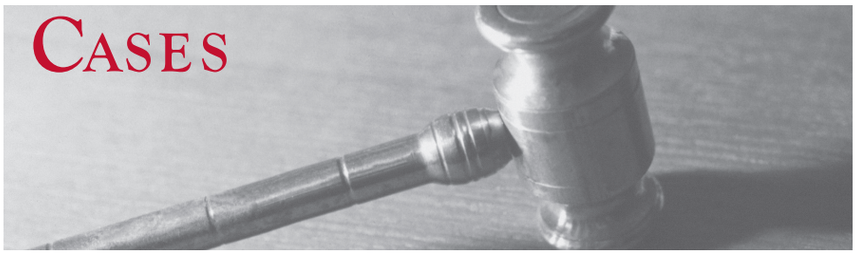
Cases



by Erich R. Eiselt, Assistant General Counsel

Get Off the Streets and Away From the Cars: Alternative Channels for Distributing Papers

In a case closely followed by IMLA, the Sixth Circuit recently upheld a Brentwood, Tennessee ordinance that prohibits the distribution of periodicals or flyers on any street or to the occupant of any motor vehicle on a street.

*The Contributo*r is a newspaper sold by homeless and formerly-homeless individuals as a way to educate people about homelessness and help vendors develop job and communications skills. In early 2011 two vendors selling the paper on the sidewalk of Brentwood, Tennessee (City) were issued $125 citations for violating the Brentwood Municipal Code, which prohibited people from using any portion of the City's street, alley, sidewalk, or public right-of-way to sell goods or materials.

The City, recognizing that the law might well be unconstitutional, revised it in July 2011. The revised ordinance (Ordinance) stated:

> Nothing in this section or in any other part of this Code shall be construed as prohibiting the sale or distribution of newspapers, magazines, periodicals, handbills, flyers or similar materials, except that:
>
> (1) Such activity shall be prohibited on any portion of any street within the city.
> (2) Such materials shall not be handed to the occupant of any motor vehicle that is on a street, nor shall any action be taken which is intended or reasonably calculated to cause the vehicle occupant to hand anything to the person selling or distributing the materials.

Brentwood Municipal Code Ordinance 58-1

The Contributor thereafter hesitated to sell in the City, fearing citations and fines. It challenged the Ordinance on First Amendment grounds, alleging that it was a content-based restriction on protected speech, not necessary to a compelling governmental interest or, alternatively, even if it was content-neutral, it was not narrowly tailored and did not leave open adequate alternative channels of communication. Plaintiffs sought to enjoin enforcement of the Ordinance. On cross motions for summary judgment, the District Court for the Middle District of Tennessee ruled in the City's favor, finding the Ordinance to be a content-neutral regulation of a traditional public forum and narrowly tailored. The district court also found that the paper had sufficient alternate channels of distribution –"door-to-door, through subscriptions, on private property with permission, to pedestrians on sidewalks or in appropriately placed newsracks."

On appeal, *The Contributor* conceded that the law was a content-neutral time, place and manner restriction of a traditional public forum. The paper's remaining argument was that the Ordinance effected a "*de facto* forum closure and leaves open only alternatives that are not used by a unique publication such as *The Contributor,*" asserting that sales to automobile occupants was its only viable forum.

The Sixth Circuit disagreed. Citing its own precedent in *Phelps-Roper* it clarified that "An alternative channel can be appropriate even the speaker is denied its best or favored means of communication." Cases cited by plaintiffs for the proposition that eliminating a particular forum can undermine First Amendment rights were not valid comparators: in one, an aggrieved Chicago Blackhawks fan was prevented from reaching fellow fans near the team's arena. In another, day laborers were prevented from reaching potential employers.

In contrast, the court said, *The Contributor's* audience was "the general citizenry of Brentwood." This group could be reached by alternatives the City had offered, including door-to-door sales, as well as via other means suggested by the court, including "e-mail subscriptions." (The court even held open the intriguing possibility that vendors could continue sales to auto occupants from the sidewalk "so long as they do not step into the road to sell a newspaper or otherwise violate the Ordinance"). The court was undeterred by *The Contributor's* argument that door-to-door sales would unfairly require newspaper vendors to "foist themselves" on the public; "an alternative is not inadequate merely because the speaker must change its tactics."

The paper also asserted that the City must demonstrate that its alternatives were effective. This overstated the point. Plainly stated, the Sixth Circuit has "never placed an onerous burden on a municipality to prove the adequacy of alternative channels of communication." Rather, a municipality is simply required to "proffer a list of potential alternative avenues of communication that are reasonable and made in good faith." The City had done so, shifting the burden to the paper to show why the alternatives were ineffective. *The Contributor* could not sustain that burden, and can no longer make sales in the streets of Brentwood.

The Contributor v. City of Brentwood, No. 12-6598 (6th Cir. August 14, 2013) http://www.ca6.uscourts.gov/opinions.pdf/13a0225p-06.pdf (last accessed August 21, 2013)

NOTE: We salute IMLA member Roger Horner, Brentwood City Attorney, and Howell & Fisher's (Nashville, Tennessee) Robert Burns (who argued the case) and Mark Harrod on the City's big win in this matter.

Neighboring Jurisdictions Can Constitute "Adequate Alternatives" For Banned Adult Business

In another decision construing alternative channels of communication, the Eighth Circuit has held that when a small town takes the extreme step of completely eliminating all commercial