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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION.

Defendant agrees with the Plaintiff's Statement of Jurisdiction.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.

The issue in this case is whether the district court correctly held that plaintiff failed to show any constitutional violation as a result of its internet service being disconnected for one hour.

III. STANDARD OF REVIEW.

The district court granted summary judgment to defendant the City of Ashland on all claims. This court's review of a summary judgment is *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003); *Burlington Ins. Co. v. Oceanic Design and Construction, Inc.*, 383 F.3d 940, 941 (9th Cir. 2004). This court, like the district court, only considers the facts in the record, and the judgment may be affirmed on any grounds supported by the record. *American Civil Liberties Union v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). Any evidentiary rulings made in the context of summary judgment are reviewed for abuse of discretion. *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001).

IV. STATEMENT OF THE CASE.

A. NATURE OF THE CASE

The City of Ashland operates the Ashland Fiber Network (ER-21). The Ashland Fiber Network (“AFN”) in turn enters into contracts with internet service providers for access to AFN’s telecommunications systems (ER-33). AFN contracts with internet service providers, and the internet service provider in turn enters into contracts to provide internet service to customers (ER-33).

In August of 2006, a City employee, Richard Holbo, disconnected a modem which provided internet access to plaintiff’s website. Approximately one hour later, the modem was turned back on (ER-33). The disconnection of the modem was due to a copyright infringement claim Holbo had received (ER-22).

Plaintiff then brought this lawsuit against the City of Ashland, alleging that its First Amendment free speech rights had been violated because the fiber network is a “public forum” and its internet access had been terminated without notice or an opportunity to be heard prior to the deprivation (ER-10, 11). Plaintiff alleged that the disconnection was due to the City’s disagreement with its website content (ER-10). Plaintiff also brought a procedural due process claim (ER-10).

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B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The City of Ashland moved for summary judgment on the claims brought by plaintiff on the basis that: (1) Plaintiff had no contract with the City of Ashland, and therefore had no procedural due process rights; and (2) No First Amendment considerations existed, as the City of Ashland does not regulate access to the network based on content that might be posted on websites of customers of the internet service providers (ER-24-25).

The district court entered judgment in favor of the City of Ashland. The court held that plaintiff failed to establish any official policy or custom that had deprived it of any constitutional right (ER-171). The court also held, in response to an argument about a “failure to train” claim first raised by plaintiff in its response to the motion for summary judgment that plaintiff failed to establish that the City engaged in any “deliberate indifference” to the rights of plaintiff by disconnecting the modem (ER-172). This appeal followed.

V. STATEMENT OF FACTS.

Appellee does not accept plaintiff’s Statement of Facts. Plaintiff assumes that there was a policy in place that regulated speech on the internet. This was the threshold question which the court found that plaintiff did not prove.

The City of Ashland operates the Ashland Fiber Network (“AFN”) (ER-33). AFN has contracts with various internet service providers permitting those providers to access AFN’s telecommunication system (ER-33). The internet service providers that have contracts with AFN in turn offer internet services with individual end-users, like plaintiff (ER-33).

The City of Ashland never had a contract with plaintiff to provide it internet access (ER-34). The only contracts AFN has are with internet service providers, not with those internet service providers’ customers (ER-34).

On August 1, 2006, Richard Holbo, an employee of AFN, received an e-mail from Kathleen Parker, a syndicated columnist, complaining that a website known as “American Buddha” had taken her column picture and “doctored” it to create a pornographic picture (ER-41). Parker claimed that the image was a copyright violation (ER-41). Holbo contacted Infostructure, the internet service provider hosting that particular website (ER-34). Holbo told Infostructure about the copyright violation claim, and the name of the website of which Parker was complaining (ER-34).

The next day, after speaking with an Infostructure employee, John Dowd, Holbo disconnected the modem which provided internet access to the American Buddha website (ER-34). The modem was reconnected approximately one hour later (ER-34). The disconnection of the service was not due to the content of the

American Buddha website (ER-34). The disconnection was done because of the copyright infringement claim (ER-34). The contracts between the City and internet service providers, like Infostructure, do not include any content-based limitations (ER-34, 35-38).

