



# Can They Do That?

## Freedom of Speech in California's Retail Centers

By Steven P. Heller and Scott R. Reynolds

**W**ith the 2008 election season in full swing, California shopping center owners may face free speech issues at their properties. Unlike most other states, California recognizes a broad set of protections for petitioners, protesters and others engaged in free speech on the grounds of some types of shopping centers. Property owners and managers that understand these free speech rights will be more effective in dealing with any issues that arise.

In 1979, the California Supreme Court issued its landmark *Pruneyard* decision. *Pruneyard* protects free speech, reasonably exercised, at privately-owned shopping centers. According to the Court, a modern shopping center must permit free speech activities if it acts as a public forum that invites the public to congregate and engage in expressive activities. But even a shopping center that is a public forum may put reasonable limits on the time, place and manner of free speech activities. Owners and property managers need to assess whether a given project is likely a "public forum" and, if so, to determine how to regulate free speech activities in a reasonable manner.

### *Is it a "Public Forum"? Focus on Commercial Purpose*

A likely "public forum" is a large shopping center that provides courtyards and other gathering areas inviting the public to meet and congregate. But courts focus less on size than on purpose and specific physical attributes. And recent court cases suggest an evolution in the law that weakens the *Pruneyard* decision.

In one case, a court held that, because a stand-alone Trader Joe's was not a public forum, it did not need to allow solicitation of signatures on its property (*Trader Joe's Co. v. Progressive Campaigns, Inc. (1999)*). Size was not the only factor; the court contrasted Trader Joe's, a stand-alone grocer without plazas or courtyards, against a regional shopping center that provides areas encouraging public gathering. Another court similarly decided that a Costco was not a public

forum, because it was a stand-alone store inviting the public for shopping only (*Costco Cos. v. Gallant (2002)*). In both stand-alone store cases, courts focused on the store's purpose, which was limited to providing a place to shop, not to provide the public with a common gathering area.

California courts continue to restrict the definition of public forum by applying this purpose test. In one case (*Albertson's, Inc. v. Young (2003)*), an Albertson's store was *not* stand-alone, but instead was part of a shopping center with 20 other businesses. But the court determined that no public forum existed, because the store itself was a single-structure, single-use store with no public congregating area, and because the larger center had neither unified ownership nor common areas inviting the public to engage in typical public forum activities. Similarly, in a 2007 case (*Van v. Home Depot, U.S.A., Inc. (2007)*), a court determined that areas in front of large retail stores in commercial retail centers are not traditional public forums, so those stores need not permit expressive activities. These front areas, the court reasoned, are designed to encourage shopping, not congregating or lingering, and do not create a relationship between the expressive speech and the purpose of the store.

### *Regulating Speech in Public Forums*

Owners and managers of centers that are "public forums" may limit the time, place and manner of free speech activities, but the limitations must be reasonable. For example, courts have approved regulations that prohibit activities on specified busy retailing days; designate specified areas; prohibit repeat groups from activities more than 5 days a month or on consecutive weekends; and require prior written application, with approval on a first-come, first-served basis.

In all cases, enforcement must be uniform.

Recently the California Supreme Court held that, if a public forum exists, regulations of expressive speech must be content-neutral (*Fashion Valley Mall, LLC v. National Labor Relations Board (2007)*). Accordingly, it doesn't matter if (as suggested in the Home Depot case) the speech is related to the commercial purpose. In this case, protestors distributed leaflets outside a Robinsons-May that was part of a traditional enclosed mall, advocating a boycott of Robinsons-May in support of a union protest. Mall regulations prohibited encouragement of consumer boycotts, so mall officials asked the protestors

to leave. Emphasizing the union's free speech rights, the court ruled against the mall owners: the "no boycott" regulation was unreasonable because it was not content-neutral. However, the Court authorized content-neutral regulations against conduct

intended to disrupt or interfere with normal business operations.

### *Managing Free Speech in an Evolving Legal Environment*

This area of California law is evolving: the 2007 Fashion Valley case was a close 4-3 decision, and the dissenting opinion argued strongly for overturning *Pruneyard* entirely. For now, the *Pruneyard*-based formula remains in effect: When faced with expressive activities at a shopping center, the owner can prohibit the activities if the center is not a public forum; if it is a public forum, the owner can regulate the activities - on a reasonable, content-neutral basis. Keep abreast of future developments. **CC**

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