for hire but that it have been prepared for the employer."[89]

B. *Independent Contractor Commissioned Works*

The second type of situation regarding institutional works involves the "commissioned work," a work created by an independent contractor,[90] a non-employee, who is hired for a particular project or specifically to create the work in question. The copyright law in this area has undergone a significant change. Prior to January 1, 1978,[91] works of this type were treated in much the same manner as works created by an employee.[92] The institution was presumed to be the "author" of the work as a matter of law. However, the copyright in any work created by an independent contractor on or after January 1, 1978, is presumed to be owned by the independent contractor. Only in certain specific circumstances may the institution retain the initial copyright in the work automatically as a matter of law.

In order for the institution to be deemed the sole legal author of the commissioned work, there must be (1) a written agreement,[93] signed by both parties,[94] which specifies that the

89. Hays v. Sony Corp. of America, 847 F.2d 412, 417 (7th Cir. 1988).

90. "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958); Hammes v. Suk, 190 N.W.2d 478, 480-81 (Minn. 1971) ("[A]n independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product or final result of his work.").

91. The 1976 Copyright Act, which made significant changes in the law regarding commissioned works, took effect on January 1, 1978. Copyright Act of Oct. 19, 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2598 (1976).

92. Easter Seal Soc'y v. Playboy Enters., 815 F.2d 323, 325-27 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Const. Co., 542 F. Supp. 252, 257 (D. Neb. 1982) ("Most court decisions interpreting the work-made-for-hire doctrine under the 1909 [Copyright] Act viewed an independent contractor in the same light as an employee."); GOLDSTEIN, *supra* note 55, § 4.3.1.

93. 17 U.S.C. § 101 (1988); BPI Sys. v. Leith, 532 F. Supp. 208, 210 (W.D. Tex. 1981). It is certain that any agreement must be signed by the representative of the employer and the employee, though the Act does not specify that any particular language be used. An informal memorandum might suffice. Although the statute does not specify the time at which the writing is to be signed, most likely it must be signed prior to the creation of the work at issue. *See* GOLDSTEIN, *supra*

particular work is to be created as a "work for hire";[95] and (2) the work must fall into one of nine explicit categories set forth in the Copyright Act.[96] If both of these requirements are met, then the institution is deemed to be the author of the work as a matter of law and, thereby, the owner of the copyright protecting the commissioned work.

If one or both of these requirements is not met, the independent contractor is deemed to be not only the author of the work, but the owner of its copyright as well. The institution, in that case, would most likely be deemed to have an implied nonexclusive license to use the work in the manner contemplated by the parties at the time they entered into the agreement regarding the commissioned work.[97] If the institution

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note 55, §4.3.2; WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 120 (6th ed. 1986).

94. 17 U.S.C. § 101 (1988).

95. *Id.*

96. The copyright statute sets forth nine categories of works which, when prepared as a specially ordered or commissioned work, may constitute a work for hire if accompanied by a signed agreement stating that the work shall be considered a work for hire. Those statutory categories are: works specially ordered or commissioned for use (1) as a contribution to a collective work, (2) as part of a motion picture or other audiovisual work, (3) as a translation, (4) as a compilation, (5) as an instructional text, (6) as a test, (7) as answer material for a test, (8) as an atlas, or (9) as a supplementary work which is defined as:

> [A] work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other works, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.*Id.*

Works such as photographs, musical compositions, choreography, PATRY, *supra* note 93, at 122-24, sound recordings, paintings, sculpture, textile designs, architectural drawings, Meltzer v. Zoller, 520 F. Supp. 847, 855 (D. N.J. 1981), and computer programs, Whelan Assocs. v. Jaslow Dental Lab., 609 F. Supp. 1307, 1319 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); PATRY, *supra* note 93, at 122-23 n.36, are, for the most part, precluded from the categories of independent contractor works which may be deemed works made for hire.

97. Freedman v. Select Info. Sys., 221 U.S.P.Q. (BNA) 848, 851 (N.D. Cal. 1983) (corporate employer would have "some species of [nonexclusive] license"). This implied nonexclusive license would have to arise out of the operation of contract law, not copyright law. *See* Whelan Assocs., 609 F. Supp. at 1319-20 (employer who hires an independent contractor to create a computer program owns the single copy of the original work which is embodied in its own individual computer, but the employer has no right to market the program without a license to

provided more than the mere funding, such as participation in the design, construction or editing of a work, the institution may be deemed to be a joint author of the work.[98]

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do so). Any implied license available to the institution could only be one which is nonexclusive because an exclusive license must be in writing and signed by the copyright owner or his or her agent. 17 U.S.C. § 204(a) (1988). *See* Effects Assocs. v. Cohen, 908 F.2d 555 (9th Cir. 1990), *cert. denied sub nom.*, Danforth v. Cohen, 111 S. Ct. 1003 (1991). The congressional compromise which resulted in the work made for hire provisions of the 1976 Copyright Act specifically excluded the "shop right" doctrine of patent law. Under that doctrine the employer would acquire the right to use the employee's invention to the extent needed for purposes of the employer's regular business, but the employee would retain all other rights as long as he or she refrained from authorizing competing uses. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736-37.

98. To be a joint author of a joint work, the institution must be directly involved in bringing about the creation of the work through the actions of its employees or independent contractors. 17 U.S.C. § 101 (1988) ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."). *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (S.D.N.Y. 1974). For the institution to be considered a joint author it must contribute original copyrightable expression. M.G.B. Homes v. Ameron Homes, 903 F.2d 1486 (11th Cir. 1990); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1086-87 (9th Cir. 1989); GOLDSTEIN, *supra* note 55, § 4.2.1.2. *But see* Community For Creative Non-Violence v. Reid, 846 F.2d 1485, 1496-97 & n.15 (D.C. Cir. 1988) (one may qualify as a joint author even if his or her contribution standing alone would not be copyrightable), *aff'd on other grounds*, 490 U.S. 730 (1989); NIMMER & NIMMER, *supra* note 55, § 6.07. *Compare* Strauss v. Hearst Corp., 1988 Copyright L. Dec. (CCH) ¶ 26,244 at 21,722-23 (S.D.N.Y. 1988) (employer's dictation of layout for photograph, supervision of its creation and retouching of photograph were sufficient to constitute joint authorship with photographer) *with* Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982) (one who merely contributes ideas, directs changes and exercises approval power will not be deemed a coauthor) *and* Meltzer v. Zoller, 520 F. Supp. 847, 857 (D.N.J. 1981) (employer's contribution of ideas, making changes and exercise of approval power were insufficient to make employer a joint author of independent contractor's architectural plans). *See* Kenbrooke Fabrics v. Material Things, 223 U.S.P.Q. (BNA) 1039, 1044-45 (S.D.N.Y. 1984); Whelan Assocs., 609 F. Supp. at 1318-19 (general assistance and contributions to the fund of knowledge of the independent contractor which consists of the provision of information and advice which is little more than one would expect from the operator of any business who seeks to have a computer system designed for him or her is not sufficient for a finding of joint authorship). Unlike copyright ownership obtained under the work for hire doctrine, joint authorship is not obtained merely through the provision of money. NIMMER & NIMMER, *supra* note 55, § 6.07; *contra* Laskowitz v. Marie Designer, 119 F. Supp. 541 (S.D. Cal. 1954). Even though the amount of copyrightable expression provided by the institution is less than that provided by the employee, the institution may be found to be a joint author. *See* Maurel v. Smith, 271 F. 211, 215 (2d Cir. 1921); Schmid Bros. v.

C. *Transferability of Copyright*

It should be noted that this discussion has only dealt with the issue of initial copyright ownership obtained through authorship. Nothing in the statements made above precludes the parties from transferring the copyright in the work.[99] One of the rights provided to the copyright owner is the right to transfer the copyright, in whole or in part,[100] to whomever the owner desires. Therefore, the institution is legally able to negotiate with the independent contractor for the transfer of copyright to the institution, to transfer copyright ownership in a work for hire to its employee,[101] or to grant the employee a share in any royalties which may be created by use of the work. Assuming that any such transfers are made pursuant to the requirements of the Copyright Act,[102] it becomes a matter of employee relations and compensation outside the parameters of copyright law.[103]

W. Goebel Porzellanfabrik KG., 589 F. Supp. 497, 501-03 (E.D.N.Y. 1984); Fishing Concepts v. Ross, 226 U.S.P.Q. (BNA) 692, 696 (D. Minn. 1985). Joint authors are deemed to be tenants in common. Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736-37; GOLDSTEIN, *supra* note 55, § 4.2.2. Each joint author has the right to use or license the work. GOLDSTEIN, *supra* note 55, § 4.2.2. Each joint author has an obligation to account to other joint authors for any profits resulting from uses of the work. Crosney v. Edward Small Prods., 52 F. Supp. 559 (S.D.N.Y. 1942); Note, *Accountability Among Co-Owners of Statutory Copyright*, 72 HARV. L. REV. 1550 (1959).

