SIGNS AND FEDERAL LAWS OF PROTECTION

Federal laws, the Constitution, and Supreme Court rulings provide protections for on-premise signs. Because federal laws supersede state and local provisions, codes must be created in a way that does not violate these established principles. This document provides an overview of those federal laws.

sfi signage foundation, inc.

About The Signage Foundation Inc.

The Signage Foundation, Inc., is a not-for-profit, non-partisan organization dedicated to fulfilling the educational, research, and philanthropic purposes of on-premise signage. SFI was established in 2002 as a 501(c) (3) public foundation through its supporting organizational alignment with the International Sign Association. The Foundation is governed by a board of directors representing the diversity and professional depth within the large community of individuals that believe in the social and economic value of on-premise signage.

The Signage Foundation, Inc. affirms signage as a fundamental component of today's communication system and as a necessity for the development of a visually pleasing, economically healthy, and diverse community. The Signage Foundation promotes intelligent and productive use of on-premise signage and storefronts that benefits every sector of the U.S. economy.

The Signage Foundation, Inc., is committed to expanding the knowledge base on the use and benefits of signage products through peer-reviewed research to facilitate the operation within the marketplace by manufacturers, suppliers, and individuals in their efforts to design, build, and sell innovative products. Each fall, The Signage Foundation hosts the National Signage Research and Education Conference in conjunction with the University of Cincinnati's Colleges of Design, Architecture, Art, and Planning, and Business.

While SFI commissions original research and publishes the results as original treatises, in the interest of promoting signage information to a broader audience, it also condenses and republishes (with permission) existing articles and studies.

The Signage Foundation, Inc.
P.O. Box 14392
Washington, DC 20044
www.thesignagefoundation.org

Contents

Overview

This article has been adapted and updated by Sandy Smith at the request of the Signage Foundation, Inc. Funding for this effort was provided, in part, by individual donations to SFI. It was originally published in "The Economic Value of On-Premise Signage," published by the California Sign Association (formerly the California Electric Sign Association) and the International Sign Association in 1997.

When local municipalities attempt to regulate signage, it often is out of a desire to create a safe, pleasing community. But by focusing on one aspect of signage, regulations may have unintended consequences in other area, such as creating a challenging business environment. Occasionally, those regulations may even conflict with the most basic protections afforded all Americans in the Constitution.

Cities and states have the opportunity to pass laws and codes that enhance their communities. That right has been established multiple times through the actions of the U.S. Supreme Court, all the way back to 1926. But those local or state laws cannot override federal laws, especially when constitutional rights are involved.

The following offers a broad overview of federal protections afforded to signs and end users. This should not be constituted as legal advice. Sign companies or end users who feel that their rights have been violated by regulations or an inability to receive proper approvals for legal signage should seek professional advice.

The U.S. Constitution

The U.S. Constitution, the ultimate law of the United States, offers numerous protections for signs and for the businesses that deploy them as a means of advertising goods and services. As a form of communication, signs are protected under the First Amendment. As a form of property, signs are protected from any uncompensated "taking" under the Fifth Amendment. If a sign code regulation disproportionally affects a group of people arbitrarily, the code may be attacked on the grounds that it denies equal protection—or equal treatment—of the law under the Fourteenth Amendment.

First Amendment: Freedom of Speech

The First Amendment to the Constitution provides in part:

> "Congress shall make no law… abridging the freedom of speech, or of the press;…."

This is one of the most basic rights in the United States. Before government at any level can infringe upon that right, it must have a compelling reason. With signs, that means that any regulations cannot be based upon the content. In other words, a local community may regulate a certain *type* of sign, such as a pole sign, but may not specifically limit pole signs for a certain type of business, like a fast-food restaurant. To do so would be limiting the type of sign based on the content—a clear violation of the First Amendment.

Numerous court cases have supported signs as a form of speech, dating back to 1975. That first case, (Bigelow v. Virginia), invalidated a state law restricting newspaper advertisements. A year later, another Virginia case (Virginia Pharmacy Board v. Virginia Consumer Council) reaffirmed that free speech rights applied to commercial speech. It enhanced understanding of regulations that affected free speech, allowing limits only if:

there is no reference to content; regulations serve a significant government interest; and that there are other available channels of communication."

Those parameters on regulation of commercial speech were extended again in 1980. A New York statute that prohibited electric companies from advertising to promote electricity usage was found unconstitutional (Central Hudson Gas & Electric Company v. Public Service Commission). In what has come to be known as the Central Hudson test, the court ruled that attempts to regulate commercial speech should follow four steps:

1). Is the speech promoting a product or service that is lawful? And is it truthful?

2). Is the government interest substantial?

If both of those criteria are met:

3). Does the regulation directly advance the governmental interest?

