Local government Web sites and the First Amendment

I. Introduction

Many local governmental bodies now have excellent Web sites that are the equivalent of a virtual village hall. Residents can download permit applications, obtain information about public officials, and even access local ordinances. Local government Web sites have the ability to preserve public funds by automating routine tasks that once required expensive human resources.

Although the Internet is a relatively new communication medium, courts are likely to follow long-established First Amendment jurisprudence when new issues arise. In many respects, a governmental Web site can be viewed like a village hall. A municipality need not designate its village hall (or Web site) as a public forum for permitting expressive activity. However, if a municipality does allow the public to engage in expressive activity inside of its village hall (or Web site), it may not pick and choose messages based on content.

II. Constitutional analysis

When a challenge is made to a governmental restriction on speech, courts first determine whether the location sought for the speech is a public forum, non-public forum, or a limited public forum. Just because a government facility is used for some communication, it does not necessarily follow that it is a public forum.[1]

Places such as streets and parks, which by long tradition have been devoted to assembly and debate, are considered traditional public forums. A local government's ability to limit expressive activity in such forums, even in a content-neutral fashion, is sharply limited and must be necessary to serve a compelling state interest and the regulation must be narrowly drawn to achieve that end.[2]

On the other hand, limited forums are venues such as the meeting rooms or display cases located in libraries and schools designated by the public body as available for public use. Where expression is allowed in a limited public forum, it may be regulated to preserve the tranquility which the forum's basic purposes require.[3] However, when such locations are open to public use, any regulation must be content neutral.

Finally, a non-public forum includes public property or avenues of communication which are not by tradition or designation a forum for expressive purposes.[4] In a non-public forum, the government may reserve the forum for its intended purpose as long as the regulation on speech is reasonable and is not based on the speaker's views.

III. *Putnam Pit v. City Of Cookeville*

In *Putnam Pit v. City of Cookeville*,[5] the Sixth Circuit decided a very interesting case that recognizes liability based on discretion in allowing hyperlinks from a municipal Web page. The *Putnam Pit* is a small free tabloid and Web page published and edited by a colorful muckracker by the name of Geoffrey Davidian. Mr. Davidian is a self-appointed eye on government corruption in Cookeville. Mr. Davidian requested that Cookeville establish a hyperlink from its Web page to the *Putnam Pit* Web page. Cookeville refused and was therefore sued by the *Putnam Pit*.

At the time Mr. Davidian requested the hyperlink, several for-profit and non-profit entities were linked to the city's Web site, including a local technical college, two Internet service providers, a law firm, a local computer club, a truck product manufacturer and distributor, and a site with information on Cookeville. Although there was initially

no policy relating to links from Cookeville's Web page, upon learning of Mr. Davidian's request, the City decided to limit links to non-profit organizations. The city's manager, however, testified that even if the *Putnam Pit* were a non-profit organization, he would not have allowed the link. He also stated that he "didn't care for" the newspaper and believed that it distorted the truth. Cookeville then limited hyperlinks to Web sites promoting economic welfare, tourism and industry.

The court found that the Web site constituted a nonpublic forum under the First Amendment. However, in recognizing that restrictions must be content neutral, the court stated:

...while the city may restrict use to those who participate in the forum's official business, it may not do so based on viewpoint. In other words, Davidian has no entitlement to a link to the city's Web site, however, he may not be denied one solely based on the controversial views he espouses, without regard for the forum's purpose and structure. This requirement that the city act without regard to viewpoint leads us to hold that Davidian has raised an issue of material fact as to whether the city's actions violated his First Amendment rights because they were based on impermissible viewpoint discrimination.

The city's establishment of a policy to limit the pool of persons who might be linked to the city's Web page is reasonable. The city has legitimate interests in keeping links that are consistent with the purpose of the site -- providing information about city services, attractions, and officials. Further, the city argues that it had an interest in allowing a relatively limited number of links to its site, so as to avoid a cacophony of speakers which might drown out the city's information or cause the city to eliminate its site altogether. (Internal citations omitted.) *Id.* at 845.

The court ultimately found that there were issues of material fact relating to whether Cookville engaged in viewpoint discrimination. Accordingly, the court reversed the district court's grant of summary judgment on the issue of whether the city's refusal to give the *Putnam Pit* a hypertext link from the city's Web site violated the First Amendment.

IV. Suggestions for an Internet site linkage policy

Many local governmental bodies have decided to allow hyperlinks. Regardless of what a policy says, employees should be trained to avoid making judgments based on the content of a requested hyperlink. From a practical standpoint, linkage policies are desirable because employees can use the policy as a scapegoat when requests for inclusion are made from outside sources. Rather than make comments that can be used against the governmental body in litigation, the employees can simply reference the policy. This section makes a few suggestions for hyperlink policies:

A. Prohibit all external links. Consider not allowing any links. This is the best way to reduce the likelihood of a successful lawsuit.

B. Use clear language. Standards for permitted inclusion must be clear and definite because courts are reluctant to accept policies based on vague or overly general criteria.

C. Be objective. Use objective criteria to determine inclusion to avoid a claim that a government official is using his or her own discretion to interpret the policy as a pretext for censorship. As a general rule, the more subjective the standard used, the more likely that the category will violate the First Amendment.

D. Wear a blindfold. When carrying out the policy, local government officials must not discriminate based on the source. Each local governmental body must train its employees to follow its properly drafted policy and only articulate the policy as the reason for acceptance or rejection.

E. Have a purpose. Identify the purpose of the Web site and limit access accordingly. For example, a local government Web site might exist solely to give its users information about the community's governmental services and public officials.

F. Require insurance. Consider requiring insurance or indemnification agreements to guard against third party claims such as libel, intellectual property infringement and invasion of privacy.

V. Final thoughts

The future will raise interesting issues for local government Internet use. For instance, many Web sites have chat rooms and message boards. While the *Putnam Pit* case only involved a hyperlink, the Internet allows for active communications by posting and responsive posting either immediately (chat rooms) or at any later point (message boards). What type of regulations could be imposed in such a context? It seems that once a governmental body opens up such a virtual dialogue, it would create a public forum substantially immune from regulation.

It will also be interesting to see if courts treat Internet communications the same as traditional communications. Much of the First Amendment jurisprudence that has developed over the years has involved situations where substantial resources must be devoted for allowing people to communicate. For instance, if the Klu Klux Klan wants to protest at a park, expensive police resources will be used for protection and there is a threat of danger to a community. However, requiring that a controversial group be permitted a hyperlink to communicate its message arguably has virtually no financial cost to a local government.

Only time will tell how courts will treat Internet communications. However, if local governmental bodies follow long-standing First Amendment jurisprudence, they should feel secure using Internet-based applications to conveniently and effectively serve their communities.

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1. *United States Postal Service v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114 (1981).

2. *Carey v. Brown*, 447 U.S. 455-461 (1980).

3. *Kreimer v. Bureau of Police for the Town of Morristown,* 958 F.2d 1242 (3d Cir. 1992).

4. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

5. *Putnam Pit v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000).