

FREE SPEECH AND PUBLIC/PRIVATE EVENTS

James C. Kozlowski, J.D., Ph.D.
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Recently, I received the following inquiry from a parks and recreation director regarding the scope and applicability of the First Amendment to a festival in a city park organized by a private volunteer organization:

A four day fall festival is held in one of our parks. The festival is organized by volunteers appointed by the City Council. The revenues and expenses for this event flow through the City system. The event is open to the public with no admission cost but there are fees for rides, food, parking, etc.

The festival includes carnival games and rides, arts and crafts tents, ethnic/cultural events and an area of civic, commercial and educational booths. There is a cost for an organization to have a booth. The volunteer group organizes the events of the festival, collects fees, approves booth rentals, etc. The City Council approves the schedule and events.

If a person, candidate for elective office, or organization is unable/unwilling to pay the booth fee, must the person be allowed to solicit or practice free speech, etc., in areas other than the booth rental areas? And is there any difference if the booths are sold out? One could make the argument that there is space on the grounds even if the booth area is sold out.

Although I certainly welcome and appreciate such thought provoking inquiries from professionals in the field, in my responses, I always caution that it would be inappropriate for me to provide any information which could be construed as legal advice. Only local counsel can provide a legal opinion regarding a particular situation in a given jurisdiction.

The *Wickersham* opinion described herein, however, may provide some insight into some of the issues a federal court may consider in determining the constitutionality of restrictions on free speech during an event open to the public on public land, but organized and controlled by a private volunteer group. Specifically, in *Wickersham*, the federal district court had to determine whether the private organizer of an event was a “state actor” subject to the First Amendment.

STATE ACTOR

In the case of *Wickersham v. City of Columbia, Mo.*, 371 F. Supp. 2d 1061 (W.Dist. Mo. C.Div. 2005), plaintiffs wanted to distribute leaflets and circulate petitions at a Memorial Day Air Show (“the Air Show”) held at the City of Columbia's airport. While the City owned the airport and opened a designated area on the tarmac for the public to view the Air Show, pursuant to a contract with the City, the Memorial Day Weekend Salute to Veterans Corporation (Corporation) had exclusive control over the designated tarmac area during the Air Show.

Under such circumstances, the City maintained that it had no power to require the Corporation to permit any free speech at the Air Show because to do so would interfere with or dilute the Corporation's message, i.e., to honor and remember veterans. Similarly, the Corporation claimed that it had a free speech right not to be associated with any group or individual expression or message which was not approved by the Corporation.

According to the federal district court, “[a] private party has the right to prevent free speech on its property, for a good reason, a bad reason, or no reason.” On the other hand, under certain circumstances, the court noted that a private party will be considered a “state actor” and, thus, treated like the government when it restricts speech. In determining “whether the private party charged with deprivation [of Free Speech rights] could be considered in all fairness a state actor,” the federal court would consider the following factors and issues:

the actor's receipt of governmental assistance and benefits,

whether the actor is performing a traditional governmental function,

are the government and the private entity so entangled that it appears that the private entity is acting in concert with the government,

whether there is such a close “nexus” between the government and the challenged action that it is fair to treat the private actor like the state,

does the government provide significant encouragement either overt or covert,

does a private actor operate as a willful participant in joint activity with the state or its agents.

As noted by the court, “[t]his list is not all inclusive because the state action doctrine is contextual and no single factor is necessary for there to be state action.”

Applying the listed factors to the context of this particular case, the federal district court found evidence that the City had indeed delegated to the Corporation functions traditionally and exclusively performed by government. Specifically, the City Police were instructed by the City to report during the Air Show to the Corporation's representative and to follow her directives. While the court acknowledged that “merely providing police protection for a civic event does not transform a private entity into a state actor,” in this particular instance, the court found the City had given the Corporation “the power to direct the police, not just ask for their assistance, as is the norm for a private individual.”

In addition to “satisfying the government function test,” the court found a sufficient “degree of entanglement between the City and the Corporation” to suggest that both public and private entities were “acting in concert and thus both are state actors when they prevent all leafleting and petitioning at the Air Show.” In the opinion of the court, such “entanglement” was further evident in the fact that “the City advertises the Air Show in its official publications and on its website, and the website for the Airport contains a direct link to the Corporation's website.”

