GOVERNMENT WEBMASTERS CONFERENCE

October 2-3, 2003

DoubleTree Hotel

Kansas City, Missouri

"Legal Considerations and Practical Advice for Governmental Website Operators"

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PART I:

LEGAL CONSIDERATIONS FOR CREATING AND OPERATING A GOVERNMENT WEBSITE[1]

Accessible from virtually anywhere, creatable by virtually anyone, and able to provide virtually any kind of digital, infinitely copy-able content, Internet websites present a myriad of legal issues for all website owners to consider. Websites operated by a government entity -- with which we are concerned here -- implicate additional, important constitutional and statutory obligations that are not applicable to private entities. As a means for providing government information, communicating more directly with citizens, and for providing efficient government services, such websites obviously hold great promise. However, government entities that do so should be aware that this new tool for citizen interaction carries with it the potential for legal entanglement on several fronts.

1. THE FIRST AMENDMENT AND THE PUBLIC FORUM DOCTRINE:[2]

The First Amendment of the United States Constitution – applicable only to government entities – is of preeminent importance in this area. The First Amendment, and the degree to which a "public forum" exists, are central to many issues presented by government websites. In particular, the public forum doctrine sheds light on legal

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[1] This overview of legal considerations pertaining to government websites is intended to provide government website policymakers with a base of knowledge, and to bring to mind issues that website planners may not yet have considered. It is not intended to be an exhaustive treatment of the issues, nor does the Baller Herbst Law Group purport to have expertise in the law of your given state or locality. Keeping in mind that this is an extraordinarily fluid and rapidly changing area of law, we urge government website officials to obtain legal counsel for additional evaluation of these and other legal issues, and for appropriate consideration of local law.

[2] It is possible that the public forum doctrine – having evolved over many years of First Amendment jurisprudence – may not be extended wholesale to cyberspace. The Supreme Court recently declined to use the public forum analysis in analyzing free speech questions involving public access cable television channels (using an alternative and arguably more flexible *O'Brien* test instead), with Justice Stephen Breyer suggesting that "the new and changing area" of cable television was not an appropriate context for the "partial analogy" of the public forum doctrine. *Denver Area Educational Telecommunications Consortium v. FCC,* 518 U.S. 727, 749 (1996). Justice Souter put a finer point on it:

> "As broadcast, cable, and the cybertechnology of the Internet and World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others. Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. . . . [I]n my own ignorance I have to accept the real possibility that if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong."

Id., at 776-777 (Souter, J., concurring).

Regardless of the public forum doctrine's judicial viability (it remains dominant), the lessons of the public forum analysis can serve as effective decision-making guideposts for government website policymakers.

ramifications of allowing others to communicate via your public, governmental website. Thus, it is central to policy questions relating to:

⇒ Links from the government site to external websites.
⇒ The inclusion of local businesses/attractions information on the public webpage.
⇒ Advertising policies.
⇒ Public bulletin boards, "talk back" features, and other citizen interactivity efforts.
⇒ Copyright (tangentially).

The degree to which the government website amounts to a "public forum" dictates how a court will treat any regulation of speech by the government. (A "regulation of speech" in this context would include the website's policies on external linking, advertising, public bulletin boards, etc.) In simple terms, if a government website is analogous to a public park, a court will require the government to meet a very high justification for any regulation of speech. It will be very difficult in that case for the government entity to exert any sort of control over the speech expressed on the website, or to withstand a challenge by a disaffected party. Conversely, if the website is more akin to a government publication, with significant restrictions on outside content or no outside content at all, the court will likely not treat the website as a public forum, and First Amendment challenges to the website will be much more difficult to maintain:

A. **"Traditional" Public Forum:** Such as parks and streets, "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983).

- Any state regulation of speech in a traditional public forum must withstand strict scrutiny.
- Content-based restriction must serve a compelling state interest and be narrowly tailored.
- Content-neutral regulations (time, place, manner) also subject to heightened scrutiny, and alternative means of expression must be available.
- Website that is not open to the "free exchange of ideas" will not be deemed a traditional public forum. *Putnam Pit, Inc. v. City of Cookeville, Tennessee,* 221 F.3d 834 (6th Cir. 2000).
- Website that opens door to "free exchange of ideas" will be subject to the highest level of judicial scrutiny. This could be triggered by, among other things:
  - Publicly-accessible "bulletin boards."
  - "Talk Back" areas.
  - Unrestricted online chats.