99. Though the status of the author of a work made for hire cannot be changed by agreement, the parties in an employment situation may expressly agree that the ownership of the copyright in the works produced by the employee or independent contractor is to be transferred. GOLDSTEIN, *supra* note 55, § 4.3 at 390-91 & n.2; NIMMER & NIMMER, *supra* note 55, § 5.03[B][1][b][i]; PATRY, *supra* note 93, at 121. Such an agreement may require the payment of additional compensation to the employee. *Cf.* Hewett v. Samsonite Corp., 507 P.2d 1119, 1120-21 (Colo. App. 1973) (continuation of at-will employment insufficient consideration for assignments of patented inventions made by employee outside the scope of employment). *See supra* note 10.

100. Prior to January 1, 1978, a copyright was not divisible. Today, a copyright is viewed as a bundle of rights which may be licensed or sold individually.

101. *See* Welles v. Columbia Broadcasting Sys., 308 F.2d 810 (9th Cir. 1962).

102. "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. § 204(a) (1988).

103. Of course, contracts between the parties cannot alter the status of the "author" of the work, nor the consequences that result for copyright nationality,

D. *Works Created for a Governmental Entity*

Special copyright considerations come into play when the institution is a governmental entity. Except when the work created constitutes an "edict of government,"[104] a state governmental entity is treated the same as any private person or institution. Therefore, the above copyright analysis holds true for any institution affiliated with a state or local governmental entity. It should be noted that some states have laws authorizing governmental employers to assert copyright ownership of work produced by employees within the scope of their employment.[105]

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duration, reversion or renewal. *See* GOLDSTEIN, *supra* note 55, § 4.3 at 391.

104. Edicts of government, such as judicial opinions, administrative rulings, legislative enactments or similar official documents, where the government is acting *qua* government, are not copyrightable for reasons of public policy. Del Madera Properties v. Rhodes and Gardner, 637 F. Supp. 262, 263-64 (N.D. Cal. 1985), *aff'd*, 820 F.2d 973 (9th Cir. 1987). *See also* Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. 591 (8 Pet.) (1834); Building Officials & Code Adm. v. Code Technology, 628 F.2d 730, 734-35 (1st Cir. 1980). *See generally* GOLDSTEIN, *supra* note 55, § 2.5.2; NIMMER & NIMMER, *supra* note 55, § 5.06; Marvin J. Nordiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 32 COPYRIGHT L. SYMP. (ASCAP) 43 (1986); CARUTHERS BERGER, STUDY NO. 33: COPYRIGHT IN GOVERNMENT PUBLICATIONS, U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION, 20-34, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 86th Cong., 2d Sess. (1961).

105. *See, e.g.*, FLA. STAT. ANN. § 240.229(1) (West 1989):

> Any other law to the contrary notwithstanding, each university is authorized, in its own name, to:
>
> (1) Perform all things necessary to secure letters of patent, copyrights, and trademarks on any work products and to enforce its rights therein. The university shall consider contributions by university personnel in the development of trademarks, copyrights, and patents and shall enter into written contracts with such personnel establishing the interests of the university and such personnel in each trademark, copyright, or patent.

Id.

CAL. EDUC. CODE § 35170 (West 1978): "The Governing board of any school district may secure copyrights, in the name of the district, to all copyrightable works developed by the school district, and royalties or revenue from said copyrights are to be for the benefit of the school district securing said copyrights." *See also* CAL. EDUC. CODE § 72207 (West 1989) (community college districts).

The New York legislature has acted in the related field of patent law to provide rights for faculty members. In construing N.Y. EDUC. LAW § 355(3) (McKinney 1988), which calls for the adoption of new incentive-based patent policies by state

The ownership of copyright by employees of institutions which are affiliated with the federal government is a different matter. Under United States copyright law, no work prepared by an officer or employee of the United States government as part of that person's official duties may be protected by copyright.[106] In other words, the work product of a federal officer or employee is not copyrightable subject matter. If the work was not created within the federal employee's scope of employment, of course, it may have the protection of the copyright law.[107] Whether a work created by an independent contractor under contract with the federal government can be protected by copyright depends upon the regulations promulgated by the federal agency contracting for the work.[108]

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universities which would encourage research in new technologies, the legislature stated that

> [n]othing contained . . . in this act shall be construed to affect terms and conditions of employment of employees of state university in any manner. Modification or revision of a patent policy of state university may not affect the terms and conditions of employment of employees of state university except to the extent that such modification or revision is effectuated pursuant to an agreement negotiated between the state and an employee organization representing such employees pursuant to article fourteen of the civil service law.

1981 N.Y. Laws 871(3).

The New York legislature noted the public would be the beneficiary of the resulting stimulation of research.

> The legislature finds that among the factors which are now negatively affecting the rate of technological innovation and new product development in this country are patent policies which do not provide adequate incentives and rewards to those involved in university-based research and those interested in commercializing new technologies developed in conjunction with such research.

1981 N.Y. Laws 871(1).

106. 17 U.S.C. § 105 (1991). *See also* Jery E. Smith, *Government Documents: Their Copyright and Ownership*, 5 TEX. TECH L. REV. 71 (1973). The 1976 Copyright Act did not change the view that works created for the United States government by its officers and employees should not be subject to copyright protection. H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5671.

107. "[A federal] Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee." H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5671. As of January 1, 1991, federal government employees were forbidden from personally accepting honoraria for any "appearance, speech, or article," whether or not related to their job responsibilities. 5 U.S.C. §§ 501-505 (1988).

108. The law regarding works created by independent contractors hired by the

E. *Works Created Pursuant to Grants*

Various issues regarding copyright ownership and the exploitation of research results and reports can arise where a research project has been supported by a grant. While most private grantors have no specific rules regarding copyright ownership, government granting agencies have rules that typically allow copyright ownership to vest in the grantee institution with the government grantor obtaining a license to use the products for government purposes.[109]

Grantors that support research, both government agencies and foundations, generally make grants only to organizations. As a result, the work for hire rules discussed earlier must be utilized to determine copyright ownership. If the researcher carried out all the work as an employee of the institution and within the scope of his or her employment, the institution that

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federal government also differs from the nongovernmental arena. Congress, in passing the current copyright statute, determined that the individual federal agencies could develop for themselves policies regarding copyright protection for commissioned works. H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5672-73. As a result, some agencies have determined that independent contractors hired to create a particular work may retain the copyright in that work. Other agencies have determined that commissioned works will be treated the same as works created by federal employees and are provided no copyright protection. Yet other agencies have adopted flexible policies which permit the issue of copyright ownership to be determined during negotiations. In none of these situations, however, is the federal agency allowed to claim a copyright for itself. If the independent contractor is not permitted to retain copyright protection for the work, the work is deemed to be in the public domain. *See* Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981); NIMMER & NIMMER, *supra* note 55, § 5.06[B][2]; Jerome S. Gabig, Jr., *Federal Research Grants: Who Owns the Intellectual Property?*, 16 PUB. CONT. L.J. 187, 199-201 (1986); Andrea Simon, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 34 COPYRIGHT L. SYMP. (ASCAP) 39 (1984).

