VOL. 34 ISSUE 2 | SUMMER 2014

International Council of Shopping Centers, Inc.
1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099
Phone (646) 728-3800

THE LEGAL JOURNAL OF THE SHOPPING CENTER INDUSTRY

In Depth

Cases

From Canada

Shopping Center Legal Update is published by the Legal Department of the International Council of Shopping Centers, Inc., 1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099.

Editor-in-Chief: Stephanie McEvily, Esq.

Knowing When (or Whether) to Say When—A Survey of Public Access and Free Speech Rights at U.S. Shopping Centers

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The right to free speech in the United States traces its roots back to the founding of the republic. The same cannot be said of public access to privately owned shopping centers. Yet, the intersection of the two concepts has, for shopping center owners and managers in some states, created a challenging balancing act. This article examines the competing interests of shopping center owners seeking to control access to their private property and of persons seeking to exercise free speech rights on the same private property.

The Federal View

In 1968, the United States Supreme Court considered the case of *Food Employees v. Logan Valley Plaza*.[1] The shopping center in *Logan Valley* was an open-air center surrounded by heavily trafficked highways. At the time Logan Valley Mall opened in 1965, it consisted of a Weis supermarket, a Sears department store and a common parking area; however, additional tenants were added in subsequent years. The Weis employees were not unionized, and the Food Employees Union began picketing on the privately owned covered patio in front of the supermarket (i.e., the parcel pickup area where patrons could have their groceries loaded into a vehicle during inclement weather) with signs stating the market was nonunion. The lower court enjoined the union's activity. The United States Supreme Court, relying heavily upon its ruling in *Marsh v. State of Alabama*,[2] held the union could petition in the privately owned covered patio area, finding that the center served as a "community business block" open to people engaging in such activity, and that the picketing was directed specifically at patrons of the supermarket and related to the shopping center's operations. The Court, however, was quick to point out that the First Amendment did not mean that the center was without power to limit the use of its private property in a reasonable manner.

Four years later, in *Lloyd Corp. v. Tanner*,[3] the United States Supreme Court took up a question it specifically reserved in the *Logan Valley* case: Is it the privately owned shopping center's right to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations? *Lloyd* involved a traditional enclosed multi-level shopping center, with retail stores and common areas. Since it opened in 1960, the center had (and strictly enforced) a policy against handbilling inside the enclosed center. At various locations inside the center, embedded small signs in the sidewalk read:

> NOTICE
> Areas In Lloyd Center Used By The Public Are Not Public Ways But
> Are For The Use Of Lloyd Center Tenants And The Public Transacting
> Business With Them. Permission To Use Said Areas May Be Revoked
> At Any Time.
> *Lloyd Corporation, Ltd.*

In November 1968, individuals were distributing handbills protesting the draft and the Vietnam War. The individuals were told that they were trespassing, and asked to use the public sidewalks outside of the center. The district court found the center's rule prohibiting distribution of the handbills to be a violation of the First Amendment and the Ninth Circuit affirmed. The Supreme Court reversed, finding that allowing the individuals to protest inside the center went further than any prior case because the anti-war message was directed to all members of the public, not solely to the center's patrons or its retailers. The Court found that the handbills could have been distributed on any public street and, as such, the protesters did not have any First Amendment right to access the center's private property for their activity. The *Lloyd* court distinguished between *Marsh* and *Logan Valley*, holding that those rulings never went so far as to say that shopping centers were analogous to publicly owned facilities for *all* purposes.

Thus, other than private property access rights under specific federal regulations (e.g., *the National Labor Relations Act*), there is no recognized Federal First Amendment right to access private property for expressive activity. That said, nothing in the United States Supreme Court's decisions prohibits individual states from providing broader protection than access allowed under the First Amendment of the United States Constitution. As a result, what has evolved since the late 1960s is a spectrum of decisions that vary from state to state, ranging from equating privately owned shopping centers to public forums, to prohibiting all access to privately owned shopping centers for free speech activity. This broad range of decisions requires shopping center owners and managers to develop and implement distinct policies and procedures to manage free speech activities on a state-by-state basis.

The States' Views

Nine years after the United States Supreme Court's decision in *Lloyd*, the California Supreme Court diverged from the United States Supreme Court when it upheld the rights of students to engage in expressive activity at the privately owned Pruneyard shopping center near San Jose, CA.[4] In *Robins v. Pruneyard*, the property was a traditional, enclosed shopping center with 65 retail shops, restaurants and a cinema. The center prohibited all expressive activity not directly related to the center's commercial purposes. The plaintiff-appellants were high school students who wanted to solicit signatures at the center for a resolution against Zionism. The court addressed the issue of whether California's free speech provision (Article 1, § 2, of the California Constitution) provides broader protection than the First Amendment, and, if so, whether it protects free speech activity on private property. The *Pruneyard* court answered both questions in the affirmative, holding that by inviting the public onto the private property to congregate, shopping centers have replaced traditional town centers and, as such, a handful of additional orderly persons engaging in peaceful free speech activity on the center's private property are protected under the free speech provision of the California Constitution.

Since *Robins v. Pruneyard*, the California judiciary has continued to expand the protections of Article I, § 2, of the California Constitution, leading to decisions that privately owned shopping centers are the equivalent of public forums for purposes of free speech activities. California courts still uphold the right of shopping centers to regulate access with content-neutral time, place and manner rules, but the criteria for content-neutrality appears to be trending narrower with each decision.