B. **"Designated" or "Limited" Public Forum**: Government intentionally opens a nontraditional public forum for public use. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788 (1985). Potential (but judicially untested) examples include a municipal auditorium rented by a citizen's group, a subject-moderated electronic bulletin board on a government website, or a policy-defined collection of links/advertisements to external websites, with decisions *not* made on an ad hoc basis.

- Same strict scrutiny standards apply as to traditional public forum, to the extent the state chooses to keep it open and to the extent the content and participants are within the scope of the forum.
- But strict standards may not be applicable to those to whom the forum was not opened, or to content that is not within the scope of the forum. E.g.; content on bulletin boards, public notices, and advertising (to a slightly different degree) may be restricted on a content-oriented -- but viewpoint-neutral -- basis, so long as it is consistent and (ideally) supported by a stated policy.
- If a state entity excludes a speaker from the forum who falls within the "class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677 (1998).
- Important to ensure that any restrictions are viewpoint-neutral.

C. **"Non-public" Forum**: Characteristics include the government maintaining nearly complete control over communications, or only allowing government communications. As discussed below, the *Putnam Pit* court found the city website to be a non-public forum, even though it included links to external, private websites, in large part because of ad hoc decision-making by the city as to what to allow.

- Government may impose restrictions if the regulation is reasonable (non-public forum evade strict scrutiny). Once the forum is identified as non-public, it becomes very difficult for speakers to access the forum.
- Government may not discriminate based upon viewpoint of the speaker.
- First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a non-public forum and hinder its effectiveness for its intended purpose.

D. **"Designated" Forum vs. "Non-public" Forum**: Two-part test (6th Circuit) to determine whether government intended a designated public forum, or, instead, a non-public forum:

1. Whether government has made the "property" generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property.
2. Whether exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose.

Putnam Pit, Inc. v. City of Cookeville, Tennessee*,* 221 F.3d 834 (6th Cir. 2000)*:* Plaintiff Geoffrey Davidian sued Cookeville, Tennessee, alleging violations of First Amendment rights due to city's refusal of Davidian's request that it establish a hypertext link from the city website to a website owned by Davidian (who "published a small tabloid and web page" located in California, known as the Putnam Pit).

At the time Davidian requested the link the city had no stated policy on external linking, and its website "included links for several for-profit and non-profit entities,

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 about Cookeville." *Putnam Pit,* 221 F.3d at 841. The city subsequently decided to allow links to non-profit entities only.

After Davidian's request, the city chose to adopt a policy that it would only provide links from the Cookeville website to other sites which would promote the economic welfare, tourism, and industry of the city. Pursuant to this policy, the city denied the link to The Putnam Pit. Davidian argued that the city had established a designated public forum by allowing external links on its site.

The 6th Circuit held that the city's website was not a traditional public forum, nor a designated public forum, but was a **non-public forum**, and found the refusal to provide a link to the Putnam Pit to be reasonable and permissible:

- The court emphasized that, regardless of the policy the city adopted (e.g., non-profits only, local welfare-tourism-industry only), the city exercised control over links on a case-by-case ad hoc basis. "Cookeville has not provided open access to links to the city's site, whereby anyone could set up their own link from the city's site to an outside Web site without going through the city on a one-on-one basis." *Id.,* at 843.
- City "clearly did not open up access to any specified group of users." *Id.,* 844.
- City had a legitimate interest in limiting the pool of persons who might be linked from the city's web page. Found to be consistent with 'the process of limiting a non-public forum to activities compatible with the intended purpose of the property.'" *Id.,* quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 49 (1983).
- The court acknowledged that the city's policies enabled it "broad discretion" in choosing for whom to provide links from the city website, but "while the city may 'restrict use to those who participate in the forum's official business,' *Perry,* 460 U.S. at 53, 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." *Putnam Pit,* 221 F.3d at 844.

