IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al.*,

Defendants.

ORDER

For the reasons stated in this Court's March 31, 2008 Memorandum Opinion and Order, and in the accompanying Memorandum Opinion, the Court concludes as a matter of law that the challenged regulations, 3 VAC 5-20-40(A) and (B)(3), are facially unconstitutional because they violate the First Amendment to the United States Constitution.

Accordingly, having granted Summary Judgment to Plaintiffs, the Court hereby Orders that a Permanent Injunction issue against the enforcement of 3 VAC 5-20-40(A) and (B)(3).

Let the Clerk send copies of this Order and the accompanying Memorandum Opinion to counsel of record.

And it is so ORDERED.

M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: JUN 19 2008

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MEMORANDUM OPINION

By Memorandum Opinion and Order dated March 31, 2008 ("Mem Op."), this Court declared unconstitutional two regulations in the Virginia Administrative Code, 3 VAC 5-20-40(A) and VAC 5-20-40(B)(3). Because of the paucity of commentary on the record as to remedy, the Court allowed the parties to address that issue separately. The parties have briefed the issue, the Court heard argument, and the matter is ripe for disposition. Having found the challenged regulations to be facially unconstitutional,[1] the Court will order that a permanent injunction issue against enforcement of both regulations.

[1] Defendants express confusion based on an error on page 34 of the Memorandum Opinion which uses both the "facial" and "as applied" terminology. The Court now makes clear that, consistent with the remainder of the opinion, the "as applied" language should not have appeared.

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I. The Challenged Regulations

1. Regulation 3 VAC 5-20-40(A)

Regulation 3 VAC 5-20-40(A)[2] pertains to all advertisements and reads as follows:

> A. Beer, wine and mixed beverage advertising in the print or electronic media is permitted with the following exceptions:
>
> 1. All references to mixed beverages are prohibited except the following: "Mixed Drinks," "Mixed Beverages," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail Lounges," "Liquor" and "Spirits";
> 2. The following terms or depictions thereof are prohibited unless they are used in combination with other words that connote a restaurant and they are part of the licensee's trade name: "Bar," "Bar Room," "Saloon," "Speakeasy," or references or depictions of similar import; and
> 3. Any references to "Happy Hour" or similar terms are prohibited.

2. Regulation 3 VAC 5-20-40(B)(3)

3 VAC 5-20-40(B)(3) pertains to advertisements in college publications and provides the following:

> 3. Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "college student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words . . . .

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[2]During argument, Defendants informed the Court that a notice to repeal this statute had been filed on May 26, 2008. Defendants suggested the regulation was moot. Nonetheless, Defendants pursued argument as to limited constitutional applications of the regulation, so the Court must address their argument.

II. Analysis

A. Overbreadth

Defendants first suggest that the Court can declare the regulations at issue facially unconstitutional only by undertaking the overbreadth analysis in *United States v. Salerno,* 481 U.S. 739 (1981). To do so, Defendants step beyond the confines of earlier filings that rested solely on the four-part test for evaluating restrictions on commercial speech articulated in *Central Hudson. See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). (Defs.' Mem. Supp. Mot. Summ. J. 17.) Even presuming that this newly injected argument properly stands before the Court, *Salerno* and the other cases Defendants cite are inapposite.

Courts have applied the overbreadth doctrine only in non-commercial speech cases, and in cases outside the First Amendment altogether. *See Virginia v. Hicks*, 539 U.S. 113 (2003) (First Amendment facial challenge to trespass statute enacted by housing authority not based in commercial speech precepts); *Virginia v. Black*, 538 U.S. 343 (2003) (First Amendment facial challenge to cross burning statute not based in commercial speech statutes);*United States v. Salerno,* 481 U.S. 739 (1987) (Eighth Amendment facial challenge to Bail Reform Act). During oral argument, Defendants acknowledged that they could not offer a single case in which a court evaluated commercial speech utilizing an overbreadth analysis. The Court has found none. Indeed, *Central Hudson* disavows such an analysis explicitly. *See Cent. Hudson*, 447 U.S. at 566 n.8 ("This analysis is not an application of the 'overbreadth' doctrine."); *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Defendants' assertion that the Court cannot declare the regulations facially unconstitutional outside a *Salerno* analysis also ignores existing caselaw. *Central Hudson* itself struck down a statute facially. *Cent. Hudson*, 447 U.S. at 606 (Rehnquist, J., dissenting). In addition to *Central Hudson*, the United States Supreme Court appears to have facially struck down commercial speech statutes solely within the commercial speech analytical framework. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). A permanent injunction also has issued on finding a regulation invalid as applied. *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

The *Central Hudson* test binds this Court, and, as initially argued by both parties, must govern the review of the curb on commercial speech at issue here. This Court need not reconsider its March 31, 2008 ruling that the regulations are facially invalid.