109. A typical provision is found in the grant regulations of the Department of Education:

> The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:
>
> (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and
>
> (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

34 C.F.R. § 80.34 (1991). Similar regulations have been promulgated by the Environmental Protection Agency, 40 C.F.R. § 30.1130 (1991), and the National Science Foundation, 45 C.F.R. § 602.34 (1990).

accepted the grant and employed the researcher owns the copyright in any material which results.[110]

As to questions concerning the ownership and marketing of "spin-off" or derivative works based upon the data developed during the original project, most grantors, government and non-government, follow a laissez-faire approach. Private grantors traditionally have no rules regarding such works. Government granting agencies will typically leave such determinations to the grantee institution. The general rule for the federal government is that "program income," which includes not only fees resulting from activities under the grant, but also royalties earned from the initial report and any derivative works, belongs to the grantee unless the grant agreement provides otherwise.[111]

Because such questions regarding derivative works are to be determined according to the policies of the institution that

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110. If an institution functions on the academic model it may permit the employee to retain the copyright in such works even though produced within the scope of employment. *See supra* note 84 and accompanying text (discussing the traditional "teacher exception").

111. UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 13-42 (1982); PAUL G. DEMBLING & MALCOLM S. MASON, ESSENTIALS OF GRANT LAW PRACTICE § 10.13 (1991). The program income rules for the Department of Health and Human Services are indicative of this practice:

> (a) This section applies to royalties, license fees, and other income earned by a recipient from a copyrighted work developed under the grant or subgrant. Income of that kind is covered by this section whether a third party or the recipient itself acts as the publisher, seller, exhibitor, or performer of the copyrighted work . . . .
>
> (b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no HHS requirements governing the disposition. A grantee is not prohibited from imposing requirements of its own on the disposition of this kind of income which is earned by its subgrantees provided those requirements are in addition to and not inconsistent with any requirements imposed by the terms of the grant.

45 C.F.R. § 74.44 (1991). *Cf.* National Science Foundation Regulations, 45 C.F.R. § 602.25(a) & (b) (1990).

The practice that leaves program income to be spent according to the policies of the grantee organization also tends to be followed by non-government foundation grantors. Such a consequence may result by default because often the grant conditions do not provide in any way for the disposition of program income. Where the matter is addressed, there may be an understanding between the foundation grantor and the grantee that income generated from publications arising out of grant funded projects either is to be credited to the grant project account or is restricted to underwriting the costs of other publications of the grantee institution or its staff members.

employs the researcher, the employee- researcher can produce derivative works from his or her research and market them only if permitted by the policies of the employing institution, or as those policies may have been modified by the terms of the grant between the institution and the funding source. The institution must decide if it will allow an employee to receive extra compensation for working on his or her own time and turning the research results into a saleable publication.

Even though it is common for grants to be silent regarding the creation and marketing of derivative works, it is better practice to address the issue of the copyright ownership of such works and the right to exploit them for profit in the conditions of the grant between the grantor agency and the grantee institution.[112]

Where the institution decides to allow its copyright in the underlying grant-funded material to be used in such a manner, it could enter into a royalty-splitting agreement with the employee that would provide a fair return to the employee as an incentive for personal creative work. Because the employee already has been paid to carry out the research and write up the results in report form, such an agreement should provide for sufficient monetary incentive to sustain the derivative writing project, but not so much that there could be embarrassment to the employing institution or the funding source if the employee makes a large amount of money for a relatively small amount of extra personal effort.

The employer-grantee can minimize the possibility of adverse reactions to such an unexpected success by capping the amounts that the employee can receive. Further protection can be had by providing that all of the institution's share of the royalties as employer-grantee and all of the royalties to be received by the employee in excess of the cap amount, are to be dedicated to further research or to publications.

To the extent a sabbatical can be considered a type of grant, the institution that is supporting the employee during a sabbatical arguably could lay claim to the copyright in the products written during the sabbatical and any proceeds from

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112. In grant terminology, such provisions are called "special conditions" because they are added to the terms of the grant to deal with foreseeable circumstances that are not covered in the general or uniform conditions. DEMBLING & MASON, *supra* note 111, §§ 12.01-12.02(a), 13.01.

their marketing. This is particularly true if the employee is on full salary during the sabbatical and supported by other resources of the employing institution. As indicated in the text above, a sabbatical may not be a true scholar's vacation, but only an opportunity to work in another environment which is frequently dedicated to a single project. If that project or a derivative work from it yields extra income to the employee, the usual rules regarding ownership of copyright and royalties may apply.[113]

VI. WRITING FOR PROFIT AS A CONFLICT OF INTEREST

A great deal of writing produced by individuals yields no remuneration at all. It is done for the pleasure of imparting knowledge, as a professional obligation, or as a way of increasing one's reputation within a discipline. Such writing, which has a limited potential for conflicts of interest,[114] should be affirmatively encouraged by the parent institution and rarely presents a problem. However, writing for profit can easily present a conflict of interest or at least the appearance of a conflict of interest.

A. *Determining the Propriety of Accepting Payment for a Writing Project*

When dealing with writing for profit, the basic question exits of whether it is appropriate for an employee of a nonprofit or governmentally supported organization to receive compensation for writing that is related to his or her job, especially when the compensation is in the form of royalties.[115] If the situation appears at all dubious, the individual should consult with his or her supervisors and the final decision should be made at the supervisory level. The circumstances should be

113. *See supra* discussion at pages 437 to 440.

114. The potential conflicts of interest for uncompensated writing generally concern the use of employer resources. *See supra* pages 432 to 449.

115. *See* CAL. LABOR CODE § 2860 (West 1989) ("Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.").

candidly and realistically assessed, preferably in a spirit of what is best overall for both employee and institution.

The suitability of a proposed personal writing project for profit should be determined only after several factors are examined. An initial factor is whether the project should be done as a professional obligation without any substantial fees. If it is a short article for a professional journal to share expertise with colleagues, usually the project should be done out of a sense of professionalism. It is demeaning to a person's professional standing to appear to be grasping in these matters. However, in these situations the employee generally should be allowed to write the article or paper as part of his or her regular duties, assuming that the publishing entity and the employing institution share the same goals. Writing of this sort should be encouraged because it reflects well upon the individual and the institution.

It is also necessary to examine the nature of the project itself. Is it truly a scholarly effort of educational value or is it a purely commercial venture? The motivation itself is not of prime importance; many valuable contributions have been produced from motives which at the time were more commercial and monetary than scholarly. The focus should be on the product and whether it represents a genuine effort to amplify some aspect of technical, cultural, or scientific knowledge, or to disseminate existing knowledge in a more creative and effective fashion.

Not all writing is scholarly. Those projects that appear to be pure commercial ventures must be closely monitored and should be treated as any other outside employment for pay.[116] They do not deserve the support and encouragement by the institution that would normally be given to educational writing projects.

When the publication is closely related to one's job or when there may have been support by one's institution for the research that underlies the written product, the employee who is paid for the writing could be viewed as overreaching by marketing the work product of the institution. This is so even

116. Producing yet another book for an already saturated field by simply repackaging existing textual materials to capture a portion of a lucrative market is an example of a writing activity which does not add to or better disseminate knowledge.

though the actual writing was personally initiated and not related to assigned tasks. In such cases, restraint is urged to preserve one's professional dignity and to fend off allegations of profiteering.[117]

A central consideration is how the writing is related to the employee's ordinary work. If very similar, there must be a substantial, independent creative effort in addition to the ordinary daily work product, to justify a personal venture for which extra compensation can be received. If the proposed work is significantly related to official daily assignments and does not represent much additional creative effort or private time, perhaps the project should be done as a part of the employee's regular duties.

If an employee is asked to produce a publication about the institution, the project probably should be official, and the institution should negotiate and sponsor it. In this situation any special compensation to the writer-employee for the extra effort should be left to the discretion of the institution, assuming it is legally permissible for the institution to pay such extra compensation to an employee.

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117. There can be situations where it is proper for the employee to keep the payment. Consider the situation of an historical museum affiliated with a university. The museum wanted to hire as head curator a scholar with a considerable reputation. He was offered the position under conditions similar to other faculty appointments: he was only required to carry out certain enumerated duties and was not required to make any distinction between the time spent on his official tasks and his private writing. He was further given the right to retain all royalties as long as his job performance did not suffer. The historian could not consider the position at the relatively low salary the museum was able to offer unless the institution allowed him these perquisites. After accepting the appointment the scholar continued his publishing activities, but also distinguished himself as a curator and educator, to the great credit of the museum. His writing brought in royalty payments which approximately doubled his museum salary, an amount which he estimated was necessary to meet his personal obligations. There were some grumblings from the rest of the staff, but all his manuscripts were typed by a secretarial service hired with his own or his publisher's funds. Because there had been complete disclosure and agreement between the curator and management before he accepted the job, there was no impropriety in his retention of all royalties. If the scholar had made demands on the museum's resources and personnel for his personal writing, another agreement might have been necessary to compensate the museum for such use of its property, perhaps paying a portion of his royalties to the museum. This would be consistent with the rules of many universities by which the scholar is expected to share royalties with the university if more than ordinary uses have been made of university personnel and other resources in facilitating the preparation and publication of outside writing which yields revenues.

