

VO V. CITY OF GARDEN GROVE

9 Cal. Rptr. 3d 257 (Ct. App. 2004)

The California court of appeals ruled that a city ordinance regulating cybercafes was facially unconstitutional because it gave excessive discretion to city officials to issue permits, thus violating First Amendment protections. However, the portions of the statute that enumerated specific restrictions on the operation of the cafes survived facial review.

In response to police reports of criminal activity at cybercafes in Garden Grove, California, the city council passed an ordinance requiring all cafes to obtain conditional use permits. In reviewing the permit applications, city officials were empowered to attach new regulations to the issuance of the permits. Additionally, officials could deny an application if the applicant failed to substantiate that the cybercafe "would not jeopardize the general welfare." The ordinance also imposed a daytime curfew on unsupervised minors in the cafes, required a security guard on Friday and Saturday nights, and mandated video surveillance of the premises. Plaintiff cybercafe owners sought a preliminary injunction, arguing that the ordinance infringed on free speech and privacy protections under the United States and California Constitutions. The trial court granted the injunction, and the city appealed.

The appellate court first recognized that the Garden Grove ordinance implicates First Amendment protections, analogizing cybercafes, which provide access to the Internet, to book publishers, movie theatres, and other businesses engaged in information dissemination. The court reasoned that any restrictions on cybercafes' activities must thus be content-neutral and narrowly tailored, and leave open other means of information dissemination. The requirement that cybercafes obtain a conditional use permit failed constitutionality under this test. The court referenced a long line of decisions invalidating licensing ordinances for activities protected by the First Amendment where administrative officials were granted too much discretion in determining the grant or denial of the licenses. Because Garden Grove officials could deny permits based on ambiguous criteria, they had the implicit power to limit access to content and regulate speech, in violation of the First Amendment.

The court found that the specific restrictions on cybercafes enumerated in the city ordinance did, however, survive the constitutional test. The curfew on minors advanced a legitimate government interest in the protection of minors, was narrowly tailored, and did not foreclose alternate means of communication. Similarly, the requirement to post guards had only "tenuous" First Amendment implications.

The requirement to conduct video surveillance posed a more complicated question, especially to the degree that video cameras might record patrons' on-screen actions. The court noted, however, that the ordinance instructed cybercafes to record simply the "activity and physical features" of patrons, not their on-screen conduct, and thus the degree of surveillance required did not jeopardize First Amendment privileges. The court also rejected the contention that the surveillance requirement violated the privacy protections of the California constitution, stating that a person's activities in a "public retail establishment" are not confidential and enjoy no legally protected privacy right. Furthermore, the potential observation of on-screen activities does not intrude on the right to make "intimate personal decisions."

The court expressly rejected the dissent's argument that, because of the unique role cybercafes play in furnishing information in the twenty-first century, their regulation imperils freedom of expression and association, and thus government restrictions should be held to strict scrutiny. The court contended that such a generous construction of the activities of cybercafes was not rooted in law.