Lehman v. City of Shaker Heights*,* 418 U.S. 298 (1974)(advertising): U.S. Supreme Court held that the advertising space on city transit vehicles was not a public forum. "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Lehman,* 418 U.S. at 304. The Court emphasized that the city was engaging in commerce – the transit system – and that "[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation." *Id.*

Conclusion: To minimize First Amendment problems, government website operators should adopt specific policies governing links to external websites, website advertising, and other non-governmental uses of the public website, using the lessons of the public forum analysis and relevant case law.

2. E-GOVERNMENT CONSIDERATIONS

By "e-government," we refer here to a government entity providing the means for persons to interactively "do business with" or otherwise exchange information with the government, via the website. This would include electronic filings of all types, electronic permit applications, providing citizens and businesses access to official records and to individual records, etc. The government uses the website and the Internet not only to publish, but also to enable the citizen to submit transactions to the agency. [3]

Such transactions typically require some form of access control (username/password system, digital certificate, biometrics, etc), combined with stringent security practices. The surrounding issues are numerous and complex, and we do not consider them here in substantial detail. We urge government website planners who are considering such e-government services to do so carefully, and we strongly recommend obtaining outside technical and legal counsel.

One of the key legal considerations relating to e-government is the **Federal Privacy Act of 1974** (5 U.S.C. § 552A). While by its terms it directly applies only to federal agencies, at least nine states have closely analogous statutes that impose privacy obligations on state and local government entities.

The Federal Privacy Act is complex, but its fundamental operative terms include the following:

- "No [federal] agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to a list of exceptions] . . . ." 5 USC § 552A(b)
- "Record" is defined by federal act as: "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph."

The Federal Privacy Act also gives citizens the right to review what records the federal government maintains about them, and to seek correction of erroneous records, unless those records are legally exempt. *See* 16 CFR 4.13. Again, this right is frequently mirrored at the state level.

[3] *See,* William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What Is It? What Are Its Implications?*, 19 Santa Clara Computer & High Tech. L.J. 181, 199 (2002).

3. OPEN RECORDS ACTS

Government website operators must also be cognizant of open records laws in their state. While the federal Freedom of Information Act applies only to federal agencies, virtually all states have some analogous law subjecting state and local government entities to a similar obligation to produce records or information, pursuant to a proper request. While most states have exemptions pertaining to certain personally identifiable information (utility billing records, for example), it is conceivable that citizen communications via a government website (a talk-back feature, interactive council meetings, etc.), as well as email, may be subject to such requests. It is important, therefore, that the government website's policies inform users of the government's obligations under applicable open records laws.

Information Subject to Open Records Requests

In most states, disclosure obligations under open records laws are not applicable to every writing (electronic or otherwise) possessed by a person working for a public agency. The operative term in most states is whether the writing rises to the level of a "public record" or a "public writing." A public records request is not analogous to a discovery request; rough notes and drafts are arguably not "public records" or "public writings" under the laws of many states.

The terms "public writing" and "public record" in general pertain to documents and writings produced in pursuance of official duties. In Arizona, for example, coverage extends to all documents in custody of public officers, who are obliged "to make and maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties." *Carlson v. Pima County*, 687 P.2d 1242, 1245 (Ariz. 1984). But, "the mere fact that writing is in the possession of a public officer or public agency does not make it a public record." *Salt River Pima-Maricopa Indian Community,* 815 P.2d 900, 907 (1991). The Supreme Court of Florida recently ruled that public employees do not need to turn over private e-mail to the public, even when using government computers at work. *State of Florida v. City of Clearwater,* Nos. SC02-1694, SC02-1753 (Fla., September 11, 2003).

Electronic Information

Virtually all states hold (either implicitly or explicitly) that electronic information or documents are to be treated no differently than paper documents, for purposes of open records requests.

Entities Subject to Open Records Laws

The question of what entities are subject to open records requests may become important in situations where the government website is operated by a private contractor. It is clear that state open records laws apply to state and local government entities, and conversely that such laws do not apply to purely private entities. Less clear, and more relevant for purposes of this document, is the extent to which such laws apply to non-governmental or quasi-governmental entities that receive public funds or benefits, or that undertake government-like activities.

