THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM A. SHEEHAN III,

Plaintiff,

v.

KING COUNTY, et al.,

Defendants.

NO. C97-1360WD

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

The American Civil Liberties Union of Washington ("ACLU-WA") submits this amicus curiae brief in response to the Court's invitation to address the constitutional issues raised by the motions of defendant Experian Information Solutions, Inc. for (1) a preliminary injunction and (2) an order to show cause why plaintiff should not be found in contempt of the Court's June 10, 1998 temporary restraining order.

ACLU-WA opposes Experian's motion for a preliminary injunction. See Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (court may not enjoin protesters from

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distributing leaflets that encourage readers to contact a business person at his home phone number). ACLU-WA takes no position regarding the contempt motion, because it turns on a large number of contested factual findings. The Court has not invited amicus briefing on defendants' April 1998 motion for sanctions, so none is submitted.

I. INTEREST OF AMICUS

The American Civil Liberties Union of Washington is a nonprofit, nonpartisan organization dedicated to the principle of individual liberty embodied in the Constitution. ACLU-WA strongly supports freedom of speech and of the press. It has participated as amicus curiae in numerous cases—including cases where it has appeared both upon its own motion and upon invitation of this Court, see Fordyce v. City of Seattle, No. 92-75WD (W.D. Wash. 1993)—as counsel to parties, and as a party itself in numerous cases involving civil liberties interests. Because of the importance of the Internet as a forum for free speech, the ACLU has taken a strong interest in cases involving Internet censorship. See, e.g., Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997).

II. BACKGROUND

This amicus brief is based on the following factual assumptions:[1]

A. Sheehan's Web Site

Plaintiff Sheehan filed suit against a number of credit reporting agencies, including Experian, alleging violations of the Fair Debt Collections Practices Act and the Fair Credit Reporting Act. Sheehan has also, since at least February 1997, operated a web site at

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[1] For purposes of this amicus brief, ACLU-WA considers the record to consist of the exhibits and declarations submitted in conjunction with Experian's Memorandum in Support of Motion for Temporary Restraining Order (filed June 2, 1998) ("Experian's Brief"), and Sheehan's Response to Motion for Restraining Order and Motion to Amend (filed June 5, 1998) ("Sheehan's Brief"). ACLU-WA does not intend to take any position with regard to disputes of material fact.

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http://billsheehan.com. As presented in Exhibits A-C to Experian's Brief, the web site contains four general types of content:

(1) Sheehan's grievances against government officials and private parties, most of them credit reporting agencies and debt collection services;

(2) Strongly worded expressions of opinion (e.g., referring to a corporation as "criminally insane," and persons as "assholes," "jerkoffs," "scumbags");

(3) allegations about corporations and persons, some of which Experian claims are defamatory;

(4) Information about employees of Experian and other credit agencies. After Sheehan filed his lawsuit, he added to the web site information regarding defendants' outside counsel.

The information about employees is limited to home addresses; street maps identifying the locations of the addresses; home telephone numbers; fax numbers; social security numbers; photographs of automobiles and their license plates which appear to have been taken in public; and photographs of people which appear to have been taken in public. Sheehan declares that he obtained this information lawfully, from such public information sources as the Washington Secretary of State and other Internet sites. Sheehan Declaration at 2, lines 8-10.

Sheehan's web site contains no explicit encouragement for readers to engage in any specific conduct, or to use the information about Experian employees or attorneys in any specific way. The only place in the record where a Sheehan web page explicitly encourages any action is a web page on which Sheehan "fully advise[s]" readers to make collect calls to the President of US West (not a party) for the purpose of engaging in protest speech. Exhibit A to Experian's Brief.

Sheehan made one phone call to the home phone number of one of Experian's attorneys, Exhibit D to Experian's Brief, and he also sent printouts from his web site via fax to defendants'

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attorneys at their places of business, Exhibits B-C to Experian's Brief. Other than these actions of Sheehan himself, the record contains no evidence that any person has ever contacted any employee or agent of Experian, or for that matter any individual identified in Sheehan's web site, as a result of viewing the site.

B. Experian's Counterclaims and Motion for Pretrial Injunctions

Experian alleged counterclaims of defamation, commercial disparagement, interference with lawful business, negligence, and "wanton and willful misconduct." (Experian does not allege invasion of privacy, and it is questionable whether it would have standing to do so.) Experian moved for a temporary restraining order and a preliminary injunction to prohibit Sheehan from posting on any web site (1) "any false or defamatory statements about Experian, its employees or agents," and (2) "any other language specifically calculated to induce others to harass, threaten or attack Experian, its employees or agents, including, but not limited to, their social security numbers, home phone numbers and maps to their homes."