According to the court, “once the city becomes a substantial, necessary and active participant in the event,” the City “cannot rely on superficial distinctions created by contract to insulate itself from constitutional obligations.” Despite the fact that the Corporation had 3,000 volunteers and spent approximately \$100,00 each year for the event, the court found “undisputable” evidence that “the Air Show could not occur without the substantial involvement of the City before, during and after the event.” Given such a “symbiotic relationship between the City and the Corporation” in conducting this particular event, the court concluded that “the Constitution does not permit them to exclude all unapproved expression.” Specifically, the court held that the City and the Corporation “may not simply say that the entire Air Show is to honor and remember veterans and, therefore, any message other than ones approved by the Corporation will distract, mar or offend.”

In reaching this determination, the court distinguished these facts from a situation in which the city turned over a park to a private organization for an event, reunion or festival. Under such circumstances, the court could find that “the private group merely has the use of public property and, therefore, could exclude whoever they wanted even though the event is occurring on public land and open to the public.” According to the court, under such circumstances, “the possession of a permit to perform on public property what are ordinarily private functions does not convert the permit holder into a state actor.”

In this particular instance, however, the court found the City’s was not simply permitting the Corporation to conduct a private event on public property. On the contrary, in the opinion of the court, the City was “inextricably involved in the Memorial Day Air Show and, therefore, neither the Corporation nor the City has a right to control all expression at this public event.”

REASONABLE RESTRICTION

According to the court, the City and the Corporation did have the right to impose “reasonable time, place and manner restrictions” on plaintiff’s desire to “stand on the tarmac and distribute leaflets and circulate petitions.” Specifically, the City and the Corporation could exclude leafleting, protests, petitioning, or any other speech or activity at the Air Show during “solemn” events recognizing “the sacrifices made by the current and former men and women in the armed services.” According to the court, leafleting and similar protest activities during these solemn events “might distract the crowd or offend those whose loved ones were being recognized.”

On the other hand, the court noted that the Corporation had banned *all* leafleting, petitions, and protests, even though most of the Air Show was “devoted to entertainment” and commercial activity. Given the “entertainment component of the Air Show,” the court would not allow the Corporation to “exclude all speech activities merely by claiming that the entire event is to honor and remember veterans, so no other message is permissible.” According to the court, such a complete ban on certain types of expressive activity was impermissible “content and viewpoint discrimination... especially in light of the Corporation’s advertising policy that allows commercial advertising even where the advertising does not promote the Corporation’s stated goals of honoring and remembering veterans.”

In addition to the ban on leaflets, protests and petitions, the Corporation did not permit unauthorized booths and displays on the tarmac at the Air Show. When it came to booths and displays, the court recognized that the Corporation, had “an interest in controlling who is perceived to be associated with them.” Accordingly, the court found “the Corporation does retain complete control over who participates in the Air Show, occupies a booth or has a display on the tarmac” because “[a] reasonable person might assume that a participant in the Air Show ‘speaks’ for the organizers.” In contrast, the court noted that “[a] reasonable person would not think that someone handing out leaflets in a crowd represents the viewpoint of the organizers of an event absent some identifying mark.”

Unlike “minimally intrusive” leafleting, the court found the City and the Corporation could also exclude all petitioning at the Air Show because members of the public were more likely to stop, talk and perhaps read the petition before deciding whether or not to sign. In contrast, the court noted that “[t]he distribution of literature [such as leaflets and pamphlets] does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.”

Further, the court found that reasonable time, place and manner limitations on First Amendment activities at the Air Show “must be content neutral and must be uniformly enforced.” As a result, the City and the Corporation could not exclude, as it had done in the past, a sign which read "God is Watching" while presumably allowing a sign reading "God Bless our Troops."

Consequently, the court held that the City and the Corporation could not exclude all protests, leafleting or expressive clothing/hats/buttons which expressed a viewpoint which disagreed with the Corporation’s message at the Air Show. Further, the court ordered the City and the Corporation to allow plaintiffs and similarly situated individuals to “distribute leaflets at the Air Show subject to the permissible restrictions.” The court, however, ordered plaintiffs and similarly situated individuals to “not circulate petitions or engage in any other form of soliciting at the Air Show.”