B. Limited Constitutional Application

In any event, even if the Court undertook the analysis urged by Defendants, it must issue a full permanent injunction. Citing principles from the overbreadth doctrine, Defendants urge this Court not to issue a full injunction, but instead to fashion a limited injunction retaining aspects of the regulations that can be applied constitutionally. Defendants urge the Court to fashion a more narrow injunction in the following manner:

> For example, 3 VAC 5-20-40(B)(3) is constitutional as applied to a college student publication whose readership is predominately under the age of 21.
>
> Similarly, 3 VAC 5-20-40(B)(3) is constitutional as applied to advertisements promoting the illegal sale of alcohol, such as an unlicensed establishment advertising the sale of alcohol on its premises.
>
> 3 VAC 5-20-20(A) [sic] is also capable of constitutional applications. For example, a restaurant that does not have an ABC license but serves alcohol is a

> "speakeasy" by definition. *See Merriam-Webster Online Dictionary*, 16 May 2008 (a place where alcoholic beverages are illegally sold). The regulation is constitutional as applied in that situation.

(Defs.' Br. 5-6.)

In an overbreadth analysis, the Supreme Court has held that "partial, rather than facial, invalidation is the required course . . . [u]nless there are countervailing considerations." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *see also Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1084 (4th Cir. 2006). Similarly, the United States District Court for the Eastern District of Virginia has held, "When certain words or subprovisions of a statute, as opposed to the statute in its entirety, are overbroad, a court may limit injunctive relief to the problematic words, phrases, or subprovisions." *Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 741 (E.D. Va. 2007).

However, the preference for limited injunctive relief is subject to two qualifications. First, a limited injunction should not issue if the legislature would not have passed the act had it known the relevant provision to be invalid. *Brockett*, 472 U.S. at 506. Second, the courts should "impose a limiting construction . . . only if [the act] is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (*quoting Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 236 (4th Cir. 2004). Therefore, courts should not "rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 397. A complex revision would encroach on the legislature's authority. *Id.* Courts should issue limited injunctions only if "'the text or other source of [legislative] intent identifie[s] a clear line that [the courts can] draw.'"

PSINet, 362 F.3d at 236 (*quoting Reno*, 521 U.S. at 884). In sum, a readily identifiable and separable part of the act must be constitutional.

1. Regulation 3 VAC 5-20-40(A)

As to the first challenged regulation, governing all advertisements and prohibiting use of specific references such as "Polynesian Drinks," "Cocktails," or "Spirits," Defendants contend the Court should fashion a limited injunction continuing the restriction against advertising the unlawful sale of alcohol, in part because a "speakeasy" is a place where such conduct occurs.

This Court held that 3 VAC 5-20-40(A) violates the First Amendment under *Central Hudson* primarily because the Defendants failed to explain how any part of the regulation directly advances the purported governmental aim of temperance. (Mem. Op. at 15.) In initial briefing, the Defendants argued primarily that this regulation was moot because of its upcoming repeal, and offered little to no defense of it at all. This Court declared the regulation unconstitutional in its entirety. *Id.*

The Defendants now contend that 3 VAC 5-20-40(A)'s prohibition of the term "speakeasy" may be applied constitutionally on a limited basis because the regulation remains constitutional as to advertising the unlawful sale of alcohol. (Defs.' Br. 5-6.) A "speakeasy," they say, is a restaurant that serves alcoholic beverages illegally. *Id.* Because such an operation is illegal, it does not pass *Central Hudson*'s first prong requiring that the "commercial speech . . . . concern lawful activity and not be misleading." *Cent. Hudson*, 447 U.S. at 566. Therefore, advertising containing the term "speakeasy" falls outside First Amendment protection.

This contention cannot stand. First, sweeping aside the issue of why any entity would seek to advertise unlawful activity, this Court cannot ignore the fact that the term "speakeasy"

retains meaning only within the context of prohibition.[3] A place selling alcohol illegally would not be called a "speakeasy" in 2008 any more than an unconventional woman would be called a "flapper." Issuing a limited injunction retaining such antiquated language ignores the context in which the regulation currently exists, and defies common sense.

Second, even if the Court were inclined to so act, an injunction could not be fashioned. Defendants conceded at argument that, in order to effectuate this limitation, the Court would have to add the phrase "the unlawful sale of alcohol" to the regulation's prohibitions because the regulation does not say this on its face. Somehow the term "speakeasy" would have to remain while other phrases involving lawful conduct would have to be removed. This Court should not alter regulations to the degree required by Defendants' position: excising all but one of a regulation's prohibitions while adding phrases to it as well. No "clear line" can be drawn to retain the constitutional aspects of the regulation's text even accepting Defendants' arguments. *PSINet*, 362 F.3d at 236. This Court cannot "rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 397. Thus, any attempt to limit 3 VAC 5-20-40(A) cannot be effectuated by the Court without unduly encroaching on legislative authority, so the Court would have to order a permanent injunction, even utilizing the overbreadth analysis Defendants urge.

