International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

IMLA Code Enforcement Conference

COSPLAY: ENFORCING DECENCY COVES v. THE 1ST AMENDMENT

David A. Ives
Assistant City Attorney
Murfreesboro TN 37130

Karen Blake
Conflicts Attorney
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, Tennessee 37201

©2015 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2015 Code Enforcement Program, held October 3-4, 2015 in Las Vegas, NV. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

OUTLINE

I. What is the governmental interest?

II. In public or private?

III. Is enough covered up?

IV. Is too much covered up?

V. Enter the First Amendment:

   A. Freedom of expression?

   B. Right to Petition Government?

   C. Freedom of Association?

I. What is the governmental interest?

The preamble to the Constitution of the United States declares: "We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity…."

Article I, Sec. 1, of the Tennessee Constitution provides that "…all free governments are founded on [the] authority [of the people], and are instituted for their peace, safety, and happiness…."

Article III of the Charter of the City of Murfreesboro (which is actually a Special Act adopted by the Tennessee General Assembly) enumerates 68 separate "corporate powers." Included are:

> Sec. 30 "… to define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, vocations, callings, uses of property and all other things whatsoever detrimental, or liable to be detrimental to the health, morals, comfort, safety, convenience, or welfare of the inhabitants of the city…."
>
> Sec. 31 "To prescribe and define the limits within which business occupations and practices, liable to be nuisances or detrimental to the health, morals, comfort, security or general welfare of the people may lawfully be established or maintained."
>
> Sec. 36 "To license, tax and regulate theatrical and other exhibitions, shows and entertainments, and to suppress immoral or vicious or indecent theatrical and other shows, exhibitions and entertainments."
>
> Sec. 62 "To have and to exercise the fullest general powers and authority necessary for the protection of life, health and property … and to adopt and enforce such ordinances, rules and regulations, whether specifically enumerated herein or not, as may be deemed necessary and proper to preserve the health, peace safety, quiet, good order and general welfare of the city and the inhabitants thereof."

II. In public or in private?

Most likely, even the most strident advocate for morals and decency would admit that, in today's world, the acts of consenting adults in private – so long as they do not involve criminal behavior such as prostitution or use / sale of illegal drugs – are outside the purview of local, state or federal governmental authorities. But the distinction between public and private may sometimes be difficult to ascertain.

Matthews Municipal Ordinances, at Sec. 49:12. Public Indecency, prohibits a variety of acts "under circumstances in which his or her conduct is likely to be viewed by and affront others, not members of his or her household."

Murfreesboro's Section 21-23, Public Indecency, includes the following:

> (D) *Public place* means a place to which the public or a group of persons has access and includes but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequence in a public place."

Are hotel ballrooms, when rented for a private gathering, "public places"?

III. Is enough covered up?

Cities have a duty, as well as the authority, to regulate and suppress conduct that threatens the public health, safety, morals, security and general welfare of the City and its citizens.

Exercising this authority, cities have enacted a variety of laws aimed at protecting the people from evil. Matthews Municipal Ordinances contains the following provisions that might be applicable to a COSPLAY gathering:

> "Sec. 49:6. Immoral or obscene shows or exhibits.
> Section 1. No person … shall allow upon the premises under their control, the exhibiting of any bare or uncovered breast at or below the areola area or the exhibiting of any breast at or below the areola area of girls or women covered with a transparent or semi-transparent material

> which exposes to public view the breast at or below the areola area, or exhibiting of bare or uncovered buttocks, genitals pubic hair, or anus of either girls, women, boys or men, or the exhibiting of buttocks, genitals, public hair or anus covered with a transparent or semi-transparent material which exposes to public view the buttocks, genitals, pubic hair or anus."
>
> "Section 2. No person … shall produce or put on any performance or exhibit that includes [any of the above]."

Murfreesboro's Code includes the following:

> "Section 21-23 Public Indecency.
> (A) A person who knowingly or intentionally, in a public place:
>
> …
>
> (2) appears in a state of nudity;;
>
> …
>
> Commits public indecency….
> (B) ***Nudity*** means the showing of the human male or female genitals, pubic area, or buttock with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.
>
> …."

A separate section expressly prohibits exposing minors (a person under the age of 17) to the described "nudity."

