

Plaintiffs hereby submit this OPPOSITION TO DEMURRER OF DEFENDANT CITY OF LIVERMORE.

ARGUMENT

I. The Communications Decency Act does not affect this action

The City is correct that the Communications Decency Act ("CDA") at 47 U.S.C. §230 provides broad protection for online service providers, particularly in defamation actions such as *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327 (online service not liable for refusing to remove defamatory messages); and *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44 (online service not liable for refusing to remove columnists defamatory column.) The instant case, however, is not effected by the CDA.

A. CDA §230 was not intended to offer immunity to libraries, and the only court to look at the issue has already rejected library immunity

In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* (1998) 2 F.Supp.2d 783 (E.D.Va), the library argued that because it was an "interactive computer service" it was immune from judicial review for its decision concerning its treatment of obscene and pornographic material. (*Id.* at 789.) After fully analyzing *Zeran* and the legislative history of the Communication Decency Act itself, the Loudoun court concluded that:

§230 was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material; §230 was not enacted to insulate government regulation of Internet speech from judicial review.

(*Id.* at 790.) In other words, the CDA was not enacted to protect government entities from judicial review but rather private entities from judicial review.

The Loudoun court further noted that "even if §230 were construed to apply to public libraries, defendants cite no authority to suggest that the 'tort based' immunity to 'civil liability' described by §230 would bar the instant action, which is for declaratory and injunctive relief." (*Id.*) This is the same relief requested in this case.

The ACLU in its brief at p. 6, fn. 7, suggests that Loudoun is distinguishable in its decision to deny §230 immunity to libraries. Specifically, the ACLU suggests that the Loudoun decision is to be read as simply denying immunity for constitutional challenges. The problem with this analysis is that it does not do justice to Loudoun's analysis of the CDA's legislative history nor to the *Zeran* case. If the Loudoun court wanted to express the maxim that "federal immunities must give way to constitutional challenges," then it could have done so in one sentence. Instead, the court made a lengthy analysis with which the ACLU does not so much disagree as it ignores.

Accordingly, this court is asked to follow Loudoun and find that 47 U.S.C. §230 offers no immunity to the library.

B. Even if CDA §230 offered general immunity to libraries, the obscenity exceptions to CDA §230 specifically override it

Assuming, arguendo, that Loudoun was decided incorrectly and that public libraries do enjoy CDA immunity, the exceptions found at 47 U.S.C. §230(d) override the immunity.

According to 47 U.S.C. §230(d)(1), nothing within §230 is to be construed as effecting the enforcement of obscenity and child pornography statutes. As the Supreme Court noted in Reno v. American Civil Liberties Union (1997) __ U.S. __, 117, S. Ct. 2329, 138 L.Ed.2d 847, 901 fn. 44, "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

The gravamen of this suit is that the defendant library is knowingly soliciting, aiding the transmission of, and providing obscene and harmful images, transmitted from both within the state and from without the state, to minors. This cause of action is entirely consistent with the CDA's stated exemptions. Indeed, because 47 U.S.C. §230(d)(4) states that §230 is intended to have no effect on state laws consistent with §230, it is clear that Congress did not intend to abolish federal or state obscenity and lewdness based actions.

C. Even if CDA §230 offered general immunity to libraries and the obscenity exceptions did not apply, it does not affect this action

Finally, even if §230 applied without exception as the City suggests, it would not aid the City in its attempt to dismiss this suit.

The City suggests that under §230(c)(1), neither the City (in its role as "provider") nor its patrons (in the role of "users") can be treated as a "publisher or speaker of any information provided by another information content provider." Therefore, the City concludes, the fact that children are being harmed by seeing obscenity on the City's computers is of no concern because the City did not publish the obscenity.

Two analogies show that this reading cannot be what Congress intended. First, imagine that a man stationed himself at one of the library's computers and, when an 11 or 12 year old child walked by, said, "Here, let me show some neat pictures." The child stops to look. Imagine that the man then calls up on the screen utterly debased and vile obscene images, such as a person apparently being sexually abused at knife-point. The child, after seeing the images, becomes visibly upset and relates the incident to an adult who in turn calls the police. The City would suggest that the man could not be prosecuted under a state "criminal exhibition of obscene images harmful to minors" statute such as Cal. Penal Code §313.1(a) or under any other "corruption of youth" statute because the man, under §230(c)(1), was neither the publisher nor the speaker of the obscene images but was merely an exempt "user" of an "interactive computer system." The City would also give the man complete immunity from an "Intentional Infliction of Emotion Distress" suit for the same reason. This is patently absurd and hardly what Congress intended. The man's wrong exists not in creating or distributing the images but in choosing to publicly exhibit them to impressionable youngsters. It is no different with the library, and the

facts of this case are a far cry from Mr. Zeran's plea that America Online remove defamatory material from its service.

As another example, assume that the man has a cable television which receives otherwise legal images but which are obscene as to children. Obviously, the man is neither the publisher nor the speaker of the images. However, if the man goes into public and invites children to view his cable television, he would likewise be civilly and criminally liable as an exhibitor.