Holbo had in the past been using a procedure to deal with alleged copyright infringement claims (ER-169). The process, as recorded by Holbo, was as follows:

1. Received notice of copyright infringement.
2. Attempt to contact downstream customer (phone, with follow-up e-mail).
3. If infringing material is still available after eight hours, attempt to notify customer (phone, if possible, follow-up with e-mail).
4. Place modem in local.modem's file on DHCP servers with a disabled.modem config file with notations as to who/what/why then reset the modem.
5. When downstream customer calls back and assures the material is not any longer available, comment out of local.modem's file and reset modem.

(ER-169).

VI. SUMMARY OF ARGUMENT.

The trial court properly granted summary judgment because plaintiff failed to establish the City had any policy which provided for the disconnection of

modems due to the content of websites. Plaintiff failed to sue any individual, and instead chose to sue only the municipality. As a result, plaintiff was required to show that there was evidence of a policy on the part of the City to violate First Amendment rights. The City as a matter of law cannot be liable for Holbo's actions even if improper, because there is no vicarious liability for an employee's actions under 42 U.S.C. § 1983. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiff failed to offer any evidence whatsoever that the disconnection of the modem resulting in the shutdown of its website was related to any content on the website.

The claims plaintiff made at the trial court were that: (1) The disconnection violated its procedural due process rights, a claim abandoned after defendant filed its motion for summary judgment; (2) that the disconnection violated its First Amendment rights because the decision to disconnect was based on "content" of its website. (*Complaint*, ¶¶ 12-14, ER-10, 11).

In its response to defendant's motion for summary judgment, plaintiff for the first time raised a "retaliation" claim under the First Amendment (ER-140). Plaintiff also claimed that it had an action against the City under the Digital Millennium Copyright Act (ER-49, 50).

None of the “prior restraint” arguments that plaintiff makes in its Appellant’s Brief, or its argument about the publishing of “digital pamphlets,” were made in the court below, and this court should not consider those arguments on appeal for the first time. *Cornhusker Casualty Ins. Co. v. Kachman*, 514 F.3d 977, 981 (9th Cir. 2008).

For the reasons set forth below, the district court’s decision should be affirmed.

VII. RESPONSE TO ARGUMENT.¹

A. The District Court Correctly Held that Plaintiff Failed to Prove Any Policy that Violated Its First Amendment Rights.

To bring a 42 U.S.C. § 1983 claim against a municipality alone, plaintiff had to demonstrate that the execution of a government’s official policy deprived plaintiff of rights, privileges or immunities secured by the Constitution. *Monell, supra* at 436 U.S. 694. There is no vicarious liability for an employee’s action under 42 U.S.C. § 1983. *Monell, supra* at 690 U.S.

Plaintiff offered no evidence before the trial court of any policy adopted by the municipality regarding the disconnection of the website, much less a policy

¹ Since the majority of the arguments that Appellant makes in its opening brief were not made at the trial court level, Appellee will address the correctness of the district court’s decision based on the fact that plaintiff did not prove any policy; and will then address why the disconnection of the modem did not violate plaintiff’s First Amendment rights.

that required disconnection of a modem due to the content of a website. As the trial court correctly held, it is not enough for a Section 1983 plaintiff merely to identify conduct attributable to the municipality. Instead, the plaintiff must also demonstrate that through its deliberate conduct, the municipality was a “moving force” behind the injury alleged. *Board of County Com’rs. of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

In the *Bryan County* case, the plaintiff sued the sheriff’s office for the “wrongful” hiring of a deputy, alleging that this one-time hiring decision resulted in her own personal injuries after the deputy used excessive force during an arrest. *Id.* at 1388.

The court rejected the plaintiff’s argument that a single hiring decision, which was legal, somehow amounted to a “policy” adopted by the County to deprive plaintiff of any constitutional right, or amounted to “deliberate indifference” to plaintiff’s rights. *Id.* at 1394. The court held that “Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights.” *Id.*

Here, the only reason Holbo disconnected the modem was because of the copyright infringement claim, a legal act. This single legal act cannot, as a matter of law, be the basis of liability under Section 1983.

The trial court stated that plaintiff had two possible avenues to establish a claim against the City. First, plaintiff could show that the policy followed by Holbo represented the City's "official policy" or, plaintiff could show that the City of Ashland caused a violation of plaintiff's free speech rights by failing to train its employees, which amounted to a "deliberate indifference" to plaintiff's rights. *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Plaintiff established neither. There was no factual dispute below that the only reason the modem was disconnected was because of the copyright infringement claim made against plaintiff by Kathleen Parker. The only "policy" ever referenced was Holbo's memory of the copyright infringement procedure, which plaintiff complained Holbo did not follow. There was no evidence of any adoption of any policy by the City to disconnect a modem due to website content.