On June 10, 1998, the Court denied the first part of Experian's requested restraining order, but granted the second.

III. ARGUMENT

A. There May Be No Need to Reach Constitutional Questions on this Motion

The Court has invited ACLU-WA to address the constitutional issues raised by Experian's motions, which the remainder of this brief does. However, the moving party must first establish that it is entitled to a preliminary injunction on a substantive cause of action before there is any need to address whether the First Amendment forbids the injunction. A party may not secure an injunction simply by proving that contested speech is not constitutionally protected.

The Court's analysis must therefore consider whether Experian is likely to succeed on the merits of the claims it has pleaded and whether Experian can be made whole by monetary

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damages (i.e. whether irreparable harm has occurred and is threatened). ACLU-WA leaves it to the parties to discuss the sufficiency of the evidence with regard to each element of Experian's five counterclaims and the adequacy of legal remedies.

B. The Requested Injunction Is An Unconstitutional Prior Restraint

In this motion, Experian does not seek compensation for injuries it may have suffered, but instead seeks complete governmental suppression of Sheehan's speech—before trial. Such relief is presumptively unconstitutional. The First Amendment strictly limits the circumstances where parties may be held liable in civil damages for their speech. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (limiting private cause of action for intentional infliction of emotional distress); New York Times v. Sullivan, 376 U.S. 254 (1964) (limiting private cause of action for defamation). After-the-fact punishment for speech is rarely allowed under the First Amendment, and injunctions against speech are even more extraordinary.

"Temporary restraining orders and permanent injunctions—i.e. court orders that actually forbid speech activities—are classic examples of prior restraints." Alexander v. United Sates, 509 U.S. 544, 550 (1993). They are presumed to be unconstitutional. Id.; Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980) (citing Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)); New York Times Co. v. United States, 403 U.S 713, 714 (1971) (refusing to enjoin publication of the Pentagon Papers). The presumption of invalidity is even stronger in the case of a pretrial injunction, which of necessity is made without a final ruling that the speech lacks constitutional protection. Even obscene speech that may be enjoined after trial may not be enjoined without a final judicial determination of obscenity, because the First Amendment does not tolerate even temporary suppression of speech that might ultimately be found to be protected. Vance, 445 U.S. at 316. The Court recognized this when it denied Experian's request to enjoin

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"false or defamatory" speech. A court cannot enjoin speech that might be, but has not yet been, found defamatory. Near v. Minnesota, 283 U.S. 697 (1931).

This case closely resembles Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), which involved a preliminary injunction against the distribution of leaflets by an organization that criticized the business methods of a real estate broker. The organization distributed leaflets at various places in the broker's home town, including the homes of his neighbors. Id. at 417. The group hoped to shame the broker into changing his ways by "[letting] his neighbors know what he was doing to us." Id. Going a step further than Sheehan's web site, two of the leaflets in Keefe explicitly requested recipients to call the broker at his home phone number. Id. The Court dissolved the preliminary injunction as an unconstitutional prior restraint. Id. at 418-19. The Court specifically rejected the contention that the target of the protest had any valid basis for an injunction: "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court." Id. at 419. The Court also rejected the contention that the broker's interests in privacy outweighed the public interest in peaceful distribution of the leaflets. Id. More than any other case, Keefe disposes of the constitutional issues raised by Experian's motion.

C. Sheehan's Web Site Contains Constitutionally Protected Speech

Experian argues that the rule against prior restraints ought not apply because Sheehan's speech is not protected by the First Amendment. Amicus respectfully disagrees.

1. The Internet is a Public Forum that Enjoys the Greatest Possible First Amendment Protection

In Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 1997 U.S. LEXIS 4037 (1997), the Supreme Court ruled that "the vast democratic fora of the Internet," 1997 U.S. LEXIS

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4037 at 43, constitute a free speech zone where the government's ability to restrict expression is at its weakest. The Internet is akin to books, newspapers, streets, and sidewalks as a place where proliferation of speech is expected, encouraged, and protected. Because the Internet is "the most participatory form of mass speech yet developed," id. at 34 (quoting ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring)), there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id. at 47.