The employee's prior background or work experience and personal resources should be considered when personal writing for pay is contemplated. If there are skills, expertise, or interests derived from former employment or academic studies which the employee draws upon for personal projects, the employee is in a better position to accept honoraria or royalties for personal writing, provided that the employee keeps the work separate from present job duties and fulfills official responsibilities.

The materials or resources the employee intends to use for a personal project are another factor. If the employee owns or has access to resources and facilities as a private individual, or can use facilities available to the general public to accomplish the work, the employee has a stronger case for retaining whatever profits realized from the writing.

The amount of compensation proposed to be paid to the individual should be considered by the institution when assessing the overall suitability of the writing venture. The fact that there may be some payment to the individual should not prejudice the "clearance"[118] of a proposed writing project. Appropriate payments can be extremely useful in encouraging an individual to write when otherwise nothing would be produced.[119] Without some monetary incentive most persons lose the enthusiasm to carry a long and sometimes tedious process through to completion, especially when the work must be done while also holding a full-time job.[120] The possibility of payment also can increase an individual's sense of worth and make the individual feel that his or her expression could be an important addition to knowledge, worth the sacrifice of leisure time and the effort involved.

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118. The term "clearance" is used rather than "approval," to avoid an implication that the employer endorses the project merely because it allows the employee to carry it out.

119. In many areas of academia such encouragement is not necessary in light of the traditional "publish or perish" rule which requires publication in order to achieve a tenured position. Of course, once tenure has been received, monetary encouragement is sometimes necessary to prod the tenured academic into writing.

120. It often happens in the museum world that by the time an individual has enough experience in his or her area of expertise to write authoritatively, the individual is overwhelmed by on-going responsibilities to the collection, to donors, and to the ever-increasing paperwork that comes with any position of responsibility.

Where the fees to be received appear quite high in relation to what is actually produced there is the suspicion that the outside entity is more interested in the employee's institutional reputation than an individual effort. If this is suspected, the employee can tell the publisher that the work will be done entirely as an individual with no use whatsoever of the employee's official title—not even as a means of personal and professional identification.[121] Such a condition usually leads to an interchange with the publisher which brings out the publisher's motives in wanting to advertise the writer's institutional affiliations.

If the work is potentially valuable and the expected outside payment reasonable and modest, the employee might expect cooperation and even some accommodation from the parent institution. By way of accommodation the institution might countenance minimal use of resources or equipment, such as after-hours use of one's office and office equipment. An employee might be given a light workload, or at least care could be taken not to increase the workload, as a way of facilitating a particularly worthwhile project.

Such an accommodation should not be granted as a matter of course. As fees and royalties become prominent in an outside venture, and the commercial aspects of the project appear to predominate, the employing organization is warranted in treating this as any other outside employment. Insisting all work be done off the job site and privately, without any concessions on the part of the employer, is appropriate in this situation. Employees should understand that they must continue to perform to the full extent of their job responsibilities despite the fact that they might be writing during off-hours.

B. *Manner of Compensation*

The manner in which compensation will be received by the individual for the personal writing project is a separate factor for discussion in the clearance process. The compensation should not appear excessive for the amount and quality of work, should bear some relation to the reputation and abilities of the individual, and be paid in a manner not likely to invite criticism. Honoraria or fixed fees tend to be more appropriate

121. *See supra* text at pages 433 to 434.

than royalties in this regard, although payment of royalties is customary in the publishing trade.

Sometimes difficulties can be minimized if a modest and reasonable one-time payment is accepted for the personal time and effort involved. Such one-time payments for writing are sometimes called fees, but more likely are referred to as "honoraria."[122] Honoraria usually do not raise appearances of impropriety, as long as the amount of the payment is within regular limits and is paid in accordance with a written policy of the institution.

When the author is paid a set amount the employee- author usually is confined to the writing and editing phases only. The author tends to be divorced from the publishing and marketing aspects of the work which is where the potential for conduct creating conflicts of interests is greatly increased. If the author is paid a set fee there is no monetary incentive to use his or her position with the institution to promote his or her work. Also, supervisors and co-workers will tend not to resent such a situation when there is only a modest, fixed payment, unlike the situation when the employee can be viewed as abusing the institutional position in an effort to increase royalty payments.

Royalty payments are the more common form of compensation for writing a book. The royalty payment is a percentage of the sales of the publication, typically between five and ten percent of the gross proceeds received by the publisher from sales of the work.[123] This traditional practice of royalty payment distributes the risk of the venture's success between the author and the publishing house.

Royalty payments, however, can have an entrepreneurial connotation for a person holding a full-time position in a nonprofit organization. When an author is paid with royalties he or she has a continuing relationship with the publisher and a

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122. "Honorarium" has traditionally been defined as "[a]n honorary payment or reward, usually in recognition of gratuitous or professional services on which custom or propriety forbids any fixed business price to be set." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986); "an honorary or free gift; a gratuitous payment, as distinguished from hire or compensation for service." BLACK'S LAW DICTIONARY 736 (6th ed. 1990).

123. These percentages may vary depending upon the type of market and the prestige of the author.

continuing monetary stake in the success of the publication. Under these circumstances the author is being paid in proportion to the number or dollar volume of sales, so the author has an economic incentive to use his or her position with the institution and to use institutional resources to better promote the publication.[124]

Additional complexities can be created if a "royalty splitting" arrangement is made between the employee and the institution. Under such an arrangement, royalties from a publication, usually produced both on the employee's personal time and during official hours, are divided between the employee and the organization. This practice is followed in some institutions which allow a staff member to share in the royalty proceeds it receives from publications if the employee contributed substantial private effort to the production beyond the job requirements. Conversely, the individual might assign some of his or her royalties to the institution if there were joint contributions.[125]

When there is royalty splitting, it can be difficult to establish a fair sharing arrangement. Once an arrangement has been negotiated, it should be reduced to a detailed written agreement between the institution and the employee before the product is written. Such a written understanding helps to avert allegations that organizational resources are being improperly used for one individual. An alternative is to provide for a lump sum payment to the staff member for his or her extra work and let all royalties accrue to the institution. As long as all profits go to the institution and the individual gets only reasonable compensation for writing services, there

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124. The author may have the incentive to pressure the institution's bookstore to carry the publication and coerce bookstore personnel into promoting the book to patrons. Colleagues could be pressured into assisting in the promotion of the publication by writing reviews or contacting friends to purchase the book or review it.

125. In such a case the employee and the institution may be deemed joint authors and own the copyright as tenants in common. *See supra* note 98 and accompanying text. Even when the institution is not a joint author, it may be within its rights to require the employee to share his or her compensation. Unless it is otherwise agreed, an agent is under a duty to account to the principal for any financial benefit received by the agent as a direct result of a transaction conducted by him or her, whether or not in violation of his or her duties as an agent. WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 87 (1964).

should be fewer questions about the proper division of revenues or of favoritism to one person on the staff.

Another alternative would be to put the writer on a part-time schedule while engaged in a writing project for which he or she is to retain substantial compensation. This is seldom possible unless the writer has other income. However, if advance royalties or other payments can make up enough of the difference from the diminished salary, this may be a viable alternative.

Careful assessment of all of the considerations mentioned above may force the conclusion that, on balance, the writing project should not be permitted or should be done as part of official duties rather than as a personal project. Linking the project to the employee's official duties is probably the appropriate solution for those cases in which substantial use must be made of official resources, especially if there is significant involvement of colleagues.

VII. THE PRE-PUBLICATION CLEARANCE PROCESS

An institution's management is well-advised, to establish as part of its policy on writing, a mandatory clearance procedure through which issues regarding personal writing are dealt with early in the process.[126] Care should be taken to focus primarily on the features that accompany writing such as the use of institutional resources and use of the author's job title. The process of official review and clearance of the substance or content of what is to be published by an employee can be stifling and may present legal questions of abridgement of personal freedom and professional autonomy.[127] An orderly clearance procedure is necessary, however, to provide the greatest protection for the institution.

