San Jose Sharks Vs. Bad Boys Bail Bonds: First Amendment Right to Promote Myself or My Business at Professional Sport Events

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Expressive signs, t-shirts and other written messages can be displayed and viewed by millions of people during a professional sports contest. Several recent cases highlight the challenges faced by professional sports teams who have either removed or attempted to remove fans bearing signs with biblical messages or wearing t-shirts with what teams view as negative messages (See, Aubrey v. City of Cincinnati, 1993; Stewart v. D.C. Armory Bd. Decision, 1988; and “M’s ban controversial anti-Yankees t-shirts from Safeco field,” 2002). More recently, the NHL San Jose Sharks have attempted to prohibit fans from wearing t-shirts which may serve to promote or market businesses other than the Sharks and its approved sponsors.

The Sharks’ recent ticket policy once again raises murky legal questions regarding the constitutionality of these types of policies. Jeff Stanley, co-owner of Bad Boys Bail Bonds, has purchased four Sharks season tickets for ten years and for the past four years his seats have been located behind the home team’s bench (J. Stanley, personal communication, October 26, 2011). When they attend home games at the HP Pavilion, a publicly owned facility (E. Moran, Assistant City Attorney, City of San Jose, personal communication, October 26, 2011), Stanley, his employees and guests, wear T-shirts emblazoned with his company’s name and logo (Wyshynski, 2011). In addition to his tickets, Stanley also purchased a $70,000 sponsorship with the Sharks for the 2010-11 season (Newman, 2011). Stanley, his employees and guests, had been wearing company T-shirts to Sharks games for ten years without team objection (Stanley, 2011).

When Stanley elected not to renew his sponsorship for the 2011-12 season, the Sharks promptly instituted an “enhanced” ticket policy designed to “prohibit ticket holders from using their tickets to generate publicity for the purposes of promoting and/or marketing other businesses.” (Sharks, 2011a). The Sharks amended the language on their ticket backs for the 2011-12 season to include the following: “[The policies of the HP Pavilion] include the prohibition of using admission to generate publicity for the purpose of promoting and/or marketing other entities, events, and/or personalities without the prior written consent of the San Jose Sharks.” (Sharks, 2011b)

Stanley was the only Sharks season ticket holder to receive an email regarding the new ticket policy (D. Kilmer, counsel for Stanley, personal communication, October 26, 2011). In their email to Stanley, the Sharks also advised him that, “To the extent you, or the individuals using your season tickets, may have engaged in such behavior in the past, it will not be tolerated going forward, and the Sharks and HP Pavilion will reserve the right to remove such individuals from the arena and to revoke your season tickets, without refund, in the event such behavior occurs.” (Sharks, 2011a).

Generally, a sport organization’s relationship with its season ticket holders is a mutually agreeable, harmonious, and beneficial relationship. However, the Sharks’ new ticket policy raises several legal questions. One is based on the First Amendment and whether Stanley’s t-shirt displays are constitutionally protected speech, and a second issue relates to the enforceability of the Sharks’ ticket policy under contract law.

Professional athletic teams face a number of obstacles in attempting to regulate First Amendment conduct, i.e., freedom of speech, when they manage a government-owned facility (Gosnell, 1994). Interestingly, we have very little legal precedent specifically related to professional sports clubs or leagues imposing speech restraints on fans (DiSato, 2010). Commentators have explored this legal question in the realm of college sporting events and questioned the wisdom and ability of colleges and universities to develop a policy restricting fan speech which would pass constitutional scrutiny (Calvert & Richards, 2004; Wasserman, 2006).

The Sharks scenario may be distinctly different in a few important ways. First, the Sharks are a private organization using a public facility, so questions exist regarding whether the requisite state action is present to trigger a
constitutional challenge. Second, the Sharks are conditioning the sale of the ticket on the fans’ agreement to abide by
the speech restrictions, which raises issues of consent similar to those seen in 4th Amendment challenges to the
NFL’s pat-down search policy instituted in 2005 (See, Johnston v. Tampa Bay, 2008 holding that Johnston’s voluntary
purchase of his tickets with knowledge that pat-down searches would be required operated as consent. Therefore,
the search was not an unreasonable search under the 4th Amendment). And third, the specific speech in question
may be categorized as commercial speech which is traditionally accorded less protection than pure or political
speech. For example, government restrictions on pure or political speech are subject to strict scrutiny which requires
proof that the law is designed to advance a compelling interest and uses the least restrictive means to serve that
interest. However, governmental restraints on commercial speech are subject to a lower standard of review or
intermediate scrutiny

Commercial speech has been defined as speech that does no more than propose a commercial transaction.
Advertising is the most notable example of commercial speech. The Supreme Court in Bigelow v. Virginia (1975) first
suggested that it was erroneous to assume advertising was entitled to no First Amendment protection and later
affirmed in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976) that speech does not lose
its First Amendment protection “because money is spent to project it” (p. 761).

Stanley admits that his intent in wearing company T-shirts to Sharks games is an effort to advertise and promote his
business (Stanley, 2011); thus, if Stanley’s t-shirts are considered commercial speech, an intermediate level of
scrutiny would apply. The intermediate standard still requires the governmental purpose or objectives to be
sufficiently important to warrant the intrusion on the First Amendment and that the proposed restrictions be
directly connected to achieving those objectives. In other words, there must be a direct connection between the
important goals or objectives of the regulation and the actual accomplishment of those goals or objectives, and the
regulation must be no more extensive than necessary to meet the state’s interest (Central Hudson Gas & Electric Co.

The purpose of this research project is to explore the Sharks’ ticket policy using a constitutional analysis framework.
First, we will summarize existing professional sport teams’ policies restricting speech and/or expression. Second, we
will examine and discuss the enforceability of those policies if challenged as unconstitutional under the First
Amendment. Lastly, we will examine whether conditioning the ticket sale on the fans’ consent to comply with the
ticket policy would be an effective waiver of the fans’ First Amendment rights and a recommended strategy for
professional sports teams.