2. Sheehan's Web Site Is Not An Incitement to Imminent Unlawful Conduct

The constitutional guarantee of free speech, particularly on matters of public concern, is so broad that it protects even the advocacy of illegal activity. See, e.g., Noto v. United States, 367 U.S. 290, 298 (1961); Yates v. United States, 354 U.S. 298, 318 (1957). An extremely narrow exception to this rule allows punishment or prohibition of speech that "is directed to inciting or producing imminent lawless action and is likely to induce or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Sheehan's web site sets forth information and opinion and does not incite imminent criminal conduct. Therefore its contents remain cosntitutionally protected.

a) Sheehan's Web Site Does Not Encourage Any Specific Conduct At All, Let Alone Unlawful Conduct

The record does not contain evidence of any statement from a Sheehan web page that expressly encourages readers to harass, threaten or attack any of the individuals identified there. Indeed, none of his web pages expressly encourages readers to do anything.[2] Many pages simply

[2] Experian argues that Sheehan's statement "Could somebody PLEASE medicate these guys?" is an encouragement for readers to go to the homes of the identified persons (who are not employees or agents of Experian) to forcibly medicate them. Experian's Brief at 8. This is an untenable reading of Sheehan's facetious commentary on these persons' perceived over-sensitivity to criticism. The formulation is no more an incitement than is the statement "These guys need medication."

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contain a list of individuals, with no editorial comment from Sheehan. Others contain identifying information along with Sheehan's personal opinions. It is only through speculation that one could say that Sheehan encourages any conduct at all, let alone unlawful conduct.

Brandenburg requires a subjective inquiry into the speaker's intent to incite unlawful conduct, as well as an objective inquiry into the likely effects of the speech. From an objective perspective, Sheehan's web page is most likely to result in no action, as the current record suggests it has produced no unlawful conduct. Alternatively, the web page is likely to result in lawful action, such as writing letters, engaging in non-violent picketing, or filing lawsuits. There is no objective basis for finding the web page constitutes incitement to unlawful conduct. As for intent, Sheehan declares that he posted maps to individual residences to facilitate lawful service of process. Sheehan Declaration at 3, lines 10-12. Additionally, in a Seattle Times interview, Sheehan has stated his wish that people not misuse the information (words which were selectively omitted from Experian's citation). Compare Experian's Brief at 9, lines 27-30 with Exhibit E at 3. The record cannot support a finding that Sheehan's web site is intended to or is likely to incite unlawful conduct.

b) Sheehan's Web Site Does Not Encourage "Imminent" Conduct

Supreme Court case law requires compelling proof that unlawful conduct encouraged by a party's speech will be "imminent." The First Amendment protects speech containing a generalized call for unlawful behavior—such as a call to block traffic as part of a political protest. Hess v. Indiana, 414 U.S. 105 (1973). Only speech which goes beyond general advocacy to the sort of detailed instruction and vehement encouragement likely to result in immediate illegal conduct is unprotected. Cases construing the imminence requirement show it is a daunting standard. The following cases have been found not to constitute incitement to imminent unlawful conduct:

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- An antiwar protestor who shouted "We'll take the fucking street later" or "We'll take the fucking street again" to a large crowd. Hess, 414 U.S. at 107 ("at worst," such speech "amounted to nothing more than advocacy of illegal action at some indefinite future time").

- A Ku Klux Klansman who declared a march on Congress for a specific date, saying "it's possible that there might have to be some revengeance taken." Brandenburg, 395 U.S. at 446.

- A speaker, at a meeting whose 800 participants were being protested by an "angry and turbulent" crowd of 1000 more, who "condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced." Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).

- A Communist party member who published a doctrinal justification of violent overthrow of the government. Yates, 354 U.S. at 321.

- An opponent of war who expressed "sympathy" and "support" for those "who are unwilling to respond to a military draft." Bond v. Floyd, 385 U.S. 116, 133 (1966) (not incitement to draft evasion).

- A magazine publisher who distributed an article describing methods of autoerotic asphyxiation that allegedly resulted in the death of a reader who imitated the practice. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)

The current case plainly does not involve incitement to "imminent" conduct as defined by the above-cited case law. The web site does not request that any conduct be undertaken by readers, much less that it be taken immediately. Hess noted that where a statement is "not directed to any person or group of persons, it cannot be said [to be] advocating, in the normal sense, any action." 414 U.S. at 108. Speech on the world wide web is not "directed to any group of persons," but is instead available to anyone in any country with the proper computer equipment, who may view it at the time and place of their choosing. This makes imminent

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response to any web site unlikely. Finally, Sheehan has listed home addresses of credit agency personnel on his web site since at least February 1997, but no evidence has been proffered that anyone has ever taken any action whatsoever as a result of Sheehan's posting. If unlawful action has not yet occurred after more than a year of publication, there clearly is no imminent danger.

IV. CONCLUSION

"A function of free speech under our system of government is to invite dispute." Terminiello, 337 U.S. at 4. Free speech

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Id. (citations deleted) (emphasis added).

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Because Sheehan's web site is fully protected speech, and because issuance of the requested preliminary injunction would be a constitutionally impermissible prior restraint, the motion for preliminary injunction should be denied.

DATED this ___ day of _____, 1998

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