When problems associated with the payment of fees are not at issue, a minimal pre-publication clearance procedure is called for. Certain situations may require the institution to

126. The review process is "clearance" if the project is to be done on the employee's own time and with the employee's own resources. The employer's "approval" is required if official resources are to be used.

127. Where the museum is governmentally related, any official review and clearance process raises constitutional issues. *See* Snepp v. United States, 444 U.S. 507 (1980); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

request or insist upon changes in the proposed attribution, the promotion plans and statements, or even in the substance of the employee's draft. These include the use of the institution's name, the use of proprietary information,, the appearance that the institution endorses the views put forth in the piece, or the protection of the institution's reputation.

When fees are involved, especially if the compensation is likely to be paid in the form of royalties, the situation calls for a more detailed discussion of all relevant factors before management decides whether it has any objections to the project. The failure of an employee to submit to the clearance process and thus satisfy this condition of employment would be grounds for discipline or termination.

An elaborate clearance procedure typically should not be needed for short writing efforts such as occasional journal articles or pieces for magazines serving the individual's sphere of work. Such articles usually are done without compensation, and many institutions have policies encouraging staff to write such pieces on their own initiative and without prior permission or clearance as long as institutional policy standards are met. Even in these situations the employee should be required to present a copy of the final version upon publication.

Where the writing is not a routine type of work done by the staff, the employee should inform management about the project and, if required, present a draft of the manuscript prior to its publication. By availing itself of the pre- publication version of the employee-authored piece, the institution will have time to determine whether it should allow its name to be used, whether its proprietary interests are endangered or whether a disclaimer would be advisable. The use of a special written agreement between the writer and publisher also might be called for, limiting the use of the writer's official title and thus, the implication of institutional endorsement of the writer's opinions.

By obtaining a post-publication copy of the piece, the institution will be better able to construct a bibliography of the writings of its employees. In this way the institution will be better informed as to the intellectual pursuits of its employees and can maintain an archive of the writings of its employees.

The clearance procedure should also include a written determination of copyright ownership. Each individual determination should be made according to a written institutional

copyright policy and must be evaluated according to the circumstances of the project being discussed. By placing this determination in writing, future disputes over copyright ownership can be avoided.

If payment for the outside writing is involved, clearance procedures should include discussions with the appropriate supervisor about all the circumstances surrounding the writing project.[128] It is in the clearance process that the permissible facets of a personal writing venture are sifted from the questionable or prohibited components. The employee should be required to make a written disclosure to management which contains all relevant facts regarding the proposed project.

Management should examine the subject matter of the proposed writing and the type of publication in which it will appear. Especially when dealing with a genuinely creative, scholarly, or artistic effort, however, the clearance process should be undertaken with a strong presumption in favor of the activity as a suitable and even praiseworthy venture bringing credit to the individual and indirectly, to the institution.

In most cases the nature of the project should not determine whether it is cleared, but whether management wants to associate or disassociate itself from the venture. Will the personal writing be a credit to the individual and the institution? Will it enhance the individual's reputation among his or her peers or contribute to professional growth? Not everything written need be in the category of esoteric scholarship; it can have the broader aim of educating the general public.[129]

The institution should also assess the reputation, reliability, and planned working arrangements with the publisher who will be printing and marketing the work. Some publishers have a reputation of doing less than a satisfactory job in terms of editorial accuracy. If this is a long term project, a relationship will be established with the publisher involving many contacts over perhaps several years with the editorial staff, the production personnel, and the business officers. The ability of the author to maintain editorial control also is important, as well

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128. "Employees should obtain the approval of the institution of plans for any significant amount of outside writing . . . ." MUSEUM ETHICS, *supra* note 2, at 21.

129. A person with a facility for straightforward exposition, for example, might do a book for children as an entirely appropriate outside venture, or an article for a popular magazine.

as the assurance that the work will be published in an attractive manner.

It is important when management participates in the clearance process that its primary concern remain the manner in which the writing activity and marketing is carried out, and not turn it into an attempt to control the content of the written expression. The institution's policies on personal writing should focus upon the use of institutional resources and the amount, as well as the method of payment, if any. When the institution's reputation, its proprietary interests or its basic ability to function are at issue, however, the concern for the employee's freedom of expression can become secondary.[130]

Unless other arrangements with the institution are made, the employee should expressly affirm, in writing, that he or she will not use official hours to work on the personal project, but will carry out any personal writing activity on his or her private time. It is suggested that a person keep a log of the time spent on a personal writing project, to serve as a perma-

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130. If a museum curator decides that in his or her opinion a particular collection in the employing museum contains poor quality or bogus objects, the publication of these views in a professional journal could severely damage the reputation of the museum. Especially if the curator's views were not fully researched and documented, the institution would have an interest in preventing the curator from publishing these views. Agents owe their principals a duty of fundamental loyalty, and this principle should operate even where the agent's freedom of expression is involved. In such situations the employing organization might insist that the employee have the publisher print a strong disclaimer stating that the employee's views are his or her own and the employee accepts full responsibility for them. If the employee is being paid to write the work and it has commercial aspects, the employer might impose additional conditions on its publication. However, the institution could not legally prevent its publication.

Both private and public employers are constrained by the First Amendment from seeking a court injunction to stop a disparaging publication. Such an action would constitute a prior restraint, defined as "an official restriction imposed upon speech or other forms of expression in advance of actual publication." Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955). Any prior restraint on publication bears a heavy presumption against its constitutional validity. Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963). However, private parties have been successful in a limited number of commercial cases where prior restraints have been allowed. *E.g.*, trade secrets protection, KLM Royal Dutch Airlines v. Dewitt, 418 N.Y.S.2d 63 (App. Div. 1979) *modified*, 418 N.Y.S.2d 725 (App. Div. 1979); trademark infringement, Dallas Cowboys Cheerleaders v. Pussycat Cinema, 604 F.2d 200 (2d Cir. 1979); false commercial advertising, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976); Donaldson v. Read Magazine, 333 U.S. 178, 189-91 (1948); FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937).

nent record demonstrating the work was done apart from the regular job. This is especially helpful if the personal project is closely related to the person's regular work duties. A log may not be necessary if the work duties differ so markedly from the personal writing that the employee could not possibly incorporate any official product into the personal publication or otherwise use official time for the personal writing. For employees such as curators or members of a museum scientific staff who have only minimal supervision of their time and general work duties, a log documenting the time spent on their personal writing projects can be an invaluable instrument for keeping the record straight.

If the venture is within the policy guidelines or traditions of an institution as a suitable activity for its staff, the institution may be able to make use of such a policy to refute any appearance of institutional endorsement. It can point out that such projects are done independently by the staff as a professional responsibility, and the views expressed are their own.

VIII. PROTECTION OF EMPLOYEE RIGHTS OF FREE EXPRESSION

A. *Non-Governmental Institutions*

Institutions which are not governmentally related are not limited by the federal Constitution. Strictly private institutions are not within the ambit of the federal Constitution's protection of expression and their actions do not raise federal constitutional concerns.[131] Therefore, no clearance procedure or

131. Constitutional protections generally do not apply in the private sector. "The constitutional guarantees of freedom of speech and of the press offer protection against state or federal governmental action only; they neither apply to nor restrict private action." Kuczo v. Western Conn. Broadcasting Co., 566 F.2d 384, 387 (2d Cir. 1977); Foster v. Ripley, 645 F.2d 1142, 1146 (D.C. Cir. 1981) ("[R]estrictions imposed by the First and Fifth Amendments are applicable only to the instrumentalities of government."). *See* Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 741 (1978) (holding plaintiff did not prove that right of private employer to discharge an employee at will due to the employee's political beliefs, activities and associations is restricted by public policy), *aff'd*, 416 N.Y.S.2d 160 (1979); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1433 (1967); *cf.* Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity–Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 953 (1952) (the public nature of the corporation's charter as well as its economic power will bring about the direct application of constitutional limitations to the corporation).

other restrictions on employee expression instituted by such an institution would violate the First Amendment. For those employed by nongovernmental entities, protection of expression, if any, must be based upon state constitutions, state statutes,[132] common law,[133] union contracts[134] or other

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The Constitution is fundamentally a limitation on the power of government. As such, the protection of the Fourteenth Amendment, and through it most of the Bill of Rights, can be applied only to the acts of the states, not purely private action. This "state action" requirement, which also includes federal governmental action, is necessary for the First Amendment's protection of speech to be invoked. *See generally* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1-16.5 (1986 & Supp. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch.18 (1978).

