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LAYER42.NET
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

10 BARBRA STREISAND, an individual,

11 Plaintiff,

12 v.

13 KENNETH ADELMAN, an individual;
14 PICTOPIA.COM, a California corporation;
LAYER42.NET, a California corporation; and
15 DOE 1 through DOE 20, inclusive,

16 Defendants.

Case No.: SC077257

**DEFENDANT LAYER42.NET'S DEMURRER
TO COMPLAINT**

Date: October 14, 2003

Time: 8:30 a.m.

Dept.: H (Hon. Allan J. Goodman)

Complaint filed: May 20, 2003

17 Defendant Layer42.net demurers to the Complaint filed by Plaintiff Barbra Streisand as
18 follows:

19 1. The first cause of action for invasion of privacy (intrusion into seclusion) fails to state
20 facts sufficient to constitute a cause of action pursuant to Code of Civil Procedure § 430.10(e) because
21 it is barred by Communications Decency Act, 47 U.S.C § 230.

22 2. The second cause of action for invasion of privacy (publication of private facts) fails to
23 state facts sufficient to constitute a cause of action pursuant to Code of Civil Procedure § 430.10(e)
24 because it is barred by Communications Decency Act, 47 U.S.C § 230.

25 3. The third cause of action for invasion of privacy (constitutional privacy) fails to state
26 facts sufficient to constitute a cause of action pursuant to Code of Civil Procedure § 430.10(e) because
27 it is barred by Communications Decency Act, 47 U.S.C § 230.
28

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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT LAYER42.NET'S
DEMURRER TO COMPLAINT**

Date: October 14, 2003

Time: 8:30 a.m.

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17 **I. INTRODUCTION**

18 Defendant Layer42.net's demurrer should be sustained because Plaintiff Barbra Streisand's
19 Complaint against it is barred by the Communications Decency Act, a federal law granting internet
20 service providers immunity from lawsuits relating to the content posted on websites they host.

21 **II. STATEMENT OF FACTS**

22 Defendant Kenneth Adelman took photographs of the entire California coast and published the
23 photographs on his website, www.californiacoastline.org. One of the photographs depicted Plaintiff's
24 beachfront estate in Malibu. Plaintiff complains that publication of this photo was an invasion of her
25 privacy.

26 Defendant Layer42.net is the internet service provider that hosts the website. (Complaint, ¶ 6.)
27 Layer42.net is not responsible for the content of websites it hosts and the Complaint does not so
28 allege.

1 **III. ARGUMENT**

2 Section 230 of the Communications Decency Act provides that “[n]o provider or user of an
3 interactive computer service shall be treated as a publisher or speaker of any information provided by
4 another information content provider.” 47 U.S.C. § 230(c)(1). It further provides that “[n]o cause of
5 action may be brought and no liability may be imposed under any State or local law that is inconsistent
6 with this section.” *Id.* at § 230(e)(3). Thus, this section “creates a federal immunity to any cause of
7 action that would make service providers liable for information originating with a third-party user of
8 the service.” *Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684, 692 (2001). In enacting this
9 statute, “Congress made a policy choice...not to deter harmful online speech through the separate
10 route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially
11 injurious messages.” *Id.* at 697 (quotation omitted).

12 “This form of immunity requires that (1) the defendant be a provider or user of an interactive
13 computer service; (2) the cause of action treat the defendant as a publisher or speaker of information;
14 and (3) the information at issue be provided by another information content provider.” *Gentry v. eBay,*
15 *Inc.*, 99 Cal.App.4th 816, 830 (2002) (provider of auction website not liable for fraudulent item
16 descriptions and seller ratings posted on site by users).

17 An “interactive computer service” is “any information service, system, or access software
18 provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C §
19 230(f)(2). Examples of such services are websites as such eBay that “enable[] users to conduct sales
20 transactions” (*Gentry*, 99 Cal.App.4th at 830 n.7), services like AOL that provide and distribute a
21 variety of information (*id.* at 830), and libraries providing Internet access to the public. *Kathleen R.*,
22 87 Cal.App.4th at 692.

23 The statute provides immunity to a “distributor” as well as “a publisher or speaker of
24 information” provided by another. *Id.* at 695 n.3. Thus, immunity applies whether the service
25 provider is merely a conduit for the information (for instance, a library providing Internet access,
26 including access to pornography, *id.* at 695) or plays “an active even aggressive role in making
27 available content prepared by others.” *Gentry*, 99 Cal.App.4th at 830 (describing case where AOL
28

1 “contracted for [allegedly defamatory] reports, retained certain editorial rights as to its content, and
2 aggressively promoted the report.”)