4). Is the regulation more extensive than necessary?

The courts have applied the Central Hudson test several times, including in 1993 (City of Cincinnati v. Discovery Network, Inc.). It used the same approach in a 1996 case involving the ban of liquor prices (44 Liquormart, Inc., v. Rhode Island). The state argued that promoting reduced use of alcohol was in its interest. The court ruled that the ban on advertising was overly restrictive and the state could not provide a definitive link between the ban of this advertising and the goals of reducing alcohol use.

The bottom line: Local and state government may regulate the size, height, location, and other physical characteristics of signage. However, the government may not regulate the message contained on the sign. This also can apply broadly to a class of signs, such as those used for commercial enterprises.

Fifth Amendment: Just Compensation

The Fifth Amendment contains two guarantees:

1) Due process, which protects citizens from government activities that prohibit their rights without due process of law; and

2). The "takings" clause, which prevents the government from seizing private property without just compensation. This is most commonly understood in the context of eminent domain, where government takes over private property for public benefit. However, this also may occur when a regulation or law effectively deprives a property owner of use of the property. To constitute a taking, the regulation must destroy a major portion of the property's value.

Courts have found time and again that signs are considered private property in these circumstances. To qualify for Fifth Amendment protections, however, the local or state government does not have to fully "seize" the property. Some courts have ruled that regulations and restrictions that affect a business significantly may earn some level of compensation.

Say a new ordinance has forced a business owner to remove a previously legal sign. Without the ability to identify the business location, sales drop, potentially endangering the business itself. In that case, the sign's end user would have a strong argument that the city should compensate him for, in effect, taking his sign.

Signs most often are affected by "takings" when new ordinances are put in place. A previously legal sign no longer conforms to regulations. Often, local governments require that these signs be brought to code at some predetermined time or event. This may follow a request to expand the sign or to rebuild it after damage or to replace or repair more than 50 percent of the sign as part of maintenance.

In some cases, states may set a time frame under which the sign must conform with the new codes or the owner will be fined. These type of regulations typically take into account the "amortization period," a timeframe in which the sign's owner is considered to have recouped the cost of building and installing the sign. However, this fails to take into account the ongoing value of advertising purposes that a business receives from signage.

The U.S. Supreme Court has identified three factors that have particular significance in determining whether there has been a taking: (1) the economic impact of the taking; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action. (Connoly v. Pension Benefit Guarantee Corp. (1986) 475 US 211)

In some jurisdictions, in lieu of compensation, amortization is accepted as a reasonable means of compensation for the removal of on-premise signs. However, amortization is not without controversy. For further discussion of amortization, see the SFI publication *Amortization Explained*.

Case laws have allowed a businessman who recently purchased an existing business to change the name on the sign without bringing the sign into conformance with new regulations (Kevin Gray-East Coast Auto Body v. Village of Nyack, 1991). Although this law was based on content—and therefore a First Amendment issue—the case also affected how the amortization period is considered for a non-conforming sign.

Another case, (Naegele Outdoor Advertising Inc. v. City of Durham, 1994), found that a 5.5-year amortization period was justified in a city's ban on virtually all commercial billboards. This length of amortization period is not a new standard, as appropriate amortization periods are decided on a case-by-case basis.

In general, states and local communities may regulate signs to such a degree that existing signs no longer conform. However, sign owners must be allowed a certain amount of time to comply with the law, or be compensated for their losses. Without either, the new codes could be considered an unjust "taking" under Fifth Amendment protections.

Fourteenth Amendment: Equal Protection

The Fourteenth Amendment requires that all citizens be treated equally and ensure that the "due process" rights in the Fifth Amendment apply at the state and local levels. Where signage is concerned, this typically comes into play with regulations, permitting, and licensing.

Due process requires that any standards for permits be clear, concise, and easily understood by a person of "ordinary intelligence." Statutes that are extremely complex can violate due process by punishing people for conduct they could not have known was illegal, or subjectively or arbitrarily applying the law. They may cause a chilling effect on First Amendment rights.

Equal protection means that no person shall be denied the same protections of the law offered to others in similar circumstances. In sign usage, this means that a permitting authority must approve or deny permits in accordance to the codes, without any regard to the type of business involved so long as the business is not illegal. There are other parameters as well, for signs that may offend community sensibilities, such as sexually explicit material. Without any of these issues at play, a permit must be allowed no matter the type of business.

Specific court cases in the sign industry include one that banned some freestanding pole signs while allowing others (North Olmsted Chamber of Commerce v. City of North Olmsted, 2000). While this case also violated First Amendment provisions, it was found to offer speech to some—those with approved pole signs—while prohibiting it for others. The permitting plan also gave too much latitude to the permitting official.