Plaintiff offers no argument as to why the trial court erred in holding that as a threshold matter, no official municipal policy to violate plaintiff's rights existed in the first place. Since plaintiff fails to address this issue, and the undisputed facts established no official policy mandating the violation of plaintiff's First Amendment rights, the district court's decision should be affirmed for that reason alone.

Further, the trial court correctly held that municipal liability can only attach under a "failure to train" theory if there is a deliberate choice to follow a course of

action, selected from among various alternatives by City policymakers (ER-172).

Plaintiff offered no evidence that any of its constitutional rights were violated because the City was deliberately indifferent to plaintiff's civil rights. Plaintiff's reliance on *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) is misplaced. The decision in that case hinged on the fact that plaintiff had an established liberty interest under the Fourteenth Amendment to not be incarcerated without a prompt pretrial court appearance. *Id.* at 1474-75. Here, there is no evidence of any "deliberate indifference" to any established constitutional right. Plaintiff fails to explain to the court why violating copyright law is a constitutionally protected right, so as to make Holbo's actions based on the infringement claim somehow constitutionally impermissible.

B. No First Amendment Rights Were Ever Implicated in this Case.

As discussed above, there was no ordinance or rule enacted by the City which imposes content-based restrictions on the internet service providers with whom it contracts. Further, there was no ordinance or rule enacted or enforced by the City which imposed content-based restrictions on internet access or website content.

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Plaintiff claimed that the act of disconnection violated the First Amendment because the decision to disconnect was based on the website's content (Complaint, ¶ 12, ER-10).

The undisputed facts at the trial court were that the only reason the modem was disconnected was due to the copyright infringement claim by Parker (ER-34). Even assuming that the City's disconnection amounted to "state action" and the plaintiff's website posting of Parker's doctored photograph without her permission constituted "speech," there was no First Amendment violation because no action was taken based on the content of the website.

In the absence of content-based restrictions, there can be no First Amendment violation. *Committee of Independent P-I v. The Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983) (Anti-trust exemption in Newspaper Preservation Act which did not affect the content of newspapers, but was an economic regulation, did not invoke First Amendment protections); *Ellwest Stereo Theaters, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982) (ordinance requiring open booths in picture arcade of theater which did not prohibit showing of films based on content did not invoke First Amendment analysis).

The modem was disconnected by the City due to the copyright infringement claim by Parker. Although plaintiff claimed below that the network was "silenced in retaliation for its publication of political speech" plaintiff offered no admissible

facts supporting this assertion. Instead, plaintiff simply argued that its publication of unpopular speech “must” have been a substantial motivating factor in the decision to disconnect. Plaintiff offered no facts supporting this, or that the reason that the modem was disconnected was not in fact due to the copyright infringement claim, but was instead due to the content of plaintiff’s website.

Specifically, plaintiff offered no admissible, factual evidence contradicting the testimony of Holbo that the copyright infringement claim, not any website content, led to the disconnect. There was no evidence of any ordinance requiring that the modem be disconnected due to the content of the website, there was no evidence that Holbo disconnected the website because of the content of the website, and there was no evidence supporting a claim that Holbo’s disconnection of the modem was somehow a “pretextual” reason to disconnect the modem.

In short, plaintiff offered no factual evidence at the trial court level supporting its claim that the real reason for the modem disconnection was due to the content of the American Buddha website. Further, plaintiff failed to offer any evidence of any ordinance, regulation, law or policy enacted by the City of Ashland that allowed for the disconnection of modems based on the content of what individual end-users might be posting on their websites. Plaintiff failed to establish any facts supporting a claim that its First Amendment rights were violated. The trial court correctly dismissed the case.

C. A Fiber Network is Not A Public Forum.

Even assuming that the City's action was somehow a restriction on speech, it was permissible under First Amendment "forum" analysis in any event.

The constitutionality of government restriction on free speech activity depends on the nature of the forum and on the type of restriction. *Perry Educ. Ass'n. v. Perry Local Educ. Ass'n.*, 460 U.S. 37, 44-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). There are three distinct categories of government "fora" recognized for free speech activities: (1) Traditional public fora; (2) Designated public fora; and (3) Non-public fora. *Perry, supra*, 460 U.S. at 45-47.