3 Information is provided by “another information content provided” when the defendant “is not
4 responsible, in a whole or in part, for the creation or development of any of the harmful matter
5 accessible through its computers.” *Kathleen R.*, 87 Cal.App.4th at 692 (library not liable for providing
6 Internet access to pornography because library did not create the pornography). For instance in
7 *Gentry*, the court concluded that eBay could not be liable under state law for failing to provide a
8 certificate of authenticity to purchasers of autographed collectibles through its website because the
9 causes of action sought to “hold eBay responsible for misinformation or misrepresentations originating
10 with other defendants or third parties.” *Gentry*, 99 Cal.App.4th at 820. Such causes of action are
11 preempted by section 230. *Id.*¹

12 Here, section 230 bars all of Streisand’s causes of action against Layer42.net. Streisand’s
13 claims take issue with the content of the website, i.e., that it invades her privacy and misuses her name.
14 Layer42.net has no control over the content of the site. Layer42.net is not the publisher or speaker of
15 the photographs or words and section 230 prohibits it from being considered so by the mere fact that it
16 provides an interactive computer service.


17 **IV. CONCLUSION**

18 Defendant Layer42.net’s demurrer should be sustained without leave to amend because all
19 causes of action alleged by Plaintiff Barbra Streisand are barred by the Communications Decency Act.

20 Respectfully submitted,

21 Dated: June 26, 2003

22 REYNOLDS CASAS & RILEY, LLP

23
24 By: 
25 Daniel L. Casas
26 Attorneys for Defendant
27 LAYER42.NET

28 ¹ The foregoing explanation of the Communications Decency Act was taken from the memorandum of points and authorities submitted by Defendants Adelman and Pictopia.com in support of their respective motions to strike.

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**APPENDIX OF NON-CALIFORNIA
AUTHORITY IN SUPPORT OF
LAYER42.NET'S DEMURRER TO
COMPLAINT**

Date: October 14, 2003

Time: 8:30 a.m.

Dept.: H (Hon. Allan J. Goodman)

Complaint filed: May 20, 2003

17
18 Defendant Layer42.net submits the following non-California authority in support of its
19 demurrer to the Complaint:

20 A. 47 United States Code Annotated § 230.

21 Respectfully submitted,

22 Dated: June 26, 2003

23 REYNOLDS CASAS & RILEY, LLP

24
25 By: 

Daniel L. Casas
Attorneys for Defendant
LAYER42.NET

EXHIBIT A



C

47 USCA § 230

§ 230. Protection for private . . .
Current through P.L. 108-35, approved . . .
Approx. 5 pages



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§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent,

harassing, or otherwise objectionable, whether or not such material is constitutionally protected;
or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [FN1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) 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.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

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.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

2001 Main Volume

(June 19, 1934, c. 652, Title II, § 230, as added Feb. 8, 1996, Pub.L. 104- 104, Title I, § 509, 110 Stat. 137; Oct. 21, 1998, Pub.L. 105-277, Div. C, Title XIV, § 1404(a), 112 Stat. 2681-739.)

[FN1] So in original. Probably should be "subparagraph (A)".

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-204 and House Conference Report No. 104- 458, see 1996 U.S. Code Cong. and Adm. News, p. 10.

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

References in Text

The Electronic Communications Act of 1986, referred to in subsec. (e)(4), is Pub.L. 99-508, Oct. 21, 1986, 100 Stat. 1848, as amended, and is classified principally to chapter 121 (section 2701 et seq.) of Title 18, Crimes and Criminal Procedure. For complete classification of this Act to the Code, see Short Title note under section 2510 of Title 18 and Tables.

Codifications

Section 509 of Pub.L. 104-104, which directed amendment of Title II of the Communications Act of 1934 (47 U.S.C.A. § 201 et seq.) by adding section 230 at end, was executed by adding the section at end of Part I of Title II of the Act to reflect the probable intent of Congress.

Amendments

1998 Amendments. Subsec. (d). Pub.L. 105-277, Title XIV, § 1404(a)(2), (3), Oct. 21, 1998, 112 Stat. 2681-739, added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (d)(1). Pub.L. 105-277, Title XIV, § 1404(a)(1), Oct. 21, 1998, 112 Stat. 2681-739, redesignated former subsec. (d)(1) as (e)(1), and, in subsec. (e)(1) as so redesignated, added "or 231" after "section 223".

Subsec. (e). Pub.L. 105-277, Title XIV, § 1404(a)(2), Oct. 21, 1998, 112 Stat. 2681-739, redesignated former subsec. (e) as (f).

LIBRARY REFERENCES

American Digest System

Libel and Slander ¶28.
Telecommunications ¶262, 461.15, 470.1, 472.
Key Number System Topic Nos. 237, 372.

Corpus Juris Secundum

Injurious Falsehood, see C.J.S. §§ 53 to 55, 98.
Telegraph, Telephone, Radio, and Television, see C.J.S. §§ 114 to 115, 217, 221, 232.

