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**SUPERIOR COURT OF CALIFORNIA
 COUNTY OF ALAMEDA, EASTERN DIVISION**

KATHLEEN R., Plaintiff, vs. CITY OF LIVERMORE, et al, Defendants.) Case No. V-015266-4)) BRIEF OF AMICI CURIAE AMERICAN CIVIL) LIBERTIES UNION, AMERICAN CIVIL) LIBERTIES UNION OF NORTHERN) CALIFORNIA, AND PEOPLE FOR THE) AMERICAN WAY IN SUPPORT OF) DEFENDANT CITY OF LIVERMORE’S) DEMURRER)) Hearing Date: October 21, 1998) Time of Hearing: 2:00 p.m.) Department: 50) Trial Date: Not set yet
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INTRODUCTION

Plaintiff has filed a lawsuit to require the City of Livermore to ensure that no one uses the City’s library computers to obtain obscene materials over the Internet and to ensure that no minor ever views harmful matter on the Internet. The relief plaintiff seeks would require librarians to assume the role of Internet censor -- a role forbidden by the First Amendment, and by the Communications Decency Act, which explicitly prohibits lawsuits such as this. [47 U.S.C. §230](#).

The Internet, and in particular the World Wide Web to which the Internet provides access, is in many respects the equivalent of a global library, the content of which is "as diverse as human thought." [Reno v. American Civil Liberties Union](#), 521 U.S. ____, 138 L.Ed. 2d 874, 885 (1997). Any person with access to the Internet has at his or her fingertips a profusion of information, opinion, and ideas so great as to literally defy description.¹

1 However, the Internet user must actively look for the information he or she hopes to find. "Unlike communications received by radio or television, ‘the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.’" [Reno v. ACLU](#), 138 L.Ed. 2d at 887 (quoting lower court opinion). That means that those who access sexually explicit material on the Internet do so because they want to, not through error or accident. Because "[a]most all sexually explicit images are preceded by warnings of its content . . . the ‘odds are slim’ that a user would enter a sexually explicit site by accident." [Id.](#) at 886-87.

2 Blocking software, sometimes also referred to as filtering software, is designed to screen out or "block" particular categories of unwanted content that would

The injunction plaintiff seeks would require Livermore's libraries to drastically reduce the number of websites available to their patrons and might very well cause them to discontinue Internet access entirely. It would essentially give the library three choices: (1) the library could attempt to identify and restrict access to "obscene" and "harmful matter" sites either through the purchase of commercial blocking software² or by having librarians look for the prohibited sites; (2) rather than attempting to eliminate the forbidden sites, the library could limit Internet access to a set of pre-screened sites that no one could contend contain obscenity or harmful matter; or (3) the library could eliminate Internet access entirely. The first option is both unconstitutional and unworkable. An injunction that could be complied with only by severely restricting Internet access or by eliminating Internet access entirely is likewise barred by the First Amendment.

otherwise be available over the World Wide Web. See Censorship in a Box: Why Blocking Software is Wrong for Public Libraries, available at <http://www.aclu.org/issues/cyber/box.htm> and sources cited therein. In addition to blocking out sexually explicit material, such software may also block out websites based on a variety of other criteria such as violent content, language, or advocacy of unpopular opinion, often including not only "hate" sites but sites such as those dealing with the issue of drug policy or those created for the gay and lesbian community. Id. Due to the limitations of technology, blocking software is both under inclusive, failing to block sites it intends to block, and over inclusive, blocking sites that fall outside the stated blocking criteria. Id. Appendix I; see also, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, F. Supp., 1998 U.S. Dist. LEXIS 4725, *3 (E.D. Va. 1998) (where plaintiffs allege that software intended to block only unprotected matter was blocking website of American Society of Friends (the Quakers), the Zero Population Growth website, and the site for the American Association of University Women-Maryland).

