

OAAA LEGAL REPORT

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Mobile Billboards

(OAAA Counsel Eric Rubin examines varying court rulings in cases involving constitutional claims from mobile billboard operators. In the end, Rubin says reasonable self regulation would help litigants.)

Recent decisions by a federal court in Florida and a state appellate court in California concerning mobile billboards stand as clear reminders that, despite many factors that make each form of outdoor media distinct, overarching legal issues of common concern unite the various segments of the outdoor industry and link them together. These two cases demonstrate how First Amendment precedent that evolved with respect to conventional billboards also shapes the evolution of mobile sign regulation. These decisions also illustrate how many of the legislative and public affairs lessons learned first with respect to conventional billboards are adaptable to alternative outdoor as well.

Let's first take a look at the decision of the United States District Court for the Middle District of Florida in Bonita Media Enterprises, LLC v. Collier County, et. al., ____ F.Supp ____ (No. 2-CV-411, decided February 13, 2008). Bonita owns and operates mobile billboards in Collier County, FL, and other areas. Each side of Bonita's vans displays one tri-vision panel that rotates every eight seconds. Bonita's signs disseminate both commercial and noncommercial messages.

In 2006, Collier County Code Enforcement issued Notices of Violation alleging that Bonita had violated three fairly typical ordinance provisions that prohibited the following:

- 1."Any sign which employs motion, has visible moving parts, or gives the illusion of motion, excluding time and temperature signs,
2. Any sign which constitutes a traffic hazard, or detrimental to traffic safety by reason of its size, location, movement, content, coloring, or method of illumination, or by obstructing or distracting the vision of drivers or pedestrians,

3. Any signs mounted on a vehicle, be it the roof, hood, truck bed and so on, where said sign is intended to attract or may distract the attention of motorists for the purpose of advertising a business, product, service, or the like, whether or not said vehicle is parked, or driven, excluding emergency vehicles, taxi cabs, and delivery vehicles, where a roof mounted sign does not exceed two square feet."

Bonita first challenged the county's citations on First Amendment and other grounds before the Collier County Code Enforcement Board. The Board rejected Bonita's claims and affirmed the violations. Bonita then brought suit in federal court under the Civil Rights Act. After hearing oral argument, the federal court issued an order granting a preliminary injunction against the county. In granting a preliminary injunction, a court must find that the complaining party is likely to succeed on the merits of its case after full hearing. There, the court's preliminary ruling against Collier County effectively ended this litigation.

In its written opinion, the U.S. District Court reviews Collier County's mobile billboard restrictions by applying the same First Amendment analysis established by the Supreme Court for conventional billboards in Metromedia v. San Diego (1982). In Metromedia, the Court recognized that conventional outdoor advertising signs are a medium for the dissemination of speech protected by the First Amendment. Under Metromedia, the essential constitutional inquiry is whether a restriction on signs has the result of favoring commercial speech over noncommercial speech, or whether the restriction at hand is a "content neutral, time, place and manner" restriction that simply regulates the physical dimensions, safety precautions, or other "non-speech-related" factors without favoring a particular category of speech or viewpoint.

Accordingly, the District Court begins its analysis with a section-by section analysis of the Collier County regulations. The Court concludes that these prohibitions actually do depend on the message being disseminated on a mobile sign, and thus operate as a content-based regulation.

"Section 5.06.06 (U) prohibits signs employing motion, visible parts or the illusion of motion but excludes time and temperature signs... Section 5.06.06(W) prohibits signs which constitute a traffic hazard... by reason of, among other things, 'content'...Section 5.06.06(X) contains double content-based restrictions. It first applies to signs mounted on vehicles intended to attract attention 'for the purpose of advertising a business, product, service, or the like' but not for other purposes. The section then excludes certain prohibited signs based on the type of vehicle, including emergency vehicles, taxi cabs and delivery vehicles."

However, although always constitutionally suspect, every content-discriminatory regulation does not automatically violate the First Amendment. In order to pass constitutional

scrutiny, the particular speech restriction at issue must be individually scrutinized to determine whether it in fact is counter-balanced by a clear and compelling governmental interest and is so narrowly drawn that it does not affect any more speech than is absolutely necessary. The severity with which the courts apply these standards and the degree of latitude that they afford the government's judgment depends on whether the regulation only centers on commercial speech, or whether it impinges on more highly protected noncommercial speech.