In many states, the mere receipt of public funds is not sufficient to bring a private entity within the scope of the open records law. There typically must be some "public-ness" about the entity in question, whether by undertaking a traditional government function, carrying on "public business" in some way, or being formed by the government itself. *See* Arkansas Code Ann. § 25-19-103(5)(A)("any . . . agency wholly or partially supported by public funds or expending public funds"; receipt of public funds alone insufficient; question is whether private entity carries on "public business" or is otherwise intertwined with activities of government. *See, City of Fayetteville v. Edmark,* 687 S.W.2d 840 (1985); Connecticut: *Board of Trustees v. FOIC,* 436 Conn. 544, 436 A.2d 266 (1980)(four-part functional test to determine whether hybrid entities are subject); Delaware: 29 Del. C. § 10002(a); Florida: Fla. Stat. § 119.011(2)(1995)(inquiry is whether nongovernmental body is "acting on behalf of any public agency."); Georgia: *Northwest Ga. Health Sys. v. Times-Journal,* 461 S.E.2d 297 (1995)(any entity that serves a public function is subject to act's requirements); Iowa: Code § 22.2(2)(1991), *KMEG Television, Inc. v. Iowa State Board of Regents,* 440 N.W.2d 382 (Iowa, 1989); Nevada: N.R.S. 239.005; New Hampshire: R.S.A. 91-A:2, *Lodge v. Knowlton,* 118 N.H. 574, 391 A.2d 893 (1978); Oregon: *see Marks v. McKenzie High School Fact Finding Team,* 878 P.2d 417 (1994)(six-part functional test); Pennsylvania: "essential government function"; Texas: § 552.003(1)(A)(x), Tex. Op. Att'y Gen. No. JM-821;

Receipt of public funds *is* the touchstone for open records act coverage in other states. In Indiana, "public entity" is described as any provider of goods, services, or other benefits that is "(1) maintained in whole or in part at public expense; or (2) supported in whole or in part by appropriations or public funds or by taxation." *Indianapolis Convention and Visitors Association, Inc. v. Indianapolis Newspapers, Inc.,* 557 N.E.2d 208 (Ind. 1991); Kansas: K.S.A. 45-217(e)(1); Kentucky: KRS 61.870 (any body that receives at least 25 percent of its funds from state or local authority funds); Louisiana: La. Rev. Stat. Ann. § 173390 (nongovernmental bodies receiving public funds are subject to open records law to the extent the records pertain to the receipt of public funds); Maryland: *Moberly v. Herboldsheimer,* 345 A.2d 855 (1975)(open records law applies only if the entity receives sufficient public funds to be considered an "agent" of the state); Michigan: MCLA § 15.232(d)(iv)("public body" definition includes entities "primarily funded by or through state or local authority."); Montana: Mont. Code Ann. § 2-3-203(1)(state constitution guarantees access to records of "public bodies," including "organizations or agencies supported in whole or in part by public funds."); New York: *See*, *Westchester Rockland Newspapers v. Kimball,* 408 N.E.2d 904 (1980); North Dakota: N.D.C.C. § 44.04-17.1; Oklahoma: 51 O.S. § 24A.3.2 (any entity "supported in whole or in part by public funds" is subject); South Carolina: S.C. Code Ann. § 30-4-20(a); Virginia: Va. Code Ann. § 2.2-3701, 1995 Va. Op. Atty Gen. 4 (Jan. 9, 1995)(organizations must be supported principally by public funds to be "public bodies" under the Act); West Virginia: *4-H Road Community Association v. West Virginia University Foundation,* 388 S.E.2d 308 (1989).

A few states are much more restrictive with regard to what entities are subject to open records requests. Illinois: *See Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependency,* 380 N.E.2d 1192 (2d. Dist. Ill. 1978)(private, not-for-profit organization formed to administer drug and alcohol treatment programs not subject to open meetings act, despite fact that 90 percent of its funding came from governmental grants and contracts, and that its programs were monitored and regulated by federal, state, and local governments); Maine: 1 M.R.S.A. § 402.3 (records of

non-governmental bodies not available, since definition of "public records" turns on possession by state or political subdivision); Mississippi: § 25-61-3(a); Missouri: Mo. Rev.Stat. § 610.010(4); New Jersey: N.J.S.A. 47:1A-2 (records of non-governmental bodies not subject to law.); Wyoming: Wyo. Stat. § 16-4-201(a)(v) (records of nongovernmental bodies are not "public records.")