How many participants in a COSPLAY or amine gathering are in violation of codes such as these? Would more be in violation if there are minors present?

A slight digression – a recent interest in "saggy pants" ordinances. Some address the display of too much backside skin, while others prohibit the display of underwear above the pants.

IV. Is too much covered up?

At the opposite end of the spectrum, but equally applicable to COSPLAY gatherings, are state laws and municipal ordinances that prohibit or restrict the wearing of masks in public. With their origins in the late nineteenth and early twentieth centuries in response to activities of the Ku Klux Klan, these laws and ordinances prohibited wearing a mask or disguise in public. Some required an intent to threaten or intimidate along with being masked, and others included exceptions for Halloween, Mardi Gras, theatrical productions, and the like. And some of the latter require advance permission from the mayor or chief of police.

A New York law was interpreted as prohibiting "two or more" masked persons from congregating together during a 2011 "occupy" demonstration.

Sec. 21-111 of the Charleston SC code provides,

> "No person over sixteen years of age shall appear on any street, highway, alley, public park or other public place in the city in any mask or disguise which conceals the identity of such person without the permission of the chief of police."

There are exceptions for a "traditional holiday costume," for a "trade or employment" where a mask is required for physical safety, for a "theatrical production or masquerade ball," and for a gas mask in a "civil defense drill" or an "emergency."

Would being masked at a COSPLAY gathering violate this provision?

In Knoxville TN, street performers Spiderman and a Mime were arrested for violating an ordinance prohibiting appearing masked in public. After that incident, the city law director was quoted as saying, "Obviously, there's a tension out there between public safety issues and these people who want to wear masks. But by the same token, we think the street performers are a valuable asset that adds some zest to downtown, and we certainly don't want to arrest children on Halloween." Knoxville has since amended ordinance Sec 19-62 to prohibit intentionally concealing a "person's identity by wearing a mask, hood or other device or means of disguise covering the face" (1) to facilitate committing an offense, including threat, harass or intimidate another, (2) if likely that a reasonable person would be put if fear of their safety, (3) to evade or escape

discovery, recognition or capture, or (4) for flight or escape when charged with an offence. A street-performing Spiderman in Knoxville TN is safe today.

The Georgia "Anti-Mask Act provides, in part,

> "A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public war or public property or upon private property of another without written permission…."

Shade Miller was convicted of violating that Act when he appeared in public wearing full KKK regalia, including a mask. Upholding the conviction, the Georgia Supreme Court said,

> "The law … regulates only the non-communicative function of the mask, the concealment of the wearer identity. In other words, the statute 'seeks to proscribe conduct, not free speech, and … that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct….'"[1]

Should a masked COSPLAY participant be convicted under this Act? Is there any implication of criminal intent from Tinkerbelle? But, what about the possibility of the Joker or the Devil making inappropriate contact with Tinkerbelle – you can use your imagination – and avoid identification and prosecution because his face is covered?

The Georgia Supreme Court reached the opposite result in *Daniels v. State*, 448 S.E.2d 185 (GA 1994), where Roy Daniels, who supplemented his Social Security Disability income by collecting aluminum cans for recycling and was well known in the neighborhood, found a football helmet and a green

[1] *State v. Miller*, 398 S.E.2d 547 (GA 1990). Two interesting law review articles discuss this case and reach opposite conclusions as to the propriety of the holding. Oskar E. Rey, ANTI-MASK LAWS: EXPLORING THE OUTER BOUNDS OF PROTECTED SPEECH UNDER THE FIRST AMENDMENT, 66 Wash. L. Rev. 1139 (1991) and Wayne R. Allen, KLAN, CLOTH AND CONSTITUTION: ANTI-MASK LAWS AND THE FIRST AMENDMENT, 25 GA. L. Rev. 819 (1991).

wrestling mask while looking through trash cans at the University of Georgia campus, put both on and entertained some neighborhood children who "laughed, talked and teased with Daniels, calling him by his neighborhood nickname, and generally appeared to enjoy the game."

V. Enter the First Amendment.

The First Amendment to the United States Constitution provides simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Speech includes not only the spoken and written word, but also "expressive" or "symbolic" conduct such as theatrical performances, dancing or flag burning that is intended to convey a message. Peaceable assembly includes the right of association, usually in the context of membership in a group that advances beliefs or ideas.