

****E-filed 10/24/11****

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

MARK S. BUZA,

No. C 11-4422 RS

Plaintiff,

v.

**ORDER GRANTING MOTION TO
DISMISS FEDERAL CLAIMS AND
REMANDING STATE CLAIMS**

YAHOO!, INC.,

Defendant.

Plaintiff Mark S. Buza alleges that he is the founder and leader of the National Psychoanalytic Movement (“NPSM”), a political group. Buza filed this action in San Francisco Superior Court, alleging that defendant Yahoo!, Inc. wrongfully terminated two NPSM-related websites that he had created and maintained on Yahoo! servers, through services it provides. Yahoo! removed the action to this Court based on claims in the complaint arising under federal law, and now moves to dismiss. Pursuant to Civil Local Rule 7-1(b), the motion to dismiss this action is suitable for disposition without oral argument, and the hearing set for October 27, 2011 is hereby vacated. The motion to dismiss will be granted as to the federal claims in the complaint, and the remaining state law claims will be remanded to state court.

1. Federal Claims

The second count¹ of Buza’s complaint asserts that Yahoo! violated his rights under the First Amendment of the United States Constitution by removing the expressive material posted on the

¹ Consistent with state court practice, the counts of the complaint are labeled as “causes of action.”

1 NPSM websites. Yahoo! correctly contends that because it is not a state actor, it cannot be held
2 liable under the First Amendment for suppressing speech. Buza’s response that Yahoo!’s services
3 should be seen as a “public forum” in which the guarantees of the First Amendment apply is not
4 tenable under federal law. As a private actor, Yahoo! has every right to control the content of
5 material on its servers, and appearing on websites that it hosts. *See Hudgens v. NLRB*, 424 U.S.
6 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is
7 a guarantee only against abridgment by government, federal or state Thus, while statutory or
8 common law may in some situations extend protection or provide redress against a private
9 corporation or person who seeks to abridge the free expression of others, no such protection or
10 redress is provided by the Constitution itself.” (citation omitted)). Accordingly, the federal
11 constitutional claim must be dismissed.

12 The fifth count of the complaint is labeled “unlawful access to stored communications.” In
13 his opposition to the motion to dismiss, Buza clarifies that he intends to bring this claim under 18
14 U.S.C. § 2701², which provides for criminal penalties to be imposed where a person “intentionally
15 accesses without authorization a facility through which an electronic communication service is
16 provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic
17 communication while it is in electronic storage in such system” Yahoo! argues this provision
18 is inapplicable because it applies to *disclosure* of electronic communications, which Buza has not
19 alleged. The section, however, expressly extends to conduct that prevents an authorized person
20 from *accessing* the communications, which is exactly what Buza alleges Yahoo! did when it
21 terminated the websites.

22 Nevertheless, Buza has not stated, and cannot state a claim under this law, because, even
23 assuming there is a private right of action, subdivision (c) of §2701 provides that the prohibitions
24 against accessing and interfering with electronic communications do not apply to “the person or
25 entity providing a wire or electronic communications service.” The allegations of the complaint
26 establish that Yahoo! falls within that exemption. Accordingly, this claim must also be dismissed.

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28 ² Miscited in Yahoo!’s reply brief as 18 U.S.C. §1701.

1 2. State Law Claims

2 The first count of the complaint asserts a violation of the free speech guarantees of the
3 California Constitution. Cal. Const. Art. I, Sec. 2. The California Supreme Court has held that
4 “state action for purposes of California’s free speech clause is not the same as state action for
5 purposes of the First Amendment.” *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26
6 Cal.4th 1013, 1031 (2001). Rather, the actions of a private property owner may constitute state
7 action for purposes of California’s free speech clause, “if the property is freely and openly
8 accessible to the public.” *Id.* at 1033.

9 It is perhaps doubtful that California courts would apply the principles discussed in *Golden*
10 *Gateway* to conclude that Yahoo! is subject to the free speech guarantees of the California
11 Constitution, particularly since *Golden Gate* arguably represented a retreat from a more expansive
12 view of the scope of those guarantees expressed in earlier California decisions. *See id.* at 1021-23
13 (discussing *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979)). Particularly in the
14 absence of any viable federal claims, however, it is far preferable to leave the issue to the California
15 courts to decide. Even where no novel state law issue is presented, remand of state claims upon
16 dismissal of the federal claims is appropriate where retaining jurisdiction serves no compelling
17 purpose. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988) (“[I]n the usual case in
18 which all federal-law claims are eliminated before trial, the balance of factors to be considered
19 under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will
20 point toward declining to exercise jurisdiction over the remaining state-law claims.”).

21 Yahoo! contends that the third count of the complaint, entitled “trespass to chattels,” fails in
22 light of its Terms of Service (“TOS”), in which it reserves the right to remove materials from its
23 servers and hosted websites.³ As the claim sounds solely in state law, however, it will be remanded
24 to the state courts to decide.

25 ³ Yahoo! requests judicial notice of the TOS. Because the TOS is mentioned in the complaint, and
26 given that Buza does not dispute that the document submitted by Yahoo! accurately reflects the
27 applicable TOS, it likely would be permissible to consider it, and its effect on the viability of the
28 claims, in this motion to dismiss. Indeed, Buza appears to concede that the document, *if*
enforceable, bars his claims. Because the state claims are being remanded, however, the issue need
not be decided at this juncture, and the request for judicial notice is moot.

1 3. “Intellectual Property”

2 The fourth count of the complaint is labeled “intellectual property,” but does not clearly state
3 any theory of liability. Buza’s opposition merely asserts that the material on the websites in dispute
4 plainly constituted “intellectual property.” While the unauthorized taking or use of “intellectual
5 property”—like that of any form of property—likely is actionable under one or more theories, Buza
6 may ultimately be required to articulate more clearly the basis of this claim.⁴ At this juncture,
7 however, the only relevant issue is whether this claim is potentially federal in nature. While federal
8 law governs certain forms of intellectual property such as patents and copyrights, nothing in the
9 allegations suggests Buza is attempting to, or could, state a claim under such laws. Accordingly,
10 this claim will also be remanded.

11 Finally, Buza has requested leave to amend to allege a “contract of adhesion claim.” A
12 contention that a particular contract is one of “adhesion” is a potential defense to the enforceability
13 of that contract, not an affirmative claim. Additionally, contracts of adhesion are not automatically
14 unenforceable—other factors must also exist. In any event, it is not a federal claim. To the extent
15 Buza intends to argue that the TOS does not bar his claims because it is an unenforceable contract of
16 adhesion, it will be for the state court to determine whether additional factual allegations are
17 necessary or appropriate to support such an argument.

18
19 4. Conclusion and Order

20 The second and fifth “causes of action” of the complaint are dismissed without leave to
21 amend. The action and the remaining claims are remanded to the San Francisco Superior Court.
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25 ⁴ Misappropriation of intellectual property, unlike theft of tangible property, ordinarily does not
26 deprive the owner of its use. Here, Buza alleges that he has no other copies of the materials that
27 were stored on Yahoo!’s servers, and that appears to be a significant component of his claimed
28 injury. Without suggesting that Yahoo! necessarily has any legal obligation to do so, it might be in
its interest to determine whether it can provide any or all of the material to Buza from backup
sources.

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IT IS SO ORDERED.

Dated: 10/24/11



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE