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Constitutional Law: Long Live Rock...and the First Amendment

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CONSTITUTIONAL LAW: LONG LIVE ROCK . . . AND THE FIRST AMENDMENT

Sex, drugs, and rock and roll in the city of Burbank? Never! swore Councilman James Richman. But after the Ninth Circuit's decision in *Cinevision Corp. v. City of Burbank*,[1] the sex and drugs are optional but the rock and roll is here to stay.

The Ninth Circuit affirmed a district court decision, and held that the City of Burbank and Councilman Richman violated the first amendment's freedom of speech provision by denying Cinevision Corp. ("Cinevision") the right to promote concerts in the Starlight Bowl because such concerts were considered "hard rock."[2] The Council and Richman could not avoid liability by claiming legislative immunity from Cinevision's civil rights action because the Council and Richman's actions were considered by the court to be executive actions rather than legislative. The Council and Richman, though, could not even enjoy the qualified, limited, immunity afforded to executive actions because they admittedly acted in bad faith toward Cinevision, and bad faith actions extinguish the protections of limited immunity.[3]

In 1975, Cinevision entered into a five year contract with the city of Burbank to promote live entertainment during the summer in the Starlight Bowl ("Bowl"), a municipally owned amphitheater.[4] The contract gave the Council the right to exclude performers or performances, if the nature and content of the act had the potential of creating a public nuisance or unlawful behavior.[5] Cinevision had the contractual right to confer with the Council over an excluded performer or performance, but the decision of the Council, at least according to the contract, was final and binding.[6]

Cinevision presented concerts at the Bowl during the summers of 1975 through 1978.[7] In the summers of 1977 and 1978 Councilman Richman openly disapproved of all the Cinevision concerts.[8] Cinevision

1. 745 F.2d 560 (9th Cir. 1984).
2. *Id.* at 565-66.
3. *Id.* at 577.
4. *Id.* at 565.
5. *Id.* The contract stated in pertinent part that "[t]he City shall have the right to disapprove and cancel any show or performance which has the potential of creating a public nuisance or which would violate any State law or City ordinance."
6. *Id.*
7. *Id.*
8. *Id.*

proposed eight concerts for the summer of 1979.[9] The Council rejected all but two performers[10] because the remaining artists played "hard rock" music and this would attract an "undesirable" crowd to the city of Burbank.[11]

Cinevision filed suit against the City and Richman in the Federal District Court for the Central District of California under 42 U.S.C. section 1983, claiming a violation of its first amendment rights by the City and Richman.[12] Richman was sued because he was a member of the City Council and because of his blanket opposition since 1977 to any concert Cinevision proposed. Cinevision claimed that Richman's acts constituted "wanton, willful, malicious, or oppressive conduct."[13] The jury found that the City and Richman had violated Cinevision's first amendment rights and awarded compensatory damages of $20,000 against both the City and Richman, and a $5,000 punitive damage award against Richman.[14] Cinevision was awarded $119,228 in attorneys' fees pursuant to 42 U.S.C. section 1988,[15] which allows for attorneys' fees to the "prevailing party" in a civil rights action.

In affirming the district court's holding, the Ninth Circuit reasoned that since a promoter is a vital link, or conduit, in bringing to the public the protected expression of the artist, the promoter's ability to promote should garner the same first amendment protection as does the protected expression of the artist.[16]

With this concept, Judge Reinhardt extended the first amendment principles found in *Young v. American Mini Theaters*,[17] and applied those principles to the rock promoter. The *Cinevision* court cited Justice Powell's concurring opinion in *Young*, which noted that "[t]he central First Amendment concern remains the need to maintain free access of the public to the expression."[18] Without the promoter, artists would not

9. *Id.* at 566. The proposed artists were: Jackson Browne, Todd Rundgren, Roxy Music, Robert Palmer, Poco, Al Stewart, Patti Smith, and Blue Oyster Cult.

10. Robert Palmer and Poco.

11. *Id.* The undesirables were narcotics users.

12. *Id.*

13. *Id.*

14. *Id.* In City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981), the United States Supreme Court held that a municipality is immune from punitive damages under § 1983; therefore, punitive damages could not be imposed upon the City.

15. *Cinevision*, 745 F.2d at 581. Section 1988 provides, in relevant part, that in a 1983 action, "the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the costs."

16. *Id.* at 567-68. *See also* Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1063 (1st Cir. 1980).

17. 427 U.S. 50 (1976).

18. *Cinevision*, 745 F.2d at 568, citing *Young*, 427 U.S. at 77.

be able to convey to the public their protected expression. By furthering the rights of the promoter, the rights of the artist are indirectly preserved.

Cinevision attorney Bert H. Diexler declared that "the ruling of the Ninth Circuit represents a victory not only for concert promoters but for concertgoers because it bars government entities from closing theaters to keep out groups based on content."[19] This is an important observation. The *Cinevision* decision fortified the position that the first amendment protects not only the right to provide expression but also the right to receive such expression. This concept was articulated by the United States Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[20] The Court stated that "[f]reedom of speech presupposes a willing speaker. [W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipient both."[21] Thus, the *Cinevision* ruling fortifies the protection of expression, given and received, and makes the logical extension of protecting the promoter's rights because it is the promoter that makes the expression available.[22]

In answering the City's claim that the Bowl was not a public forum, the Ninth Circuit found that publicly owned property used for a variety of expressive activity is considered a public forum. Government entanglement in the origination and operation of the facility thereby subjects government regulation to the constraints of the first amendment.[23] Once limited by the first amendment, the City could not then exclude an individual or group without a compelling governmental interest to override the first amendment's protections.[24] Arbitrary factors such as political views and the makeup of the audience do not provide a sufficiently compelling governmental interest to overturn a performer's first amendment rights.[25]

With regard to the public forum issue, attorney Diexler may be

19. Jackson, *Concert Promoter is Backed by Court in Burbank Dispute*, L.A. Daily Journal, Oct. 22, 1984, at 1, col. 5.

20. 425 U.S. 748 (1975).

21. *Id.* at 756.

22. The court's decision to uphold the first amendment rights of a promoter is not a landmark decision but a logical extension of the Supreme Court's decision in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952), which established that a promoter enjoys a first amendment right to promote for profit.

23. *Cinevision*, 745 F.2d at 569. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-21 at 689 (1978).

24. *Cinevision*, 745 F.2d at 569, citing Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

25. *Cinevision*, 745 F.2d at 577.

overly optimistic in his belief that the *Cinevision* ruling keeps the government from shutting down theaters in order to carry out content-based exclusion of groups. The *Cinevision* court recognized that "*although a state is not required to indefinitely retain the open character of the facility*, as long as it does so it is bound by the same standards as apply in a traditional public forum."[26] With this, the Ninth Circuit conceded that the government could terminate the "open character of a facility," thereby contradicting Diexler's absolute assertion. The court, however, failed to state when, and under what circumstances, such a termination could occur.

The question of when the government can eliminate the open character of a facility[27] is apparently a crucial question regarding content-based exclusion because it determines the status of the facility as either a public or non-public forum. The difference between the status of being a public forum as opposed to being a non-public forum is, however, erroneously thought to be significant. "In a non-public forum, the government is free to exclude speech or speakers based upon the content of the message, except in cases of viewpoint discrimination."[28] The difference in status, however, is actually not significant for purposes of content-based exclusion. The United States Supreme Court has noted that a governmental restriction, even in a non-public forum, will be upheld only if it is content-neutral.[29] Thus, the City's vigorous argument that the Bowl was not a public forum[30] was moot since the same first amendment constraints would have applied to the Bowl whether it was a public or non-public forum.

The *Cinevision* court determined the Bowl's public forum status by looking to the Supreme Court's definition of a public forum in *Perry Education Association v. Perry Local Educator's Association.*[31] The *Perry* court defined three categories of public forums[32] and the *Cinevision* court

26. *Id.* at 569 (emphasis added), citing *Perry*, 460 U.S. at 45-46.

27. The Court in *Perry*, 460 U.S. at 46 n.7, possibly referred to a change from a public forum to a limited public forum (a public forum created for a limited purpose) as an elimination of a forum's open character.

28. Faber and Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

29. United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981). *See also* Cornelius v. NAACP Legal Defense and Educational Fund, 105 S. Ct. 3439 (1985).

30. *Cinevision*, 745 F.2d at 570.

31. 460 U.S. 37 (1983).

32. *Id.* at 45-46. The other two categories in *Perry* are "traditional" public forums such as streets, parks, and areas historically devoted to assembly or debate; and public forums such as jails, military bases and other areas not considered forums for public communication.

found that the second category — "public property which the state has opened for use by the public as a place for expressive activity" — was applicable to the Bowl.[33]

An inherent difficulty with the *Perry* definition is that it fails to state when public property becomes a public forum. The fact that government owned or operated property is open to the public does not make it a public forum.[34] "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[35] The distinguishing element in *Cinevision* appears to be that the previous grant of access to the Bowl by the City to Cinevision "[t]ransformed publicly owned property into a public forum for expressive activity. . . ."[36] Implicit in this statement is that since Cinevision had promoted a variety of acts at the Bowl before, it was established that Cinevision had the right to promote expressive activity there in the future.