In some states, doing business with the government will cause a private contractor to be subject to open records laws. In Alaska, records "developed or received by a public contractor for a public agency" are "public records available for inspection and copying." A.S. § 40.25.220(6). The local open records law of Anchorage, Alaska is particularly broad, stating that the right of access extends to "any document, whether in draft or final form, containing information relating to the conduct of the people's business which is prepared, owned, used or retained by a municipal agency or an agency under contract with the municipality. . . ." AMC 3.90.020(C). (Municipal agency is defined to include any private contractor that has custody of public records. AMC 3.90.020(B)); Utah: Utah Code Ann. § 63-2-301(1)(j), *et seq*

Clearly, there is substantial variety among state open records laws, and accordingly among the obligations those laws are likely to impose on government website operations. We recommend, therefore, that you or your counsel review and verify the open records laws applicable to your jurisdiction.

4. COPYRIGHT

11th Amendment State Immunity

Unless the state has specifically consented to suit for copyright claims (we know of none that have), state entities are immune from suit for copyright infringement. The Eleventh Amendment to the U.S. Constitution[4] embodies the notion that the states have "sovereign immunity." This means that a state and its agencies may not be sued by persons in the federal courts unless the state entity consents to being sued there (which states have done for a variety of purposes, torts, for instance, but not generally for intellectual property disputes). Suits against a state entity for copyright infringement are typically heard in federal court, therefore states generally are immune from suit for copyright infringement. *See, Chavez v. Arte Publico,* 204 F.3d 601 (5th Cir. 2001). In 1999, the U.S. Supreme Court struck down an attempt by Congress to end this immunity. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1998)

Compliance and Safe Harbors

Nevertheless, it makes obvious sense for government websites to be good copyright citizens because, among other reasons, (1) the 11th Amendment state immunity from copyright infringement may not last forever (bills are periodically introduced in Congress to eliminate it), and (2) copyright owners can employ tactics other than a conventional copyright claim in federal court for monetary damages (they can sue the alleged infringer

[4] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

individually, they can seek an injunction, and they may be able to pursue a breach of contract action in state court).

While a comprehensive review of copyright law as it relates to government websites is beyond the scope of this document, we recommend that website operators and policymakers obtain a working understanding of copyright law generally, and in particular that they are familiar with the Digital Millennium Copyright Act of 1998, which provides certain safe harbors for online service providers. We also recommend that government entities obtain counsel experienced in copyright issues to ensure that website policies and practices are in compliance, to take full advantage of protections against liability, and, especially, to respond to any allegations of direct or contributory copyright infringement.

In brief, government website policymakers should consider at least the following:

⇒ Understand and adhere to copyright obligations in the government's own use of, and presentation of information on, the government website. For example:

- Design the site so that any links to external pages open in their own window, not in a frame of the public website (which may create an unauthorized derivative work).
- Warning boxes for leaving the site are not user-friendly, and probably are unnecessary.
- But *do* include a disclaimer addressing liability for linking to a website that contains infringing or illegal content.
- "Deep linking" directly to copyrighted works of another website may infringe the copyright owner's exclusive rights to display and reproduce such works. This typically comes into play when the other website wishes to have users enter through a front page, for advertising or other purposes.

⇒ Understand the doctrine of **fair use** – 17 U.S.C. §§ 106-107 – which provides an absolute defense to a claim for copyright infringement. § 107 sets out four factors for a court to consider in determining whether the use in a particular case is a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See Kelly v. Arriba Soft,* 336 F.3d 811 (9th Cir. 2003).

⇒ Understand the **Digital Millennium Copyright Act of 1998**:

- Provides statutory safe harbor from contributory infringement for "service providers" (including website operators) that register with the U.S. Copyright Office, that have no actual knowledge of infringement, and that comply with notice and takedown procedures spelled out in the DMCA.
- However, state entities should consider *not* registering with the Copyright Office, as that could be argued to be a waiver of 11th Amendment

immunity, and they may still rely on common law copyright defenses. Check with counsel on this issue.