The purpose of the Collier County mobile sign ordinance was to protect traffic safety and aesthetics. And, having found that those provisions were not content neutral, and that they did in fact constrain noncommercial mobile signs, the federal court applies the strictest of all constitutional tests.

"While aesthetics, traffic safety and economic growth are substantial governmental interests, they have not been found to be compelling governmental interests when used to justify content-based restrictions. The Sign Code's reliance on these factors is superficial at best, and are not tailored to accomplish the County's asserted interests. For example, it is at best unclear how allowing a taxicab or a delivery truck to have signs with moving parts contributes to safety and aesthetics but disallowing plaintiffs vehicles furthers such concerns. Therefore, the Court concludes that plaintiff is substantially likely to prevail in its claim that the Collier County Sign Code provisions at issue in this case are unconstitutional."

Let's now consider the California Court of Appeals search for truth and justice in Showing Animals Respect and Kindness v. City of West Hollywood, 166 Cal.App 4th 815 (No. B201721, Second Dist. Dist. One, September 9, 2008.) The plaintiff in this case, aka "SHARK," is a nonprofit organization that campaigns against cruelty to animals. Subtlety is not SHARKS's strong suit. In order to advance its cause, SHARK operates its own mobile "Tiger Truck" in the Los Angeles area. The Tiger Truck mounts four LED video screens and a loudspeaker system. The trucks show static and full motion video messages that graphically depict scenes of slaughterhouses, bullfights, and similar fare. And just to ensure maximum impact, the Tiger Truck's speakers augment the video displays by broadcasting the anguished cries of injured animals. One evening, at about 11:45 PM, the Tiger Truck was operating along Santa Monica Boulevard in West Hollywood when the police pulled the vehicle over and issued a citation for violating the following provision of the city sign code:

"It shall be unlawful for any person to conduct, or cause to be conducted, any mobile billboard advertising upon any street or other public place within the city in which the public has the right to travel."

The West Hollywood Ordinance defines "Mobile Billboard Advertising" as:

"Any vehicle, or wheeled conveyance which carries, conveys, pulls or transports any sign or billboard for the primary purpose of advertising."

The ordinance also exempts the following mobile signs from the "primary purpose of advertising" prohibition:

"Any vehicle which displays an advertisement or business identification of its owner, and not used merely, mainly or primarily to display advertisements, or buses or taxicabs."

Like Collier County, the West Hollywood restrictions are based on legislative findings that "...mobile advertising inhibits the safe movement of traffic, contributes to air pollution, and detracts from the overall aesthetics of the city."

SHARK followed the same path set by earlier billboard litigation in Metromedia v. San Diego and its progeny, and challenged the West Hollywood ordinance on the basis that it was a content-based regulation. From a First Amendment standpoint, the SHARK case was even more compelling than Bonita because all of the Tiger Truck's messages were purely noncommercial in character. And while the West Hollywood Code was being applied to bar these non-commercial messages, like the Collier County Sign Code, it broadly permitted commercial identification messages on delivery trucks, and completely exempted signs on buses and taxis.

Under the law, there really was no intellectually honest way for the court not to view SHARK as a noncommercial speech case, and to find that the West Hollywood Ordinance favored commercial over noncommercial speech. Nevertheless, in a masterful bit of mangled analysis, the California Court takes a sharp detour away from main-stream First Amendment case law. In order to avoid crashing the Tiger Truck head long into Metromedia (sorry!), the court finds that the West Hollywood ordinance regulates the "manner of speech...and not its content." Why?

"Taken together [the code provisions] apply to all vehicles whether they carry a commercial or noncommercial message...because both are prohibited from driving through the streets of West Hollywood for the primary purpose of advertising."