There are, however, certain situations where purported "private" action may be looked upon as "state action." Private employers who exercise essentially governmental functions and are treated as public entities, may be involved in state action. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952); Marsh v. Alabama, 326 U.S. 501 (1946). *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). It should be noted that a tax exemption alone does not make a nonprofit corporation a public entity. Tax-exempt status is not sufficient to establish state action. *See* Schlein v. Milford Hosp., 561 F.2d 427 (2d Cir. 1977); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir. 1975); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1975); Stearns v. Veterans of Foreign Wars, 394 F. Supp. 138 (D.D.C. 1975); *but see* Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974) (relationship between tax exempt organizations and the government may constitute state action for matters involving racial discrimination, e.g. in the case of racially restrictive trusts, where the test for state action is less onerous, but not for other areas, where a more rigorous test for state action is used). *See also* San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 534- 41 (1987) (federally chartered corporation which is subsidized through the exclusive use of Olympic words and symbols as well as through direct grants is not a governmental actor to whom the prohibitions of the Constitution apply.).

Private colleges, universities, museums or hospitals may rely so heavily upon government support as to be constitutionally restricted in their hiring and firing practices. *See* Pennsylvania *ex rel.* Rafferty v. Philadelphia Psychiatric Clinic, 356 F. Supp. 500 (E.D. Pa. 1973); Foster v. Ripley, 645 F.2d 1142, 1147 (D.C. Cir. 1981) (fact that majority of board of directors are government officials is sufficient to find state action). Private companies may be so deeply involved in work for the government that there exists a "governmental presence," sufficient to show state action. Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). *See* DAVID W. EWING, FREEDOM INSIDE THE ORGANIZATION 100-01 (1977).

132. Many statutory rights exist which apply similarly to both public and private employees. *See* EWING, supra note 131, at 101-02. Several states have enacted statutes which prohibit an employer from interfering with the political activities of its employees. *See, e.g.*, CAL. LAB. CODE § 1102 (West 1989) (employer prohibited from coercing or influencing employees to adopt or follow "any particular course or line of political action or political activity."); COLO. REV. STAT. § 8-2-108 (1986); MISS. CODE ANN. § 79-1- 9 (1989) (employer prohibited from unlawfully

interfering with the "social, civil, or political rights" of its employees); OHIO REV. CODE ANN. § 3599.05 (Anderson 1988); S.D. CODIFIED LAWS ANN. § 12-26-13 (1982); WYO. STAT. § 22-26-116 (1977).

Federal statutes which protect both public and private employees include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1988) (prohibits discrimination in private employment on the basis of race, sex, religion, color, or national origin regarding compensation, terms, conditions or privileges of employment); the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1886); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1988); 42 U.S.C. § 1981 (1988) (protects employees from racial discrimination and guarantees to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."); and the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988).

A number of states have adopted statutes consistent with the federal Civil Rights Act of 1964. These statutes tend to protect an individual from discrimination in employment based on a variety of the following factors: handicap, race, creed, color, sex, age, religion, national origin or ancestry. Protection relates to compensation, hiring, discharge, terms, conditions, privileges or responsibilities of employment. The statutes also prohibit an employer from limiting, segregating, or classifying an employee in a way which would deprive or tend to deprive an individual of employment opportunities. *See* CAL. GOV'T CODE § 12920 (West 1980) (declares that it is the state's public policy to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age); CAL. GOV'T CODE § 12921 (West 1980) (the opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age recognized as and declared to be a civil right); COLO. REV. STAT. § 24-34-402 (1988) (prohibiting discrimination or unfair employment practice against employees in matters of hiring, discharging, promotion and demotion and compensation on the basis of handicap, race, creed, color, sex, age, national origin, or ancestry); IDAHO CODE § 67-5901 (1989) (provides protection against discrimination consistent with the federal Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967; secures for all individuals the freedom from discrimination because of race, color, religion, sex or national origin in connection with employment, public accommodations, education and real property transactions, and discrimination because of age or handicap in connection with employment); IDAHO CODE § 18-7301 (1987) (recognizes and declares the right to be free from discrimination because of race, creed, color, sex, or national origin as a civil right, which includes the right to obtain and hold employment without discrimination); MICH. COMP. LAWS ANN. §§ 37.1202, 37.2201, 37.2202 (West 1985) (prohibits an employer of one or more employees from discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status, or of depriving an employee or applicant of employment opportunities based on those same categories); OKLA. STAT. ANN. tit. 25, §§ 1101, 1301, 1302 (West 1987) (provides protection consistent with the federal Civil Rights Act of 1964 and the federal Age Discrimination in Employment Act of 1974 and applies to employers of 15 or more employees by (1) prohibiting the discrimination against employees as relates to hiring, discharge, compensation, terms, conditions, privileges or responsibilities of employment on the basis of race, color, religion, sex, national origin, age, or handicap; (2) further prohibiting an employer from

bargained-for limitations on an institution's powers to curtail

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limiting, segregating, or classifying an employee in a way which would deprive or tend to deprive an individual of employment opportunities). *See* C. EDWIN BAKER, FREE SPEECH, LIBERTY AT WORK: EXPANDING THE RIGHTS OF EMPLOYEES IN AMERICA 23-27 (1988); OUTTEN & KINIGSTEIN, *supra* note 15, at 63-138 (1983).

133. Such common law tort actions as wrongful discharge or intentional infliction of emotional distress and breach of contract actions may be available to employees. *See* English v. General Elec. Co., 496 U.S. 72 (1990).

134. In areas such as collective bargaining and the right to strike against the employer, private employees have more legal protection than public employees under the Labor Relations Act, 29 U.S.C. § 151 (1988). The protection of the Act extends to self-organization, collective bargaining and concerted activity for collective bargaining or other mutual aid or protection. 29 U.S.C. 157 (1988). Concerted activity generally involves more than one employee acting together. Lewiston Sportswear, 213 NLRB Dec. (CCH) 8 (Aug. 23, 1974). The activity must also be for the mutual aid or protection of other employees, requiring that the activity be related to the employment relationship or working conditions. *Lewiston Sportswear,* 213 NLRB Dec. (CCH) at 11.

Protected activity in the private sector does not extend to purely or predominantly political or defamatory speech. Ford Motor Co. v. NLRB, 221 NLRB Dec. (CCH) 663 (Nov. 13, 1975); Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950).

> A political tract exhorting employees not to support the traditional parties . . . is wholly political propaganda which does not relate to employee's problems and concerns qua employees . . . . While it may be argued that the election of any political candidate may have an ultimate effect on employment conditions, I believe that to be sufficiently removed so to warrant an employer to prohibit distribution on its property of material solely concerned with a political election.

Ford Motor Co., 221 NLRB Dec. (CCH) at 666.

An employer may also institute policies that prohibit an employee's activity outside of work-time and off-site where the employer has a clearly defined legitimate interest. For the policies to be enforceable, they must be so limited in scope and application as to only protect that limited interest with the minimal intrusion on the employee's civil and private rights.

> [P]rotection of the editorial integrity of a newspaper lies at the very core of publishing control . . . . [Further] editorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration . . . . In order to preserve these qualities, a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity.

Newspaper Guild, Local 10 v. NLRB, 636 F.2d 550, 560-61 (D.C. Cir. 1980) (citations omitted).

Where the policies substantially affect the terms of employment or an employee's civil rights, they may be enforceable without collective bargaining only to the extent that they protect and benefit clearly defined legitimate interests. *Newspaper Guild,* 636 F.2d at 563. For an example of the relationship of prohibited activity to job function, *see Newspaper Guild,* 636 F.2d at 563 n.50.

the expression of its employees.[135]

If the expression involves work-related issues, both federal and state legislatures have provided some protection for employees. "Whistle-blowing" statutes have been passed which provide that an employee who discloses information about a violation of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or danger to public health and safety will be protected.[136]

If the employee's employment has been terminated as a result of the employee's expression, he or she may be protected by the tort of wrongful discharge.[137] This common law ac-

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135. ROBERT ELLIS SMITH, WORKRIGHTS 76-87 (1983). A person accepts employment on the terms and conditions of the employer. If the person does not wish to work on such terms, he or she is at liberty to retain his or her beliefs and associations and go elsewhere. Adler v. Board of Educ., 342 U.S. 485, 492 (1952). *See generally* OUTTEN & KINIGSTEIN, *supra* note 15.