Other Federal Regulations

The Highway Beautification Act of 1965

Soon after the U.S. Interstate system was born, the federal government began attempting to control advertising along federal highways.

The first attempt was the Federal-Aid Highway Act of 1958, a voluntary program to which 23 states signed on. Participating states received a bonus of one-half percent of the highway's cost of construction if they agreed to control outdoor advertising within 660 feet of the interstate highways. States that participated remain under the requirements of the program. Those states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

In 1965, the approach changed, though many of the same rules applied. The Highway Beautification Act of 1965 applied to all states. Instead of a bonus payment, states that failed to control advertising along the highway would be penalized, losing 10 percent of federal spending on highways. The 1965 action also extended the ban on signage to primary roadways like loops, beltways, and spurs along the interstate system.

Like the 1958 act, the 1965 law banned signs from within 660 feet of a freeway's right of way, except in urban areas. Other types of signs that are exempt from the ban are: for sale/lease signs (if located on the property), on-premise signs, electronic message signs, historic or landmark signs, and signs for nonprofit groups.

The Lanham Act

One of the most valuable assets a business has is its logo. Especially for well-known businesses and chains, the logo can offer instant identification. The Lanham Trademark Act is a comprehensive look at federally registered names, marks, and colors included with the marks. The act prohibits state and local governments from requiring such marks be altered to comply with community aesthetic standards, though two court cases have split on the issue.

Blockbuster Video sued the city of Tempe, Arizona, which attempted to force the company to alter its trademark. The 9th Circuit Court of Appeals found that the zoning could not require that the mark be altered, but that it may prevent display of a mark for zoning purposes.

In Lisa's Party City v. the Town of Henrietta, New York, the 2nd Circuit Court found that the Lanham Trademark Act did not prevent the city from limiting sign color typefaces and elements on signage. It reasoned that these limits had no effect on the overall trademark.

While the issue remains somewhat up in the air from a legal perspective, there are direct consequences to ordinances that attempt to alter the logos. One of the strengths of franchising—which generates over $1 trillion in revenue each year—is immediate identification with signage and logos. Even something as simple as altering the colors can have a negative effect on such identification.

Trademarks are a form of property, which is why large companies aggressively enforce and protect them. Businesses that don't protect their copyrights dilute the value of their marks and their identity in the marketplace.

Copyright Protection

Adapted from the ISA Publication "Theft by Design: Copyright Protection for Sign Plans."

In 1976, copyrights were extended to include "pictorial, graphic, and sculptural works." Just as a sign company's clients are afforded protections from having their logo and other distinguishing materials protected, this extension of the Copyright Act now protects sign company's creative works. According to the Copyright Act of 1976, copyright now includes "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, print and art reproductions, maps, globe, charts, technical drawings, diagrams, and models."

Plans and specifications for signs certainly fit into that definition. Copyright law protects a creative work from the moment of creation; copyrights are not required to be filed, as long as a copyright notice includes appropriate designations.

A copyright must contain:

a. the word “copyright,” or the © symbol;
b. the name of the copyright owners; and
c. the date of the copyright.

Ensuring that all of these elements are included on a sign plan before it is sent to a prospective client typically will suffice. If a plan is created in one year and submitted to a client in another, it should have the date in which the plans were submitted to the client.

Registration may be beneficial in some circumstances, and it’s required before an infringement suit can be brought. Registering a copyright is a fairly simple process. Simply fill out the form and submit to the U.S. Copyright office. Learn more about when and how to register a copyright through www.copyright.gov.

Copyright only will apply if a paper copy is printed, or copied. In today’s electronic age, additional steps can be taken to protect sign plans. A legend on plans should state that the sign company retains ownership of the plans, which were submitted to the potential client solely for the purpose of whether to purchase a sign. The legend also should prohibit distribution of the plans to anyone other than employees of the client company.

Another option is to create a written contract before the plans are completed. This agreement could simply be a letter with language similar to that in the legend. A client’s signature on the agreement limits his or her use of the plans.

Appendix

A Framework for On-Premise Signage Regulations

As communities craft regulations applicable to signage, it is important to ensure that the regulations will pass legal tests. The Signage Foundation, Inc., includes a framework to developing on-premise signage regulations. Written by Alan Weinstein and David Hartt and funded by SFI, “A Framework for On-Premise Signage Regulations” uses verified research to craft a publication that can be customized at the local level.

The document is available at www.thesignagefoundation.org/OnPremiseSignRegulations

Learn More

Those wanting to learn more about the economic value of signs, or signs in general, may find the following publications useful. All are available through The Signage Foundation, Inc. (www.thesignagefoundation.org)

“The Economic Value of On-Premise Signage, 2012.”

“The Economic Value of On-Premise Signage, 1997.”

“Amortization Explained.”