⇒ Adopt language addressing copyright issues in **appropriate website policies** (disclaimers, copyright policy, advertising agreements, etc.).
⇒ Execute ASCAP/BMI blanket license agreements, if intend to broadcast music.

⇒ Consider obtaining broadcast/copyright infringement insurance; or verify coverage by current liability insurance.

If the portion of website where the alleged infringement occurs is a non-moderated public forum, the government entity operating the site probably will *not* be liable for contributory infringement, under evolved common law copyright principles. (But beware of First Amendment implications of providing such a public forum – see section 1, above)

5. POLICY ON COLLECTION OF PERSONAL INFORMATION

Among the several other topics in this paper that compel the drafting and publication of a policy (external linking, advertising, etc.), it is essential that a government website include a well-thought-out statement of its treatment of personally identifiable information (PII). Website officials must also be mindful of their special obligations with regard to children's PII, as a result of the Children's Online Privacy Protection Act of 1998 (COPPA)

First, website planners must decide whether they intend to collect PII at all. Unless the website is a strictly passive, non-interactive effort, it is likely that PII will be collected at some point, whether through an interactive comment form, a talk-back or bulletin board feature, or e-government applications. Good privacy practices mandate that PII not be collected absent the express consent of the user. The website's privacy policy should reflect this. Also, a number of website privacy auditing bodies also exist, which website planners may choose to employ should they wish to display a "seal of approval" on the site.

Children's personally identifiable information presents a special set of considerations. The **Children's Online Privacy Protection Act of 1998** (COPPA) establishes certain restrictions and duties for the collection of information from children, defined in the act as an individual under the age of 13. The rules spell out what a website operator must include in a privacy policy, when and how to seek consent from a parent, and what responsibilities an operator has to protect children's privacy and safety online.

According to the Federal Trade Commission, if you operate a commercial website or an online service directed to children under 13 that collects personal information from children, or if you operate a general audience website and have actual knowledge that you are collecting personal information from children, you must comply with COPPA. *See,* Federal Trade Commission, "How to Comply with The Children's Online Privacy Protection Rule," www.ftc.gov/privacy/privacyinitiatives/childrens.html, (accessed 9/23/03).

Specifically, COPPA requires website operators to include a conspicuous link to a privacy policy, within which it must spell out specifically what information is collected

from children, how that information is used, how parents may review the child's information and ask to have it deleted. Most importantly, before collecting, using or disclosing personal information from a child, a website operator must obtain "verifiable parental consent."

6. WEBSITE ACCESSIBILITY REQUIREMENTS

In addition to First Amendment and open records act obligations, government websites (unlike private websites) must also take steps to ensure that they are accessible to persons with disabilities. This obligation is embodied generally in the federal Americans With Disabilities Act, and more specifically in state acts that mirror Section 508 of the federal Rehabilitation Act of 1973.

Americans With Disabilities Act of 1990 – Title II, 42 U.S.C. §§ 12101, *et seq.*
Title II of the ADA covers all activities of state and local governments, regardless of the government entity's size or receipt of federal funding. Title II requires that state and local governments provide the disabled an equal opportunity to benefit from all programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794
Prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.

Section 508, Rehabilitation Act Amendments of 1998, 29 U.S.C. § 794(d)

- Section 508 is the most important set of laws and regulations pertaining to accessibility requirements for government websites. While by its terms it only applies to the federal government, the law typically serves as an express or implicit blueprint for state compliance guidelines. Some states have passed laws expressly stating that all state and local government websites must comply with the federal Section 508.
- Section 508 establishes requirements for electronic and information technology developed, maintained, procured, or used by the federal government. Section 508 requires federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public.
- An accessible information technology system is one that can be operated in a variety of ways and does not rely on a single sense or ability of the user. For example, a system that provides output only in visual format may not be accessible to people with visual impairments, and a system that provides output only in audio format may not be accessible to people who are deaf or hard of hearing. Some individuals with disabilities may need accessibility-related software or peripheral devices in order to use systems that comply with Section 508.
- Section 508 regulations embody technical standards, such as:

> *"§ 1194.22(a): "A text equivalent for every non-text element shall be provided (e.g., via "alt," "longdesc," or in element content)."*

and

§ 1194(f): "Client-side image maps shall be provided instead of server-side image maps except where the regions cannot be defined with an available geometric shape."

etc.