136. ISIDORE SILVER, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE § 15.7 (1989). Both private and public employees are protected by specific whistleblower anti-retaliation provisions of various federal health and safety laws. *Id.* at 15-34 & n.149. State whistleblowing statutes vary as to the type of employee protected (private or public) and the remedies available. *Id.* at 15-35 & n.153. *See, e.g.*, CAL. GOV'T CODE § 10548 (West 1990); WIS. STAT. ANN. § 895.65 (West Supp. 1991). *See* Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990) (claim under whistleblower protection statute not barred by workers' compensation law). For federal employees, the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302 (1991), enhanced the protection given to federal whistleblowers. Under the Act, unless direct appeal to the Merit Systems Protection Board is permitted, prohibited personnel practices are to be reported to and investigated by the Special Counsel. If reasonable grounds exist to believe that a prohibited personnel practice has occurred, the Special Counsel shall report this determination to the Merit Systems Protection Board, the Office of Personnel Management and may report it to the President. In addition, the Special Counsel may include corrective recommendations. If a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General as well. Pub. L. No. 101-12, 103 Stat. 16 (1989) (amending 5 U.S.C. § 1214, 1221). *See also* EWING, *supra* note 131, at 104-15; Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: the Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015 (1991); Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615.

137. Traditionally, an employment contract for an indefinite term is deemed to be terminable at will. Such a contract may be terminated by either party at any time for any reason. Chase v. United Hosp., 400 N.Y.S.2d 343 (App. Div. 1977). Several states have recognized a public policy exception to the employment-at-will rule and have allowed discharged employees to sue under the variously named tort of wrongful termination, wrongful discharge or abusive discharge. Under this theory the interest of the employer in the exercise of his or her unfettered right to terminate an employee under a contract at will is balanced against the interest of the community in upholding its laws and public policy. *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Petermann v. Int'l Bd. of Teamsters, 344

tion may protect an employee's speech whether it deals with work-related issues[138] or not.[139] Even if employment has not been terminated, when the employee's expression constitutes political speech, work-related or not, some states have adopted legislation which will protect the employee.[140]

B. *Governmentally Related Institutions*

An employee of a governmentally related institution has many of the same protections afforded the employee of a private institution. However, governmental employers may have defenses not available to their private counterparts.[141] In addi-

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P.2d 251 (Cal. Ct. App. 1959); Nees v. Hocks, 536 P.2d 512 (Or. 1975).

138. *See, e.g.*, Parnar v. Americana Hotels, 652 P.2d 625 (Haw. 1982) (termination for reporting violations of the state health code violated public policy); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. 1982) (violation of a professional code of ethics may constitute a violation of public policy). *But see* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (to evidence public policy a code of ethics must have specific provisions which contain a clear mandate of public policy); Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710 (Mich. 1982) (code of ethics of a private association does not establish public policy).

139. *See, e.g.*, Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 741 (1978) (public policy may restrict the right of a private employer to discharge an employee at will due to the employee's political beliefs, activities and associations), *aff'd*, 416 N.Y.S.2d 160 (1979).

140. Some states have passed legislation prohibiting a private employer from interfering with the political activities of its employees. *See, e.g.*, CAL. LAB. CODE § 1101 (West 1971 & Supp. 1992) ("No employer shall make, adopt, or enforce any rule, regulation or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."); CAL. LAB. CODE § 1102 (West 1971) ("No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."); COLO. REV. STAT. § 8-2-108 (1986); LA. REV. STAT. ANN. § 23:961 (West 1985 & Supp. 1991); MO. ANN. STAT. § 115.637(6) (Vernon Supp. 1991); NEV. REV. STAT. ANN. § 613.040 (Michie 1986). *See* Davis v. Louisiana Computing Corp., 394 So. 2d 678 (La. Ct. App. 1981) (although employee's candidacy for political office made the employee a detriment and "disloyal" to the employer, an employer may not control the political candidacy of its employees); SMITH, *supra* note 135, at 86. A conflict may exist, however, between such statutes and the federal prohibition of lobbying by certain tax-exempt organizations. Consider the situation of a curator of modern art at a private art museum who lobbies against state legislation which would prohibit state funding of art which is deemed "pornographic." The art museum would be prohibited by state law from interfering with the curator's political activities, but the federal tax exempt status of the art museum could be jeopardized by the actions of the curator. *See supra* note 12.

141. Governmental employers may be able to rely on governmental immunities

tion, public employees are protected by the federal Constitution.[142] While the First Amendment will not provide absolute protection of employee expression,[143] it will protect statements regarding matters of public concern.[144]

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and tort claim statutes which are not available to private employers. SILVER, *supra* note 136, at 1-10.

142. There are constitutional rights vested in the employees of governmental entities because under the United States Constitution actions by such organizations can constitute "governmental action" for purposes of what has come to be called "constitutional torts," a tort being an injury recognized by the law. *See* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972). The First, Fifth, and Fourteenth Amendments to the United States Constitution protect citizens from interference by government with the constitutional right to free expression. To the extent the employing organization either is directly a part of a governmental unit or might be a government instrumentality, there may be a finding of governmental action which arguably can amount to a violation of the guarantees inherent in those Amendments. *See* Endress v. Brookdale College, 364 A.2d 1080 (N.J. Super. Ct. App. Div. 1976); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Greenyea v. George Washington Univ., 502 F.2d 556 (D.C. Cir. 1975). Constitutional torts or wrongs involve cases where individuals' civil rights as guaranteed by the Constitution are violated by officials acting under color of official government positions. This constitutional protection has been codified at 42 U.S.C. § 1983 (1988). *See* Skehan v. Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974); Peacock v. Board of Regents, 380 F. Supp. 1081 (D. Ariz. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973); James v. United States, 358 F. Supp. 1381 (D. R.I. 1973); Kristen M. Brown, *The Not-For-Profit Corporation Director: Legal Liabilities and Protection*, FED'N OF INS. COUNS. Q. 28 (1977). *See generally* SILVER, *supra* note 136, §§ 15.1-7 (1989); STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (1990).

143. The government employee's right of expression must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). *See* Hawkins v. Dep't of Pub. Safety and Correctional Servs., 602 A.2d 712 (Md. 1992) (off-duty ethnic slur uttered by a probationary prison guard found to be sufficient basis for discharging the state employee).

144. A government employee's exercise of the "right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering*, 391 U.S. at 574. Such subjects as allegations of racial discrimination, misuse of public funds, wastefulness, and inefficiency in managing and operating government entities have been found to be matters of public concern. Roth v. Veteran's Admin., 856 F.2d 1401, 1405 (9th Cir. 1988). It has been suggested that the public employee's specialized knowledge of public matters may contribute weight to the interest of the public in having information relevant to political discourse made available to it. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Thomas W. Rynard, *The Public Employee and Free Speech in the Supreme Court: Self-Expression, Public Access to Information, and the Efficient Provision of Governmental Services*, 21 URB. LAW. 447 (1989). A determination must be made as to when a public employee is acting as a member of the general public who is discussing a matter of public concern, and when the employee is acting as a private

Employees of public institutions may be subject to greater limitations on political activities, however, than their counterparts in the private sector. Public employees are subject to federal and state legislation which restrict the political activities of public employees.[145]

Pre-publication clearance procedures can bring into focus constitutional issues,[146] whether the institution is wholly

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individual publicly employed. In determining whether the employee's speech dealt with a matter of public concern, it must be determined whether the speech in question actually dealt with the public's interest or was merely addressing a private matter. The courts distinguish between speech which seeks to bring to light actual or potential wrongdoing or breach of public trust, which warrants protection, and speech that merely reflects the employee's dissatisfaction with his or her employment. Connick v. Myers, 461 U.S. 138, 148 (1983); Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) (complaints of sexual harassment were an attempt to resolve a private dilemma and therefore not a matter of public concern).