Of course, that is not at all how the ordinance actually operates with respect to mobile speech. In reality, the ordinance allows any vehicle displaying a commercial "on-premise message" that pertains to the owner of the vehicle to wander at will through West Hollywood. Yet SHARK's noncommercial messages are excluded. As we saw in Bonita, that dichotomy in the way different mobile speech is treated automatically prompts the constitutional issue. Indeed, the

court seems to understand that its reasoning could use a little shoring up, so it adds this wonderful additional piece of logic, looking to the definition of a "Mobile Billboard" cited above.

"Our view that the ordinance regulates the manner of speech, not its content, is further supported by the language that the city used to express its prohibition on mobile billboard advertising...The words [in the statutory definition of Mobile Billboard Advertising] 'carries,' 'conveys,' 'pulls,' and 'transports' are active verbs showing that the ordinance is concerned with the speaker's acts, not the content of the speech."

A nice lesson on grammar, but this particular ordinance does not regulate "pulling" or "carrying" in the abstract. It regulates the "pulling" or "carrying" of speech. And while it allows the "pulling" or "carrying" of broad categories of commercial speech, it is being applied to prohibit SHARK's purely noncommercial messages. The court struggles to deal with that argument.

"We disagree with SHARK's interpretation of the ordinance as allowing buses and taxis, but not the Tiger Truck, to roam the city streets for the 'primary purpose of advertising.' The object of the ordinance is to eliminate from city traffic vehicles that have no real purpose apart from advertising...Buses and taxis would be on the streets whether or not they bore advertising. Thus the ordinance is reasonably calculated to reduce traffic hazards, visual clutter and pollution by banning vehicles that would not be on the streets but for the conveyance of signs or billboards 'for the primary purpose of advertising.' "

Again, the court begs the question. The point is that West Hollywood does in fact allow certain vehicles "carrying" speech in a way that is not content neutral. So the California Court again grasps around for support and comes up with this analogy from a case about the regulation of street food carts that really has nothing to do with speech.

"Nor is it relevant that the Tiger Truck is a unique method of communication able to grab public attention in a way that other media may not. *Selling message-bearing raviolis on a street corner* would also be a unique method of communication but would not escape a ban on the sale of food and refreshments on the city sidewalks."

Really, that is what the opinion says. "Message-bearing raviolis!" Unbelievable.

So why did the California Court write a decision that ignores an entire body of Supreme Court First Amendment jurisprudence and that borders on the absurd...actually, it doesn't *border* on it at all. The heart of the SHARK case is a truck that drives around the streets of West Hollywood showing full action videos of animal slaughter with an accompanying sound track. The judicial temptation is to stop that truck in its tracks before it gets into the judge's

neighborhood and terrifies his children. But judges can't just say that, so you get a decision like the one in SHARK.

There are constitutional ways for the City of Hollywood to control the Tiger Truck. There are lots of cases – common reading in law schools -- that uphold restrictions on the use of loudspeaker trucks. The display of animation and full action video on a moving vehicle is another factor that can be effectively regulated. There are ways to reenact the West Hollywood ordinance so that it is in fact content neutral. However, to accomplish that, the court would have had to invalidate the West Hollywood mobile sign ordinance. That would leave the Tiger Truck in operation until the ordinance could be changed. And for the time being, the cries of cows would continue to be heard in West Hollywood neighborhoods. So the California Court of Appeals took the detour from established law.

What does this say to the operators of mobile billboards? First, SHARK's specific intention was to make the Tiger Truck as obnoxious and "in your face" an experience as possible. The LED displays were animated and showed videos. The truck was operating at 11:45 at night. Second, the Tiger Truck roamed freely in commercial and residential areas without any self-imposed restraints. By their nature, mobile billboards are difficult to control because they are ...mobile. They can be in and out of a jurisdiction in a flash, so the regulatory reflex is to ban them completely.

For starters, to prevent a SHARK type of result, responsible mobile billboard operators should develop a specific code of practices that commits to reasonable times and places of operation. Voluntary restrictions should be adopted that proscribe full action video and flashing displays, much like the criteria that have been adopted for digital billboards. These and other measures are not gratuitous gestures. A mobile outdoor company that gets a citation has the burden of demonstrating that it is not just deploying a bunch of "Tiger Trucks" and that its operations are reasonable. That is the price of admission to the long line of helpful precedent already established for billboards that leads a court to the type of decision in Bonita.

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