The court's determination about transforming publicly owned property into a public forum, questions whether the elevation from publicly owned property to public forum through the use of expressive activity is a threshold determination. In other words, was it the use by Cinevision, alone, that opened up the Bowl to public forum status? That this seems to be the intention of the court is found in the language that public property can become a public forum for expression "even if the expressive activity is promoted by a single entity."[37] As such, Cinevision, a single entity, opened up the Bowl for use as a public forum.

The court's "single entity" determination is a major weapon for the promoter, but is also important for an artist or any other person or group seeking use of a public forum for expressive activities. Granting access to one entity that provides a variety of expressive activity opens the doors for others to follow. This may provide an effective block to a municipality changing a forum's status from public to non-public forum to deny expressive activity through content-based regulation.

Establishing that the Bowl was a public forum, the court moved to the issue of whether the government could exclude persons from a public forum based solely on content regulation. It is generally recognized that the privileges and protections of the first amendment are not absolute and do not guarantee the right to communicate one's views at all times

33. *Cinevision*, 745 F.2d at 570, quoting *Perry*, 460 U.S. at 45. *See also* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 563 (Douglas, J. concurring and dissenting) (1975).

34. United States v. Grace, 461 U.S. 171, 177 (1983).

35. *Greenburgh*, 453 U.S. at 129.

36. *Cinevision*, 745 F.2d at 570.

37. *Id.* "Single entity" refers to a single promoter or single group of promoters.

and places or in any manner that may be desired.[38] While content neutral time, place, and manner restrictions may be reasonable,[39] expression restrictions based on content alone are not allowed.[40]

Selective exclusion can be allowed only when it is supported by a compelling governmental interest and is the least restrictive means of furthering that interest.[41] The interests of the City in *Cinevision* are at best absurd,[42] and the court recognized that those interests in no way justified denial of access to the Bowl.[43] Even if the Council's exclusion was in good faith and was found to stem from a compelling governmental interest, it still could not be valid because the exclusion was based on the performers being "hard rock." (Arguably, only two of the proposed eight groups fit that category.[44]) It stands to reason then, that a "bad faith interest,"[45] such as the views espoused by Richman, would never be compelling enough to overcome first amendment scrutiny.

It is not, simply, that the bad faith of the Council (or some of its members) determined the non-compelling nature of their interest. A good faith interest notwithstanding, a general fear of unlawful activity caused by the playing of "hard rock" music (as the Council feared) is too broad an interest to justify a content-based expression restriction.[46] This is sound reasoning, since to let municipalities show a generalized fear of

38. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

39. *Virginia State Board*, 425 U.S. at 771.

40. Police Dept. of Chicago v. Mosely, 408 U.S. 92, 95 (1972).

41. *Cinevision*, 745 F.2d at 571. *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968).

42. The Council (and especially Richman) was afraid the concerts would bring "sick people" to Burbank such as "the dopers and sexual misfits of Los Angeles" and that these people might corrupt "the youths of Burbank." *Cinevision*, 745 F.2d at 576 n.20. The humorous flaw to this argument is that "the dopers and sexual misfits" may very well enjoy the entertainment the Council wanted promoted, and would come to Burbank to partake of such entertainment, thereby raising the possibility not only of corrupting Burbank's youths but its adults as well!

43. *Id.* at 571, 577.

44. Anyone with even the least knowledge of popular music knows the folly of trying to define rock and roll and its progeny, and yet, several categories of rock and roll are readily apparent. "Hard rock" is better defined as "heavy metal," the evolutionary form of the 1960's "acid rock," and is characterized by loud volume, distorted guitars (produced by effects pedals such as a "fuzz box" or "overdrive"), pulsating bass lines, and hard-driving drum rhythms emphasizing bass and snare drum combinations. To categorize singers like Jackson Browne (who has many songs featuring solo guitar or piano), Todd Rundgren, or Al Stewart as "hard rockers" is as ludicrous as labeling Perry Como or Ella Fitzgerald "hard rockers" as well. Of all the proposed performers, only Blue Oyster Cult and possibly Patti Smith could be classified as "hard rock."

45. *Id.* at 578. Richman did not contest the jury finding of bad faith on his part. The court also had ample evidence of Richman's bad faith towards Cinevision. *Id.* at 578 n.25.

46. *Id.* at 572.

unlawfulness[47] as a compelling interest would allow such municipalities to engage in content-based restriction of expression and discrimination against certain groups under the guise of a good faith interest in promoting lawful activity. Sufficiently narrow standards for content-based restriction, insured by judicial scrutiny, help keep a check on municipal power by limiting unbridled and, in this case, uninformed decisionmaking.[48]

Finally, the court took a step that may have been unnecessary. The court discussed the theory that a municipality may dedicate a public facility to particular forms of expression in order to provide a greater diversity of entertainment in the community. This discussion is gratuitous because the City never claimed it excluded the proposed acts because they were not of the specific form of expression for which the Bowl was dedicated.