Even if a government employee's speech is found to involve a matter of public concern, the right of the government employee, as a citizen, to comment on such matters must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 574. In establishing this governmental interest, the government must demonstrate actual, material and substantial disruption of the work environment. Zamboni v. Stamler, 847 F.2d 73, 79 (3d Cir. 1988). The amount of disruption the government must prove is in inverse proportion to the nature of the employee's expression. The greater the protection afforded the employee's speech, the greater the showing of disruption must be. *Connick*, 461 U.S. at 150. What is said, to whom it is directed and where it is spoken are factors which shape the interests of both the governmental employee and the employer. *See generally* Rynard, *supra*.

145. Under federal law, the Hatch Act restricts the political activities of federal employees in the executive branch, 5 U.S.C. § 7324 (1988) (prohibits active political management or active participation in a campaign), and employees of state and local agencies that receive federal funds, 5 U.S.C. § 1502 (1988) (prohibits use of official influence to affect the results of an election, solicitation of funds for political purposes and candidacy for elective office in a partisan election). The Hatch Act restrictions pertain only to partisan political activity. United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947) ("Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success."); Bauers v. Cornett, 865 F.2d 1517, 1524 (8th Cir. 1989).

Many states also have passed legislation which restricts the political activities of public employees. *See* U.S. COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, 2 A COMMISSION REPORT: "COMPILATION OF STATE LAWS REGULATING POLITICAL ACTIVITY OF EMPLOYEES," 91-157 (1968) (compares state laws with the Hatch Act); HOWARD M. ZARITSKY, STATE LAWS AND REGULATIONS REGARDING THE POLITICAL ACTIVITIES OF STATE EMPLOYEES: THE SO-CALLED "LITTLE HATCH ACTS" (1975). The scope of these restrictions varies. *See Bauers*, 865 F.2d at 1525 & n.9.

146. Less formal clearance procedures are also a cause for concern. In

owned by the government or is in a type of partnership with a governmental entity.[147] The federal government as an employer sometimes requires prospective employees to contractually bind themselves not to release classified information. A few agencies, such as the Central Intelligence Agency and the Federal Bureau of Investigation, require a contractual relation with its employees which grants the agency the right of prepublication review of matters concerning the agency, regardless of whether the information is classified.[148] These prepublication review provisions create a conflict between the government's interest in national security and the individual's interest in free speech.

These provisions have been consistently upheld. In *Snepp v. United States*,[149] one of the earliest attempts by the government to enforce such a prepublication review agreement, the United States Supreme Court upheld the constitutionality of such agreements, finding that government agencies can act to protect substantial governmental interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.[150] The Court went on to decide that the former intelligence agent's publication of unreviewed material relating to intelligence activities in violation of a prepublication review agreement constituted a breach of contract and a breach of the fiduciary duty of loy-

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Pickering, the Supreme Court left open the issue of "how far teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon before bringing the complaints before the public." 391 U.S. 563, 572 n.4 (1968). *See also* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975); Swaaley v. United States, 376 F.2d 857 (Ct. Cl. 1967); Meehan v. Macy, 392 F.2d 822, 838-39 (D.C. Cir. 1968); *cf.* Huff v. Secretary of the Navy, 413 F. Supp. 863, 869-70 (D.D.C. 1976); Klein v. Civil Service Comm'n, 152 N.W.2d 195, 201 (Iowa 1967).

147. *See, e.g.*, Foster v. Ripley, 645 F.2d 1142, 1146-47 (D.C. Cir. 1981); Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991)(pre-publication clearance regarding preliminary reporting of research results by recipients of federal grants held unconstitutional).

148. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 507- 08 (1980) (as an express condition of his employment with the CIA, "Snepp had executed an agreement promising that he would 'not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.'").

149. 444 U.S. 507 (1980).

150. *Id.* at 509 n.3.

alty.[151] The Court then held that the breach of trust impressed a constructive trust upon Snepp's profits in favor of his government employer.[152]

The constitutional issues which arise out of prepublication review concern the constitutional rights of government employees to free expression and the prohibition of prior restraints on protected expression. It is the right to express one's view on matters of public concern, not the right to make money, which is protected by the constitution.[153] These questions remain minimal so long as the primary concern of such prepublication clearance is the administrative and contractual aspects of a writing project. These aspects include the use of institutional resources, the impact on individual and institutional productivity, as well as the acceptance of royalties or

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151. *Id.* at 510-12. The contract rights of the government employer have been emphasized in subsequent decisions. *See, e.g., In re* Steinberg, 195 Cal. Rptr. 613, 617 (Ct. App. 1983) ("The prior restraints on publication in these cases were therefore upheld since the government had a contractual right to impose such a restraint.").

152. "[The constructive trust] remedy is the natural and customary consequence of a breach of trust." *Snepp*, 444 U.S. at 515. *See* Henry R. Kaufman, *Introduction: The Snepp Case–Government Censorship Through the 'Back Door'*, 1 COM. & LAW 1 (Spring 1979); James Peter Rau, Note, *Government Secrecy Agreements and the First Amendment*, 28 AM. U. L. REV. 395 (1979).

153. Generally, the Constitution does not protect an individual's private economic interests which he or she might attempt to further by written public expressions. *See* United States v. Hunter, 459 F.2d 205, 211-13 (4th Cir. 1972) (prohibition against publishing a racially discriminatory advertisement upheld as it affected the press only in a commercial context and not in the dissemination of ideas). *Cf.* Perry v. Sinderman, 408 U.S. 593 (1972); Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981); Mazaleski v. Truesdell, 562 F.2d 701 (D.C. Cir. 1977); Cardinale v. Washington Technical Inst., 500 F.2d 791, (D.C. Cir. 1974). This issue has arisen in current litigation concerning a provision of the 1989 Ethics Reform Act which prohibits all federal employees from accepting honoraria for articles, appearances or speeches. *See* 5 U.S.C. § 501(b) (1990) ("An individual may not receive any honorarium while that individual is a Member [of Congress], officer or employee [of any of the three branches of the federal government]."). Government attorneys have argued that free speech remains protected under the provision, stating that it is only payment for the speech that is prohibited. Dana Priest, *In New Ethics Order, Fine Lines and Fines: Career Employee Who Accepted Pay for Article Awaits Consequences of His Defiance*, WASH. POST, May 29, 1991, at A17. The honoraria ban, as it applied to executive branch employees, was held to be unconstitutionally over-inclusive in that the prohibition did not require a relationship between the acceptance of payment and an act of favoritism. The ban was simultaneously held to be unconstitutionally under-inclusive in that various types of expression were excluded from the prohibition, even though payment for the expression could be linked to a pledge of political favoritism. National Treasury Employees Union v. United States, 788 F. Supp. 4, 11 (D.D.C. 1992).

other extra payments for the work. Any review of the substance of the employee's product should be content-neutral and performed in a perfunctory manner.

Those in management who are responsible for drafting and carrying out policies and procedures governing outside writing by employees should consider the constitutional dimension of their activities. If disciplinary action must be taken against employees because of their private writing activities, the administrative officers responsible for the action should be certain that the employee's rights of free speech are not at issue.

IX. CONCLUSION

Private writing may be of great benefit to the employee who creates it, as well as to our society. The private benefits may be personal satisfaction, professional esteem and reputation, or monetary reward. To the extent the personal writing also provides a benefit to the employee's institution and to its overall purposes, the institution is well-advised to assist and encourage its completion.

However, when the personal writing may be detrimental to the institution, in the form of interference with essential productivity in the workplace or damage to the integrity and reputation of the institution, the institution is fully empowered to restrict or prohibit such activity. Such action should be taken pursuant to a pre-existing written policy which is previously made known to all who work for the institution.

Individual determinations should be made promptly after all factors have been considered. Final determinations should be fully explained to the employee. When personal writing is permitted with use of institutional resources, the employee and the institution should sign a written agreement, which specifies the extent to which the personal writing project may use institutional resources or encroach on the institution's interests.

Because of the overlapping complexities of conflict of interest, abuse of position principles and the copyright laws, it is important that there be policies to guide management and staff. Also, in cases that have special circumstances and do not fit within established policy, there needs to be a customized prior written understanding reached between the individual and the organization before the employee undertakes writing

efforts which are beyond the scope of established job responsibilities. This understanding is particularly necessary when the employee expects to obtain any significant amount of personal remuneration for his or her writing efforts.