State website accessibility policies

Virtually all states have standards, policies, or guidelines relating to website accessibility practices, many of which are expressly meant to apply to local government websites. Some have additional guidelines relating to procurement and application development. About half of the states have enacted laws on the topic,[5] some of which expressly require state government entities to comply with the federal section 508.

Voting Rights Act of 1965

The Language Minority Provisions of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973aa – 1a, 1973b(f)(4), may require election materials to be posted in multiple languages, if your jurisdiction is determined, according to U.S. Census data, to be subject to those provisions. *See* 28 C.F.R. Part 55.

Website accessibility resources:

- Section 508 compliance resources: http://www.section508.gov
- Web Content Accessibility Guidelines (WCAG, Priorities 1.0 – 3.0), published by W3C http://www.w3.org/TR/WCAG10/
- Practical advice: International Center for Disability Resources on the Internet – http://icdri.org
- Website testing application, providing Web Content Accessibility report: (enter website URL, it runs a test and provides an instant report based on requirements of § 508 and WCAG.) www.cynthiasays.com

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[5] California, for example, has G.C. § 11135:
."..(d) (1) The Legislature finds and declares that the ability to utilize electronic or information technology is often an essential function for successful employment in the current work world.

(2) "In order to improve accessibility of existing technology, and therefore increase the successful employment of individuals with disabilities, particularly blind and visually impaired and deaf and hard-of-hearing persons, state governmental entities, in developing, procuring, maintaining, or using electronic or information technology, either indirectly or through the use of state funds by other entities, shall comply with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. Sec. 794d), and regulations implementing that act as set forth in Part 1194 of Title 36 of the Federal Code of Regulations.

(3) "Any entity that contracts with a state or local entity subject to this section for the provision of electronic or information technology or for the provision of related services shall agree to respond to, and resolve any complaint regarding accessibility of its products or services that is brought to the attention of the entity..."

PART II:

PRACTICAL ADVICE FOR CREATING A GOVERNMENT WEBSITE

In light of the foregoing legal considerations, we provide the following high-level outline of practical issues and advice for use by governments in their planning process, or, for those that already have a website up and running, as a checklist:

1. Select **webmaster**(s) and/or web manager. Establish **policy authority** for website.

    a. Municipality is liable for website manager's actions only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. *See, St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Riddick v. School Board,* 238 F.3d 518 (4th Cir. 2000).

2. Register a **domain name.**

    a. Be mindful of inter-governmental consistency (the state may have a scheme for local governments already).
    b. Name/trademark issues.
        i. is .gov always available?
        ii. .org? .net? .state.us/* ?
    c. Register it with a domain name registrar/ICANN (website contractor may provide this as part of services).
    d. WIPO/ICANN domain name dispute process.

3. **What do you want** the website to provide?

    Government information?

    a. Municipal services information and contacts?
    b. Government workings – council meetings (streaming video?), announcements, minutes, etc.?
    c. Other government info: links to state, federal?
    d. Access-protected areas for city employees (access control scheme for sensitive information)?

    Non-governmental information?[6]

    a. Area attractions?

[6] Government website policymakers should carefully consider the ramifications of providing non-governmental information about area businesses, attractions, etc. As a political consideration, would the government be competing with a private-sector effort to do the same thing? Also, some states and localities have "public purpose" laws, which restrict the degree to which a government entity can act outside of the realm of traditional governmental functions, and may restrict how a government website provides advertising and other non-governmental information.

b. Information on area businesses? (be careful here)[7]
    1. Paid advertising?
    2. Free space?
    3. Links only, or allow entire hosted pages?
    4. How select? Geographic restrictions? Political advertising?
c. Information on area churches?
d. General announcements (e.g, club meetings)?
e. Sports teams? Schedules?
f. Youth activities? (scouting, after-school programs, etc.)
g. Any non-local, non-government information?

Interactivity?[8]

a. E-government? (permits, filings, conducting business w/ govt online, employment info etc.)
b. Citizen bulletin boards?
c. Chats with government officials?
d. Interactive council meetings?
e. Areas for children?[9]
f. Advanced applications, streaming and stored video (council meetings, etc)?
g. Musical performances?