The court stated that the exclusiveness of a public forum, when bona fide, may show the government striving for diversity of entertainment, but noted that the first amendment limits the government's desire to inculcate certain values at the expense of other protected forms.[49]

The contention that dedicating a public forum to a certain form of expression will promote diversity works only if there are several public forums available. In a community with only one or two public forums, exclusivity would achieve just the opposite of the court's notion; it would accomplish exclusion, rather than diversity, and it would harbor discrimination.

The court noted that availability of other forums for an exclusive type of expression figures heavily in the decision to dedicate the public forum to a particular form of expression.[50] "The fact that there are few, if any, alternative forums for a particular form of expression would tend to support the municipality's action; restricting the use of the forum would under these circumstances provide the public with access to expression it would not otherwise have."[51] Again, the court's premise is flawed. It works only if there are enough forums to go around. If not,

47. *Id.* at 576-77.

48. This was the same concern sustained by the Supreme Court in *Southeastern Promotions*, 420 U.S. 546 (1975). There, the Chattanooga, Tennessee, City Council denied the application by Southeastern to stage the musical "Hair," because of outside reports that the play was obscene. None of the Council members had seen the play. Similarly, in the *Cinevision* case, it is questionable whether any Burbank City Council members had ever attended a concert by any of the proposed acts.

49. *Cinevision*, 745 F.2d at 574.

50. *Id.* at 576.

51. *Id.*

the result is the exclusion of some forms of expression. This is exactly the opposite result arrived at so thoughtfully in this opinion.

The Ninth Circuit's discussion of a municipality's right to dedicate a public forum to a particular form of expression is unnecessary for the resolution of the *Cinevision* case and may actually have dangerous consequences. Such an argument runs the risk of being misused by municipalities to discriminate against protected forms of expression under the guise of promoting access to a particular form of expression. Such an application would undercut the court's holding and send the protections guaranteed by the first amendment, regarding the promotion of artistic expression, tumbling backwards.

The City, in an attempt to avoid liability, claimed that the Council acted in a legislative capacity and enjoyed full immunity from a civil rights action.[52] This would have been an effective block to liability since "[m]embers of local legislative bodies [such as the Burbank City Council] have complete immunity from suits based on their legislative acts."[53] The court, however, found that the Council was actually acting in an executive capacity, by reasoning that the Council's contractual dealings with Cinevision involved the administration and monitoring of the municipal contract, and that these functions constituted ad hoc decisionmaking.[54] Ad hoc decisionmaking is a characteristic of executive capacity.[55] Since the Council's actions were executive in nature, they were only entitled to qualified immunity.[56] To enjoy qualified immunity, actions must be in good faith.[57] Good faith is defined as "that state of mind denoting honesty of purpose, freedom from intention to defraud, and . . . being faithful to one's duty or obligation."[58] "[A] local official acts in bad faith and 'is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate an individual's constitutional rights.' "[59] Since Richman admitted that he acted in bad faith,[60] the Ninth Circuit found he was not immune from liability for punitive damages under section 1983.[61]

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52. *Id.* at 577.
53. *Id.* (quoting Kuzinch v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982)).
54. *Cinevision*, 745 F.2d at 580.
55. *Id.*
56. *Id.*
57. *Id.*
58. BLACK'S LAW DICTIONARY 623-24 (5th ed. 1979).
59. *Cinevision*, 745 F.2d at 578 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
60. *Cinevision*, 745 F.2d at 578.
61. *Id.* at 580. *See supra* note 4.

On the issue of attorneys' fees, 42 U.S.C. section 1988 allows the prevailing party in a civil rights action to recover reasonable attorneys' fees.[62] The court found that the extent of a party's success was determinative of "prevailing" for purposes of section 1988.[63] Since Cinevision won all of its contentions, the court found that it had satisfied section 1988's "prevailing" requirement and was entitled to reasonable attorneys' fees.[64]

Have other lawmaking bodies received the *Cinevision* message? In late 1985, city officials in San Antonio, Texas, were considering an ordinance "intended to inhibit controversial rock or pop attractions from performing potentially offensive material."[65] While promoters and city officials plan to do battle in the courtroom, the *Cinevision* case represents a contemporary and important analytical starting point.[66]

For now, Burbank must put up with rock and roll, in all of its myriad forms. It is doubtful, however, that Councilman Richman will ever be caught singing, "I know it's only rock and roll but I like it. . . ."[67]

Robert M. Wilder

62. *Id.* at 581.

63. *Id.*

64. *Id.*

65. Sutherland, *One City Mulls Concert Control In Lyric Row*, Billboard, Sept. 21, 1985, at 1, col. 5.

66. *Id.* at 72, col. 6.

67. "Only Rock and Roll," words and music by Mick Jagger and Keith Richards, copyright 1974 by Promopub Music.