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[3]The online version of the Compact Oxford English Dictionary defines "speakeasy" in this manner: "**noun** (pl. **speakeasies**) informal (in the US during Prohibition) an illicit liquor shop or drinking club." (emphasis in original).

2. 3 VAC 5-20-40(B)(3)

As to the second regulation, 3 VAC 5-20-40(B)(3), governing advertisements in college student publications and limiting ads to the use of certain terminology, the Defendants suggest that a limited constitutional application exists as well. Even assuming the Court should consider such an argument, it cannot agree with Defendants' contention on the merits.

First, this Court held that 3 VAC 5-20-40(B)(3) violates the First Amendment under *Central Hudson* because it did not directly and materially advance the stated governmental interest, and because it was not narrowly tailored to serve that interest. (Mem. Op. at 27, 31.) The Court found that any suggestion that the regulation materially advanced the governmental interest was speculative. (Mem. Op. 26, 27.) No limited application or construction can rectify that inherent flaw. A limited application or construction of regulation that does not directly or materially advance a governmental interest still would not directly advance the governmental interest.

Second, Defendants' proposed limitations fail for similar reasons to those discussed regarding 3 VAC 5-20-40(A). Any attempt to limit the regulation would involve intervention to a degree that would encroach on legislative authority. For example, restricting an injunction to college papers whose readership is "predominantly" underage provides no more clear a line of enforcement than the regulation already draws. This Court fails to see the clear line created by substituting the word "predominantly" for the word "primarily," which is how the regulation currently reads.[4] The proper balancing of a regulation's effect on "predominantly" underage

[4] Under the current regulation, a "'college student publication' is defined as any college or university publication that is prepared, edited or published *primarily* by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which

readers versus the impact on adult readers steps beyond the confines of this Court's role as well. In the same fashion, confining an injunction to "similarly situated colleges and universities" proves too vague to offer genuine guidance about enforcement to the Alcohol and Beverage Control Board, or to any student publication. Finally, for the same reasons stated above, the Court will not actively insert language preventing advertising for the "unlawful sale of alcohol."

In sum, the regulation simply is not subject to a limited, constitutional application. The Court cannot impose a limited injunction because the regulation is not 'readily susceptible' to a limited construction. Even if it were to adopt Defendants' proffered analytical framework, the Court would have to issue full injunctive relief.

C. Equitable Balance of Hardships Test

A permanent injunction is required under a traditional equitable balancing test applied by federal courts. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 194 (4th Cir. 1977). Generally, injunctive relief requires consideration of (1) the likelihood of irreparable harm to the plaintiff without the injunction and whether the plaintiff has an adequate remedy at law; (2) the likelihood of harm to the defendant with the injunction; (3) the likelihood the plaintiff will succeed on the merits; and, (4) the public interest. *Amoco Prod. Co.*, 480 U.S. at 542; *Blackwelder*, 550 F.2d at 194. The Supreme Court has suggested satisfying the test is grounds for a permanent injunction provided the moving party has actually succeeded on the merits. *See eBay Inc.v. MercExchange*, 547 U.S. 388, 391 (2006); *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 314

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is distributed or intended to be distributed *primarily* to persons under 21 years of age." 3 VAC 5-20-40(B)(3). (Emphasis supplied.)

(1999); *see also Shields v. Zuccarini*, 254 F.3d 476, 482 (3rd Cir. 2001). In this case, Plaintiffs have succeeded on the merits; therefore, permanent injunctive relief is appropriate provided the remaining factors are satisfied.

As to the first factor generally considered, Plaintiffs will suffer irreparable harm in the absence of an injunction. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002). In addition, Plaintiffs continue to lose revenue because of their inability to advertise alcoholic products. (Mem. Op. at 4, 6.) Moreover, monetary damages are generally inadequate for a First Amendment violation because quantification of injury can be difficult. *See Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). Regarding the second factor, issuing an injunction will not harm Defendants. Courts have recognized that enjoining enforcement of an unconstitutional law does no harm. *See Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Finally, courts have recognized that "upholding constitutional rights serves the public interest." *Id.* In sum, under the equitable balance of hardships test, permanent injunctive relief should commence.

III. CONCLUSION

For the reasons stated above, this Court will issue a permanent injunction against the enforcement of the challenged regulations. An appropriate Order will follow.

M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: JUN 19 2008