4. **Hosting/ownership issues:**

    a. Hosted by government-owned facilities, or hosted by web services company?

        Potential ramifications for contributory/vicarious liability. See, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.,* 75 F.Supp.2d 1290 (C.D. Utah 1999)(contributory copyright infringement).
    b. Who owns the website?
    c. Who gets to keep what after the arrangement ends?

5. **Create necessary policies.** Obtain legal counsel to draft policies reflecting choices made in # 3, above.

    a. Website purpose policy[10]
    b. Linking policy[11]
    c. Advertising policy

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7 See discussion of *Putnam Pit* case in Part I, Section 1.

8 See Part I, Sections 1 & 2.

9 See discussion of COPPA, Part I, Section 5.

10 The City of Cookeville's stated website purpose, as quoted by the court in *Putnam Pit,* is:

> "... to publish, electronically, information about the benefits and opportunities afforded within the community to its citizens and visitors, including messages from city officials; council meeting agendas, ... job opportunities in city government; information about building permits; property taxes and the like."

11 See *Putnam Pit* case discussion, Part I, Section I.

d. Privacy policy/use of personal information
e. Copyright[12]
    1. Copyright notice and info
    2. Register with U.S. Copyright Office as service provider? (check with counsel)
    3. ASCAP/BMI copyright license agreement/payment for performance rights if intend to broadcast copyrighted music, now or in the future.
    4. Consider insurance ramifications
    5. Disclaimer(s)

6. **Insurance?**

7. **Ongoing**: Maintain committee and a clear chain of authority to review issues as they arise.

[12] See Part I, Section 4.

Adrian E. Herbst heads the Minneapolis office of The Baller Herbst Law Group. For more than 25 years he has been on the cutting edge of cable and telecommunications matters, providing regular consulting and legal assistance to municipalities throughout the United States. This has included the initial franchising processes for cable communications as well as renewals, transfers of ownership, and a wide-range of administrative enforcement matters and development of local programming and issues related to local programming. Recently, his work has expanded with the broadband services offered in cable and telecommunications systems to include planning, competition policy, and internet services.

He has served as a key member of many national organizations in programs to provide assistance to local governments, including International Municipal Lawyers Association (IMLA), National Association of Telecommunications Officers and Advisors (NATOA), the Alliance for Community Media and the National League of Cities (NLC). He has served in many capacities on behalf of these national organizations, including developing model ordinances for IMLA and chairing a specialized rights-of-way taskforce for NATOA that developed policies and guidelines for local units of governments throughout the country. He has served as President of the Minnesota Trial Lawyers Association and Vice President of the League of Minnesota Cities and is also a member of various other legal organizations including the Federal Communications Bar Association, and the Telecommunications Committee of the Minnesota State Bar Association.

Mr. Herbst has a unique background in municipal and governmental law and policy, having been a full-time City Attorney and elected City Councilman for 16 years for the City of Bloomington, Minnesota. While serving as City Attorney, Mr. Herbst led a group that was instrumental in the development of the initial franchises for cable services. As a result of this experience, he advised many municipal organizations both on the state and national level to help initiate procedures and guidelines for cable franchising. Further, because of this unique background, he was selected to serve as General Counsel for the Economic Development Authority for the City of Bloomington, Minnesota and was instrumental in the acquisition of land for development, public financing, and spearheaded the creation, development, and negotiation of a development agreement that led to the development of the Mall of America, the largest single shopping mall and attraction center in the country.

Mr. Herbst has been a recognized national leader in municipal law matters and, in particular, cable and telecommunications and as such has been a regular presenter on behalf of various organizations in workshops and seminars as well as national conferences. His recent writings and presentations include:

- "Advanced Communications Seminar" "The ABC's of MPT: Understanding Current Issues in Municipal Utilities, Public Procurement, Technology and Telecommunications"
- "Local Impact of Changing Ownership and Finances of the Cable and Telecommunications Systems"
- "Regulating Telecommunications Companies"
- First Amendment and Public, Education and Government Access
- Liability Issues in Government access and related municipal websites

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