The point, of course, is that, CDA §230 was never designed to provide this sort of "public exhibitor" immunity. For this reason, the court should not find this lawsuit as being preempted by the CDA.

II. The First Cause of Action (waste of taxpayer funds) is viable and need only be amended

Plaintiffs will not contest defendant's argument that C.C.P. 526a actions demand a precise factual allegation concerning taxpayer standing. Plaintiffs will do so by amending the complaint. This may include adding or substituting another plaintiff for this cause of action.

With regard to the actual validity of the cause of action itself, the City errs in suggesting that the provision of obscenity, especially children, is an acceptable use of government funds. It is easy for a patron (especially a young one) to call up obscene images through any search engine using trivial words such as girl or woman. Moreover, Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1047 is clear that the amount of public funds in question need not be large:

Thus, taxpayer standing exists where the amount of the challenged expenditure is small or an allegedly illegal procedure actually saves taxes, where a purportedly illegal expenditure does not come from tax revenues, where the action is brought by a nonresident taxpayer, and even where there are other persons directly affected by the challenged government action.

The court is asked to allow plaintiffs an opportunity to amend the complaint and also to possibly add or substitute another plaintiff for this particular cause of action.

III. The second Cause of Action (Nuisance) states a cause of action

The City's is correct that, at this point in time, the complaint speaks only of a public nuisance and not a private one. The fact remains that the elements of a public nuisance are made out in the complaint.

A. Plaintiffs have standing

First, by alleging that children are and continue to be exposed to obscene pornography, plaintiffs have alleged a private harm with the exact specificity needed for a nuisance claim. In People ex rel. Busch v. Projection Room Theatre (1976) 17 Cal.3d 42, the plaintiff attempted to have a theater declared a public nuisance because of the "past and continuing exhibition' of magazines and films 'all of which are lewd and obscene under the laws of this State. . .'" (Id. at 48.) Our Supreme Court found that "there is no overriding principle of law which precludes the states

from regulating the exhibition of obscene matter by application of their public nuisance statutes." (Id. at 55.)

The only question, then, is whether the plaintiffs in this case have alleged the sort of "special injury" necessary for a private citizen complaining of a public nuisance. (See, Id. at 51.) The answer is in the affirmative, owing to the fact that the harm alleged is actual in that the minor suffered actual psychological injury by being repeatedly exposed to material deemed obscene material and material "harmful to minors." This injury is sufficient. In Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal.App.3d 757, 768, the pleadings suggested that a condition maintained by the government was a danger to the neighborhood, thus qualifying as a public nuisance. The court further found that not only was there a private nuisance because land was involved, but because it was plaintiff's child and brother who were killed, plaintiff had standing to sue on both a private and public theory.

Similarly, plaintiffs here is not alleging a theoretical harm but an actual harm to a minor child. There should be no question that plaintiffs have shown the requisite harm to qualify for relief under Busch. (See, also, Beck Development Co. v. Southern Pacific Transportation Co. 44 Cal.App.4th 1160, 1213 (while speculation itself is insufficient, a private party has standing if he shows that an "apprehension of injury is well founded" or the existence of an "actual and unnecessary hazard"; Restatement Second of Torts, §821C, comment d (physical injury from a localized nuisance is generally considered sufficient to confer standing).)

B. The alleged nuisance is not "authorized by statute"

The city is correct that anything "authorized by statute" is not a nuisance as per Civil Code §3482. However, neither the library nor the city has ever specifically authorized the exhibition to adults of obscene material nor the exhibition to minors of obscene or harmful matter.

As a general rule, our Supreme Court has "consistently applied a narrow construction to section 3482." (Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal.3d 86, 100.) In order to qualify as a §3482 defense, the authority must be express. Such was the case in Farmers Ins. Exchange v. California (1985) 175 Cal.App.3d 494, where an insurer sought to have the state's practice of spraying malathion declared a public nuisance. The cause of action failed because the release of the destructive spray was specifically authorized by Food & Ag. C. §5321 et seq.

Apart from a very specific grant, however, municipalities generally lose when they cite to Civil Code §3482. The City of Madera argued that state statute specifically authorized it to operate a sewage plant, thus excusing the plant's noxious odors. The court rejected the argument because "[n]one of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities." (Varjabedian v. Madera (1977) 20 Cal.3d 285, 292.) Los Angeles argued that because federal law controlled the planning, location, construction, and operation of airports and also governed flight procedures, the City was excused from the personal injuries caused by airport noise. The Supreme Court disagreed, finding that "statutes which broadly authorize or regulate airports and aircraft flights do not create a

legislative sanction for their maintenance as a nuisance." (Greater Westchester, 26 Cal.3d at 101.)

Boiled down, the simple test is whether "it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." (Id.) Here, it would take a "legislative" enactment which stated: "The library approves of minors viewing on library computers obscene pornography transmitted via the Internet, and staff is to allow minors to do so and assist them as necessary."