No case has yet held that the operation of a fiber network by a municipality establishes a "public forum" for purposes of the First Amendment. However, as a matter of law, a governmental entity does not create a public forum when it establishes an internet connection, even if that internet connection is accessed in a public building, and open for use by the public. *United States v. American Library Association, Inc.*, 539 U.S. 194, 205, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) (internet access in libraries is neither re a "traditional" nor a "designated" public forum); *Putnam Pit, Inc. v. City of Cookeville, Tennessee*, 221 F.3d 834, 843 (6th Cir. 2000). (City's website, which established links to other websites, was a non-public forum under the First Amendment). In this case, the City of Ashland

simply provides access to its fiber network to internet service providers, who in turn sell access to the internet to end-users like plaintiff. Since this is steps removed from providing internet access at a public building for public use, such as a library, or establishing a website specifically controlled by the City, the fiber network is a non-public forum (if it is a forum at all) for purposes of the First Amendment.

In a non-public forum, the government can restrict free speech, so long as any restrictions are reasonable in light of the functions served by the forum and are viewpoint neutral. *Perry, supra*, 460 U.S. at 49. In reviewing the reasonableness of any restrictions, a court does not impose its view regarding the ideal use of the forum. The government's decision to restrict access need not be the most reasonable, or the only reasonable, limitation. *Cornelius v. The NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 808, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). A non-public forum can restrict speech based on content, so long as the restriction is viewpoint neutral. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (a non-public forum may prohibit speech on certain subjects, but may not prohibit the expression of particular views about such subjects).

Further non-public forums can totally ban certain speech activities.

Arkansas Educational Television Comm. v. Forbes, 523 U.S. 666, 682, 118 S.Ct.

1633, 140 L.Ed.2d 875 (1998) (television station could exercise broad discretion and exclude certain candidates from televised debates based on a determination by station executives so long as exclusion was not based on speakers' viewpoint); *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1998) (high school newspaper non-public forum; control of published materials by school officials was reasonable); *Greer v. Spock*, 424 U.S. 828, 840, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (military base is a non-public forum, military commander had discretion to disapprove of literature distributed on military base due to content); *Cogswell v. City of Seattle*, 347 F.3d 809, 818 (9th Cir. 2003) (City restriction of candidates' statements and voters' pamphlets was constitutional; voter pamphlet was a non-public forum, and the City was not required to allow free exchange of ideas). Under these cases, the only relevant inquiry is whether the exclusion of the speech is based on the speaker's viewpoint on a subject, not the subject itself.

In this case, the sole reason that the modem was disconnected was because of a copyright infringement claim. The modem was not turned off because of the content of plaintiff's website. Plaintiff points to no evidence offered at the trial court that the modem was disconnected to prevent it from engaging in "digital pamphleteering." Holbo took action because of a claim of violation of federal copyright law.

Plaintiff offers no law supporting any claim that a violation of copyright law is somehow protected speech under the First Amendment, and that any “policy” about how to deal with a copyright infringement claim is either unreasonable, or viewpoint based. Even if the court assumes that the City created a “forum” by owning a fiber network and allowing internet service providers to contract for its use, a disconnection due to a copyright infringement claim is reasonable. It was based solely on a claim of violation of federal law and nothing else. No First Amendment violation occurred, even if this court goes so far as to determine that the fiber network is a “forum”, and the actions of Holbo constituted a “policy”.

Plaintiff’s arguments regarding “strict scrutiny,” and “compelling interest” analysis only apply to public forums. Plaintiff fails to explain to this court why it should reject the analysis of the United States Supreme Court in *American Library Assoc., supra*, which held that an internet connection provided at a public library was not a public forum. Here, the City simply provides the fiber network; internet service providers provide the actual access. All of the cases relied on by plaintiff have to do with actual ordinances or statutes, enacted by governmental entities directly affecting the use of a public forum, or viewpoint based limitations on speech. None of them are applicable to this case.²

² *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (Law creating commission that labeled certain books “obscene” without a

A non-public forum need not show any “compelling state interest;” it need only show that a restriction is reasonable in light of the purpose of the forum.