First, as discussed in the Argument section of this brief, it is axiomatic that only judges and juries are empowered to declare expressive materials obscene or harmful matter, thereby denying others the right to read or view them. See Freedman v. Maryland, 380 U.S. 51 (1965). Neither librarians nor the makers of commercial blocking software are constitutionally empowered to make such decisions in the library setting. Moreover, from a practical standpoint, neither librarians nor the makers of commercial blocking software can be sure they have excluded all forbidden sites. There are currently at least 320 million pages of material available on the World Wide Web. Steve Lawrence & C. Lee Giles, "Searching the World Wide Web," Science Magazine, April 3, 1998. No local library can be expected to have the resources to screen any but a tiny fraction of those pages. Nor could commercial blocking software provide an answer. First, such software invariably blocks much more than only legally obscene or harmful matter (see supra, n.2), a result prohibited by the First Amendment. Reno v. ACLU, 138 L.Ed. 2d at 899-900. Moreover, determining whether particular expression meets the legal definition of obscenity or harmful matter is a task beyond the capability of commercial software. In addition to the constitutional impediments mentioned above, these determinations require the application of contemporary statewide standards specific to California. See Penal Code §§ 311, 313. We know of the existence of no such customized software. Moreover, no blocking software can ever guarantee to eliminate all forbidden sites. Thus, the library would not be in compliance with the proposed injunction.

Limiting the sites available to those that librarians have carefully prescreened would assure compliance with the proposed injunction but is constitutionally infirm. Reno v. ACLU, 138 L.Ed. 2d 874 (1997); see Smith v. California, 361 U.S. 147 (1959). This strategy would deny library patrons access to vast quantities of protected material simply because of the inability of librarians to screen it. Eliminating Internet access entirely is, of course, an even less acceptable approach. "Surely, this is to burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957).³

3 That is not to say, however, that either parents or librarians are without resources in guiding children in the proper use of the Internet. Teaching parents and children how to use the Internet in order to find the material they seek, imposing time limits on how long any particular individual is permitted to use an Internet terminal before yielding it to another user, providing links to web sites that are particularly appropriate for children, and installing privacy screens to minimize the chance that passersby may see unwanted material are all ways to encourage an atmosphere that is respectful of the rights of all library patrons. See Censorship in a Box, supra n.2.

In Reno v. ACLU, the United States Supreme Court held that the Internet, like books and newspapers, is entitled to the very highest level of First Amendment protection. 138 L.Ed. 2d at 895, 897. While the Court's decision in Reno does not mean that obscenity and harmful matter may not be regulated, it does mean that obscenity or harmful matter may not be prohibited in a manner that denies access to protected speech or that unnecessarily chills the acquisition or availability of protected expression. Following a long line of Supreme Court authority, Reno makes clear that protected expression may not be sacrificed in the name of regulating obscenity or harmful matter. "The interest in encouraging freedom of expression . . . outweighs any theoretical but unproven benefit of censorship." Id. at 906.

Were this lawsuit to proceed, it would thus raise very serious questions of constitutional law concerning the relief sought and its manner of implementation. This court need not reach those questions, however. Further prosecution of this lawsuit is barred by federal law, both under the immunity provisions the Communications Decency Act, 47 U.S.C. § 230, and by First Amendment doctrine barring prior restraints.

ARGUMENT

I. THIS LAWSUIT IS BARRED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT.⁴

4 In Reno, the Supreme Court struck down two provisions of the Communications Decency Act: (1) the prohibition on transmission of any indecent communication over the Internet to a person under the age of 18 (47 U.S.C. § 223(a)), and (2) the prohibition on the transmission or display over the Internet of any "patently offensive" communication in a manner that is available to a minor. 47 U.S.C. §223(d). The Court held that both of these

The theory of plaintiff's case is that, by not restricting Internet access, Livermore's libraries enable their patrons to view obscenity and harmful matter. Relying on taxpayer, public nuisance, and premises liability theories, she seeks an injunction and a declaration that the City of Livermore "is legally liable for all future damage to plaintiff's children caused by the children accessing . . . sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." Complaint, Prayer for Relief, ¶¶ 2, 3 (emphasis added).

provisions violated the First Amendment by reducing communication over the Internet to only that which is fit for children. 138 L.Ed. 2d at 899-900. The immunity provisions of the Communications Decency Act relied on here were not challenged in Reno and remain in full force and effect.

The defect in plaintiff's claim is that she seeks to impose tort liability, albeit in the form of an injunction and a claim for declaratory relief, based on the library's alleged role as a provider or "publisher" of information available over the Internet. The immunity provisions of the Communications Decency Act flatly prohibit imposing liability on a library for providing access to material that was transmitted over the Internet by others. 47 U.S.C. § 230.