The problem with such a specific grant, of course, is that it would violate federal and state obscenity law, would directly contradict Busch which states that pictorial lewdness can serve as the basis for a nuisance finding, and would more generally shock the conscience of the court and serve as another basis for a substantive due process challenge. The grant of authority that the library actually does have falls far short of specifically allowing the conduct complained of in this case because the conduct is unlawful as per state and federal law.

Thus, this court should find that the immunity granted by Civil Code §3482 is inapplicable.

IV. The Third Cause of Action (Premises Liability) states a cause of action

The City in this case is liable for creating and maintaining a known dangerous condition of property, namely providing obscene and harmful matter to children. The City's only counter is that "a public entity cannot be held liable for a dangerous condition of public property based on third-party conduct alone." (Livermore P's&A's at 14.) This argument misses the point.

The library itself is maintaining a device into which an impressionable child need only type the word "girl" and click thrice to view obscene perversions of the darkest order. It is the library which encourages minors to use the device, it is the library who knows that minors have and continue to harm themselves by simply using the device in the way the library intends, and it is the library which could easily put a stop to the harm by simply restricting minor's access.

Much like the hypothetical man, supra, who knowingly exposed youngsters to rank obscenity, so to the library and its staff knowingly sit by as youngsters use the library's equipment to harm themselves even as they use it in the way the library intends.

The litany of cases cited by the City (Livermore P's&A's at 14-15) are about harms created by third-parties and are not instructive here. As an example, Baldwin v. Zoradi (1981) 123 Cal.App.3d 275, is unhelpful because in that case, the dangerous instrumentalities (alcohol and an automobile) were provided by others and not by the defendant itself. It would be difficult to fault the library for allowing a patron to bring in a computer even if the patron used it to exhibit obscene images to children; it is quite different when the library provides the computers itself to children and gives operating instructions on how to call up harmful images.

If the library decided to celebrate the history of the razor blade and set up an open display case where youngsters were encouraged to handle dozens of razor-sharp blades, surely the library would have created a dangerous condition and would be liable for the injuries which resulted. If

the city set up a display of hundreds of obscene vile pornographic images and invited children to view the many pictures on display, knowing that the images are harmful to children and cause them extreme psychological damage, the library would have created a dangerous condition and would be liable for the ensuing psychological harm.

The allegations of the complaint are on par with these situations, and the court is asked to overrule the demurrer to the third cause of action.

IV. Concerns about the constitutionality of a remedy are premature

The city and the ACLU suggest that plaintiffs have limited themselves to a particular remedy. (Livermore P's&A's at p. 13; ACLU Brief at p. 2.) This is incorrect, for while the prayer of the complaint suggests certain results, it hardly demands a particular implementation. With regard to the problem of children harming themselves by viewing obscene images on the library's computers, the City could solve the present problem any number of ways in addition to those mentioned in the moving briefs. As an example, plaintiffs would be satisfied if the city would prohibit minors from using the Internet unless the minor had verified written parental permission. Another option would be for the city to set up unfiltered adult terminals and filtered children's terminals, with children being allowed access to the former only with verified written adult permission.

The ACLU suggests that plaintiff's prayer is defective in that it requests a prior restraint. First, it is doubtful that there are any constitutional concerns here at all: the First Amendment was designed to protect people from the State, and was not designed to protect one branch of the State from another branch of the State. The reason for this is self-evident: if the State desires to speak but finds it cannot, it need only pass rules allowing it to speak. Plaintiffs would challenge the ACLU to produce any authority which suggests that a decision by a County court allegedly limiting a city library's provision of materials somehow implicates the First Amendment rights of the library. If specific patrons have specific complaints after a solution is implemented, such could be dealt with in the course of time.

More importantly, however, is the fact that Plaintiff's have never suggested a specific system such as that invalidated in the case of People ex rel. Busch v. Projection Room Theatre (1976) 17 Cal.3d 42 (State v. private bookstore). Even the Busch court saw no problem with permanently enjoining the showing of specific obscenities found to be obscene by a jury. As the Busch court summed up:

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

(Id. at 60.) The court is thus asked to allow the case to proceed to trial and, after a verdict in favor of plaintiffs, fashion an appropriate remedy.

V. The court is asked to allow plaintiffs to amend the complaint

Plaintiffs has already conceded that one amendment to the complaint will be made, namely the §526a taxpayer-standing issue. In addition, plaintiffs are considering adding a possible substantive due process claim, adding a possible request for writ of mandate, and possibly other amendments as well. The court is asked to allow plaintiff 30 days to amend the complaint because of the great complexity of these issues.

CONCLUSION

The City is maintaining a computer system which allures children to its keyboard and, upon the typing of a word as simple as "girl" and clicking thrice, will call up obscenities of the vilest persuasion. The law presumes that such images are harmful children.

While Plaintiff would ask for an opportunity to amend the first cause of action as specified supra, the court should overrule the demurrer for the reasons given in this Opposition.

Dated: October 13, 1998

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