United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990)

(complete ban on distribution of political literature by Post Office deemed

reasonable under non-public forum analysis); *Currier v. Potter*, 379 F.3d 716, 730

(9th Cir. 2004) *cert. den.* 125 S.Ct. 2935 (2005) (when a forum is non-public, court

reviews government restrictions under reasonableness standards; the governments

decision to restrict access to a non-public forum need only be reasonable; it need

not be the most reasonable or the only reasonable limitation). To the extent that

Holbo’s actions constituted a “policy”, it was reasonable because there are no First

Amendment rights associated with copyright infringement, and plaintiff points to

none.

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notice, hearing or challenge provision unconstitutional); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); (Subversive Activities and Communist Control Law found void for vagueness); *Saia v. People of State of New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed.2d 1574 (1948); (Ordinance giving complete discretion to police chief about whether applicant could use loudspeaker on unconstitutional prior restraint on speech under the First Amendment analysis); *Arizona Life Coalition, Inc. v. Stanton*, ___ F.3d ___ (9th Cir. 2008) (License plate is limited public forum, decision to deny certain license plate message held to be viewpoint discrimination against anti-abortion group).

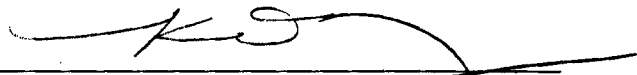
VIII. CONCLUSION

For the above reasons, the district court's decision dismissing plaintiff's claims on summary judgment should be affirmed.

Respectfully submitted this 12th day of March, 2008.

HOFFMAN HART & WAGNER LLP

By



Karen O'Kasey, OSB No. 87069
Of Attorneys for Appellee

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2-6, Defendant-Appellee is not aware of any related cases pending in this court.

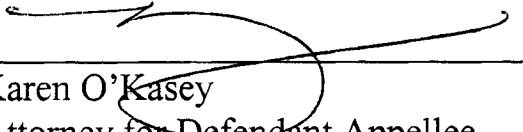
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, the undersigned attorney for Appellee, hereby certify as follows:

1. This Brief of Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3843 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. Brief of Appellee complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using WordPerfect 12, in 14 point typeface, Times New Roman font.

DATED: March 12th, 2008.



Karen O'Kasey
Attorney for Defendant Appellee

CERTIFICATE OF FILING AND SERVICE BY FIRST-CLASS MAIL

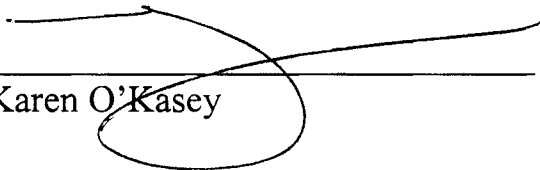
I hereby certify that on the 12th day of March, 2008, I filed the foregoing STATEMENT OF RELATED CASES by mailing the original and the appropriate number of copies by first-class mail to the following address, via U.S. Mail, postage prepaid:

Clerk
United States Court of Appeals
PO Box 193939
San Francisco, CA 94119-3939

I also certify that on the 12th day of March, 2008, I served the foregoing STATEMENT OF RELATED CASES on the following person at the following address:

Charles Carreon
Online Media Law, PLLC
2165 S. Avenida Planeta
Tucson, AZ 85710

by sending to him by U.S. Mail, postage prepaid, two true and correct copies thereof, placed in a sealed envelope addressed to him at the address set forth above.



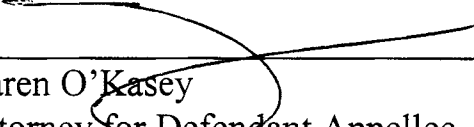
Karen O'Kasey

CERTIFICATE OF FILING BY FIRST-CLASS MAIL

I hereby certify that on the 12th day of March, 2008, I filed the foregoing BRIEF OF APPELLEE by mailing the original and the appropriate number of copies by first-class mail to the following address:

Clerk
United States Court of Appeals
PO Box 193939
San Francisco, CA 94119-3939

by depositing it in the United States Post Office with postage paid. I also hereby certify that the attached is a true copy of the original document, as so filed.



Karen O'Kasey
Attorney for Defendant Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2008, I served the foregoing BRIEF OF APPELLEE on the following person at the following addresses:

Charles Carreon
Online Media Law, PLLC
2165 S. Avenida Planeta
Tucson, AZ 85710

Via First-Class Mail
Postage prepaid

by sending him two true and correct copies thereof, placed in a sealed envelope addressed as set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day.



Karen O'Kasey
Attorney for Defendant Appellee