Law Review and Journal Commentaries

Communications Decency Act § 230: Make sense? Or nonsense?--A private person's inability to recover if defamed in cyberspace. Rober T. Langdon, 73 St. John's L.Rev. 829 (1999).
Establishing legal accountability for anonymous communication in cyberspace. 96 Colum.L.Rev. 1526 (1996).
Indecent proposals: Reason, restraint and responsibility in the regulation of indecency. Allen S. Hammond, IV, 2 Vill.Sports & Ent.L.J. 259 (1996).
Liability on the Internet. Sylvia Khatcherian, 68 N.Y.St.B.J. 34 (May/June 1996).
Safe harbors against the liability hurricane: The Communications Decency Act and the Digital Millennium Copyright Act. Jonathan Band and Matthew Schruers, 20 Cardozo Arts & Ent.L.J. 295 (2002).
Scientological defenestration of choice-of-law doctrines for publication torts on the Internet. Comment, 15 J.Marshall J.Computer & Info.L. 361 (1997).
Zeran v. AOL and the effect of section 230 of the Communications Decency Act upon liability for defamation on the internet. David R. Sheridan, 61 Alb. L. Rev. 147 (1997).

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 62.4 (Robert L. Haig ed.) (West Group & ABA 1998).

NOTES OF DECISIONS

Construction and application 2Immunity 4Preemption 3Purpose 1

1. Purpose

Communications Decency Act (CDA) was enacted, in part, to maintain robust nature of Internet communication and, accordingly, to keep government interference therein to minimum. Zeran v. America Online, Inc., C.A.4 (Va.) 1997, 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

2. Construction and application

Communications Decency Act (CDA) applies to any complaint instituted after its effective date, regardless of when relevant conduct giving rise to claims occurred. Zeran v. America Online, Inc., C.A.4 (Va.) 1997, 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

3. Preemption

Plaintiff's state common-law claim against commercial interactive computer service provider for negligent distribution of defamatory material on service provider's internet electronic bulletin board directly conflicted with Communications Decency Act's (CDA's) prohibition against treating internet provider as publisher or speaker, and thus, plaintiff's claim was preempted by CDA, where plaintiff's attempt to impose distributor liability on service provider was, in effect, attempt to have service provider treated as publisher of defamatory material. Zeran v. America Online, Inc., E.D.Va.1997, 958 F.Supp. 1124, affirmed 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

Communications Decency Act (CDA) reflects no congressional intent, express or implied, to preempt all state law causes of action concerning interactive computer services; CDA provision reflects Congress' clear and unambiguous intent to retain state law remedies except in event of conflict between those remedies and CDA. Zeran v. America Online, Inc., E.D.Va.1997, 958 F.Supp. 1124, affirmed 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

4. Immunity

Operator of interactive computer service was not "information content provider" with respect to information published on its stock quotation service, and thus qualified for immunity, pursuant to Communications Decency Act, against negligence and defamation claims of corporation for which allegedly inaccurate stock information was provided on service; corporation did not counter evidence that stock information was created solely by third parties, and operator's efforts to correct errors through deletions and correction requests to third parties was not development or creation of information. Ben Ezra, Weinstein, and Company, Inc. v. America Online Inc., C.A.10 (N.M.) 2000, 206 F.3d 980, certiorari denied 121 S.Ct. 69, 531 U.S. 824, 148 L.Ed.2d 33.

Communications Decency Act (CDA) creates federal immunity to any cause of action that would make interactive computer service providers liable for information originating with third-party user of

service. Zeran v. America Online, Inc., C.A.4 (Va.) 1997, 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

Web site operator of an information service that provided or enabled computer access by multiple users to a computer server qualified as an "interactive computer service" provider, for purposes of the Communications Decency Act of 1996 (CDA), which creates a federal immunity to any cause of action that would make computer service providers liable for information originating with a third-party user of the service, though operator neither provided nor enabled computer access to the Internet. Carafano v. Metrosplash.com Inc., C.D.Cal.2002, 207 F.Supp.2d 1055.

Provider of interactive computer service was "publisher" for purposes of Communications Decency Act, and thus could not be held liable under state law for defamation based on statements made on Internet by individual who had rented computer from provider; provider configured computer in such way that it was not possible to identify user, and plaintiff sought to hold provider liable for its conduct in disseminating statements and to place provider in user's shoes. PatentWizard, Inc. v. Kinko's, Inc., D.S.D.2001, 163 F.Supp.2d 1069.

Communications Decency Act (CDA), which provides protection for private blocking and screening of offensive material, did not provide immunity to county library board of trustees, and its individual members, in §§ 1983 action brought by library patrons who alleged that board's enforcement of its policy of blocking access to adult-oriented Internet sites from library computers violated their First Amendment free speech rights. Mainstream Loudoun v. Board of Trustees of Loudoun County Library, E.D.Va.1998, 2 F.Supp.2d 783.

Interactive computer service provider was immune from defamation liability based on gossip column, even though service provider had contracted with gossip columnist to provide column for monthly compensation of \$3000, service provider had certain editorial rights including right to require changes in content and to remove it, and service provider had affirmatively promoted columnist as new source of unverified instant gossip. Blumenthal v. Drudge, D.D.C.1998, 992 F.Supp. 44.

Interactive computer service provider was "publisher" under Communications Decency Act (CDA) with respect to claim that provider failed to promptly remove defamatory statements posted by third party when informed of those statements; thus, CDA precluded provider's liability on that claim. Zeran v. America Online, Inc., C.A.4 (Va.) 1997, 129 F.3d 327, certiorari denied 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712.

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