5 The term "interactive computer service" includes the access to the Internet provided by public libraries. Thus 47 U.S.C. § 230(e)(2) provides:

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(emphasis added).

6 Section 230(d)(3) provides:

State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(emphasis added).

7 In Loudoun, a group of library patrons brought a constitutional challenge to the library board's decision to install filtering software. Although the software purported to block access only to harmful matter, as

Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁵ Id. Section 230(d)(3) prohibits any state law cause of action that would be inconsistent with the immunity granted by Section 230 generally.⁶ Id. Taken together, these provisions "create[] a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), cert. denied 66 U.S.L.W. 3798 (U.S. June 22, 1998). Accord, Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); compare, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, ___ F. Supp. ___, 1998 U.S. Dist. LEXIS 4725 (E.D. Va. 1998) (opinion on motion to dismiss).⁷

plaintiffs alleged in their complaint, it blocked access to many sites containing protected material as well. Id. at 3. In denying the library board's motion to dismiss, the federal court held that "the First Amendment applies to, and limits, the discretion of a public library to place content-based restrictions on access to constitutionally protected materials within its collection." Id. at 31.

One issue raised by defendants in their motion to dismiss was the applicability of the immunity provisions of the Communications Decency Act. Although the court rejected the Board's claim that Section 230(c)(2) provided immunity from suit, it did so on grounds wholly inapplicable here. Loudoun was a constitutional challenge to the library board's action, not a suit grounded in tort law, as is this suit. Plainly Congress could not authorize governmental agencies to violate the constitution by providing immunity from suit. It is therefore not surprising that the Loudoun court held that "[Section] 230 was not enacted to insulate government regulation of Internet speech from judicial review." Id. at *13 (emphasis added). It was in this context that the court went on to distinguish the immunity from injunctive and declaratory relief sought by the Loudoun board from "the 'tort-based' immunity to 'civil liability' described by Section § 230" Id.

The Fourth Circuit's holding in Zeran is directly applicable here. In Zeran, an anonymous person posted advertisements on an AOL bulletin board indicating that plaintiff was selling T-shirts and other items with tasteless slogans about the bombing of the Oklahoma City federal building. 129 F.3d at 329. Although plaintiff notified AOL of the postings, AOL was slow to respond and took no action to prevent the posting of additional, similar messages. Id. Plaintiff sued AOL seeking to hold it liable for the defamatory speech initiated by the unidentified third party. Id. at 330. At issue was whether Section 230 barred Zeran's action. Id.

Zeran argued that Section 230 applies only to the strict liability imposed on publishers, not to the liability of a distributor who, like AOL, knows that a particular unlawful message is being transmitted over the private network that it controls. Id. at 331. The Fourth Circuit disagreed. Id. at 332. It held that Section 230 preempts state law actions even where the service provider has knowledge of the content of the material in question. Id.

That ruling is based squarely on the purposes of Section 230, which "was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." Id. at 330. While Congress hoped to encourage some private regulation of the Internet, at the same time it recognized that permitting service providers

to be held liable based on the speech of third parties would lead service providers to eliminate any controversial expression that might subject them to civil liability:

The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers [or librarians] to screen each of their millions of postings for possible problems. . . . Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect. Id. at 331.

Indeed, it is precisely such a restrictive effect that the injunction plaintiff seeks would impose here. Plaintiff asks the court to prohibit the library, on pain of being held in contempt, from allowing patrons to use the Internet so long as it would be possible for them to obtain access to obscenity or harmful matter. On a purely practical level, given the vast size and dynamic nature of the Web, no blocking software can guarantee that all obscene or harmful matter will be blocked.⁸ Thus the library's only choice would seem to be to deny patrons any Internet access, a result wholly at odds with Congress' intent in enacting Section 230--and with the Constitution. See Smith v. California, 361 U.S. 147 (1959).

8 The use of blocking software is not a viable option for another very important reason. As noted in the Introduction, and as would be proved at trial, such software is incapable of determining which websites meet the legal definitions of obscenity and harmful matter. The problem is compounded by the fact that, unlike books or newspapers whose content is static, once printed, websites frequently change their content. Thus constant re-review would be required. Equally important, blocking software eliminates many sites that all would agree enjoy First Amendment protection. See, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 1998 U.S. Dist. LEXIS 4725 *3. The First Amendment does not permit a library to eliminate protected expression in order to eliminate unprotected expression. See Reno v. ACLU, 138 L.Ed. 2d 874 (1997); see also Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 1998 U.S. Dist. LEXIS 4725 *34-35.