Several years ago, in *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop., LLC*,[5] the California Court of Appeal held that shopping centers cannot impose blanket bans on speech without objective evidence supporting the business judgment to limit expressive activity on certain days. Therefore, a rule prohibiting all activity on a holiday such as Black Friday, without any objective evidence of increased patron activity, reduced floor space, increased center-sponsored activity or other objective evidence supporting the restriction may likely be found unconstitutional.

Another state that has followed the *Pruneyard* decision and allows broad access to privately owned shopping centers for free speech activity is New Jersey whose courts have upheld access to shopping centers based on the extent and nature of their invitation to the public to use the property. New Jersey courts have found that there is no property more thoroughly "dedicated" to public use than community shopping centers, which necessarily includes an implied invitation for free speech activity. As such, managing access to shopping centers for free speech activity in states such as New Jersey and California can prove to be a significant undertaking.

Other states have a less expansive view of free speech rights and allow access on a more limited basis. For example, Washington State allows access to shopping centers only for the purpose of election petitioning. Similarly, Massachusetts allows access to shopping centers to solicit signatures for election purposes, but the judiciary has limited access on the basis that election petitioning is an activity of fundamental importance.

States such as Michigan, Minnesota and Hawaii have found that persons are not entitled to access privately owned shopping centers to engage in free speech activity. Unlike New Jersey and California, the Hawaii judiciary rejects the notion that shopping centers have become the modern and functional equivalent of a town center.

In many states, the issue of free speech activity in shopping centers remains unaddressed (*e.g.*, New Hampshire, Nebraska, Mississippi, Kentucky, Delaware), but there are some indications of how the judiciary may rule. For example, Nebraska courts have appeared to focus on whether governmental or government-sponsored activity violates free speech rights. In Delaware, although courts have denied access to certain private property, courts have left open the possibility that private property held open as a public space could potentially trigger free speech protection.

It remains to be seen how the judiciary in these states will regulate access to shopping centers. In the interim, shopping center owners, developers and managers will have to develop state-specific strategies to manage free speech activity.

For example, in determining whether shopping center owners are unlawfully prohibiting access in states allowing access, courts engage in a traditional First Amendment analysis of lawful content-neutral restrictions on speech versus unlawful, content-based restrictions on speech. In these states, shopping center owners should develop objective rules and guidelines for regulating access to avoid any appearance of any unconstitutional, content-based regulation of access. Conversely, in states not allowing access, shopping center owners should ensure uniform enforcement of a no-access policy to avoid any allegation of discriminatory enforcement and/or waiver by allowing access.

The Future

Many of the opinions referenced herein justify public access to private property as part of the balancing necessary to provide a forum in which a message of some kind may be conveyed to the broadest possible audience. It remains to be seen whether the continuing evolution of social media and the ability of an individual to widely disseminate a message (be it more or less than 140 characters!) will tilt the scales in favor of owners seeking to restrict public access to private property. Until then, when individuals arrive at a privately owned shopping center to engage in some form of expressive activity, it is important to know whether (or when) a shopping center owner can say when.

The following chart reflects a summary of reported cases and statutes as of May 30, 2014, and is provided solely for reference purposes. Private shopping center owners should not rely upon the summary to determine a course of action in response to persons seeking access to a shopping center; an attorney experienced in public access laws in the relevant jurisdiction should be consulted.

Summary of Public Access and Free Speech Rights at Shopping Centers

State	Very Broad	Limited	No Access	No Governing Case Law
Alabama				•
Alaska				•
Arizona			•	
Arkansas				•
California	•			
Colorado		•		
Connecticut			•	
Delaware				•
Florida				•
Georgia			•	
Hawaii			•	
Idaho				•
Illinois				•
Indiana				•
Iowa			•	
Kansas				•
Kentucky				•
Louisiana				•
Maine				•
Maryland				•
Massachusetts		•		
Michigan			•	
Minnesota			•	
Mississippi				•
Missouri				•
Montana			•	
Nebraska				•
Nevada			•	
New Hampshire				•
New Jersey	•			
New Mexico				•
New York			•	
North Carolina			•	
North Dakota				•
Ohio			•	
Oklahoma				•
Oregon			•	
Pennsylvania			•	
Rhode Island				•
South Carolina			•	
South Dakota				•
Tennessee				•
Texas				•
Utah				•
Vermont				•
Virginia				•
Washington		•		
West Virginia				•
Wisconsin			•	
Wyoming				•

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[1] *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601 (1968).

[2] *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946). In *Marsh*, the Supreme Court allowed a Jehovah's Witness to distribute religious literature on a sidewalk in the business district of Chickasaw, AL, even though Chickasaw was a "company town" wholly (and privately) owned by Gulf Shipbuilding Corporation. The *Marsh* court opined that the Chickasaw business district was indistinguishable from the "business block" of a true municipality, and a prohibition on the distribution of literature violated the First Amendment.

[3] *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219 (1972); *aff'd* in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976).

[4] *Robins v. Pruneyard*, 23 Cal.3d 899, 153 Cal.Rptr. 854 (1979).

[5] *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop., LLC*, 193 Cal.App.4th 1168, 122 Cal.Rptr.3d 277 (2011).