Section 230 represents a balancing of interests by Congress which this court may not undo by permitting plaintiff's lawsuit to go forward. While Congress clearly wanted to encourage the Internet industry to police itself and intended "'to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, . . . ' [it] made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on [those] that serve as intermediaries for other parties' potentially injurious messages." Zeran v. America Online, Inc., 129 F.3d at 330-331 (emphasis added) (quoting 47 U.S.C. § 230(b)(5)). As the Blumenthal court concluded, "Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." 992 F. Supp. at 52 (emphasis added). The Communications Decency Act thus bars plaintiff's suit.

II. THE INJUNCTION PLAINTIFF SEEKS IS AN UNLAWFUL PRIOR RESTRAINT PROHIBITED BY THE FIRST AMENDMENT.

Plaintiff seeks a permanent injunction prohibiting the Livermore Public Library "from maintaining any computer system on which it allows people to access . . . obscene material or on which it allows minors to access . . . sexual material harmful to minors." Complaint, Prayer for Relief ¶ 2; see also id. ¶¶ 1, 3. "[P]ermanent injunctions--i.e., court orders that actually forbid speech activities--are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). As such, they come before the court bearing a heavy presumption against their constitutional validity. Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980) (quoting Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)).

The rule that injunctions prohibiting speech are unlawful prior restraints finds its origin in the Supreme Court's decision in Near v. Minnesota ex rel. Osborn, 283 U.S. 697 (1931). In Near, a newspaper publisher was found to have violated the state's public nuisance statute by publishing defamatory material. Id. at 704. In accordance with the statute, the court therefore enjoined the publisher from producing any future "malicious, scandalous or defamatory" publication." Id. at 706. Thus like the injunction plaintiff seeks here, "Near . . . involved a true restraint on future speech--a permanent injunction." Alexander v. United States, 509 U.S. at 550. Such injunctions are prohibited by the First Amendment. Cf. Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (invalidating injunction enjoining exhibition of films without providing procedures for determining that they were obscene).

The vice in the injunction invalidated in Near, like the vice in the injunction plaintiff would have the court impose in this case, is that it enjoins the dissemination of expressive materials before there has been a judicial determination that those materials are unprotected by the First Amendment. Alexander v. United States, 509 U.S. at 551. While the state may punish those who are found to have violated its obscenity laws, courts may not enter a general injunction enjoining the violation of those laws, even in the guise of prohibiting a public nuisance. People ex rel. Busch v. Projection Room Theatre, 17 Cal. 3d 42, 59, cert. denied sub nom Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976). In this sense, the United States Supreme Court has "interpreted the First Amendment as providing greater protection from prior restraints [in the form of injunctions] than from subsequent punishments [under the criminal laws]." Alexander v. United States, 509 U.S. at 554.

The California Supreme Court's decision in Busch is dispositive here. In Busch, a group of law enforcement officers brought a civil action under the state's public nuisance statute to enjoin the exhibition of obscene books and films. 17 Cal. 3d at 47. In holding that the lower court erred in sustaining defendants' demurrers, the court ruled that plaintiffs' complaints stated proper causes of action to enjoin the exhibition and sale of specific materials once they had been adjudged obscene. Id. at 58. The court soundly rejected the notion, however, that a finding that the bookstores had exhibited or sold some obscene materials would justify a broad injunction closing down the bookstores or generally prohibiting the sale of obscene materials:

While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene,

constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. Id. at 59. (emphasis added).

The complaint here, unlike the action in Busch, is based on the theory that if plaintiff can prove that the websites her son accessed at the library constitute obscene or harmful matter, she is entitled to the sort of broad injunction condemned in Busch: an injunction prohibiting the library from allowing access to websites with obscene or harmful matter without identifying specific websites and without obtaining a prior adjudication that those websites in fact violate the state's obscenity and harmful matter statutes. As such, the complaint ignores the teachings of Busch. It must therefore be dismissed.

CONCLUSION

For the foregoing reasons, defendant's demurrer must be sustained and plaintiff's complaint must be dismissed with prejudice.

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