

California Superior Court
City and County of San Francisco
Department Number 304

RANDALL STONER
Plaintiff,

vs.

EBAY INC., a Delaware Corporation, et al.,
Defendants.

No. 305666

Order Granting Defendant's Motion for Summary Judgment

Defendants' Motion for Summary Judgment came on regularly for hearing on October 10, 2000. The question to be decided is whether eBay enjoys immunity under the Communications Decency Act ("CDA"), 47 U.S.C. §230, for the conduct underlying plaintiff's claims. Having reviewed the evidence, law and argument, the Court concludes that eBay is immune from any liability arising from plaintiff's claims, and therefore grants defendant's motion.

eBay is an online auction company. Plaintiff claims that eBay "has developed a method of operation that allows it to knowingly reap massive profits from the sale of bootleg and other unauthorized 'infringing' sound recordings in violation of Business and Professional Code §17200." (Plaintiff's memorandum of Points and Authorities (Plaintiff's P&A")p.I.) Specifically, plaintiff claims that eBay violates section 17200 in that "(1) eBay actually sells, or at minimum, advertises and offers for sale, and causes the sale of, various bootleg and other infringing sound recording, in direct violation of several applicable Penal Code Provisions (Pen. Code, ЯЯ653h, 653s, 653w); (2) eBay, independent of its users, engages in unfair business practices in that knowing full well that infringing sound recording auctions are prevalent of its site, eBay actively promotes and enables those auctions and takes a commission on each sale, even though it could eliminate said infringing auction if it wanted to; and (3) eBay itself engages in conduct likely to deceive the public in that it knows about and actively facilitates infringing sound recording auctions even though, as it also knows, many of the ultimate purchasers of the recordings truly do not realize they are buying illegal items with no resale value. (Plaintiff's P&A, p. 11-12, citing Second Amended Complaint ¶¶8-25.)

Defendant's immunity claims is based on 47 U.S.C. §230 (e)(1), which states that "[n]o provider or users of interactive computer service shall be treated as the publisher or speaker of any information content provider," and section 230(e)(3) which provides in part that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers

liable for information originating with a third party. Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content--are based. (*Zeran v. America Online* (4th Cir. 1997) 129 F.3d 327, 330.)

Immunity under the CDA requires proof of three elements. Defendant must establish (1) that eBay is an interactive computer services provider; (2) that eBay is not an information content provider with respect to the disputed activity; and (3) that plaintiff seeks to hold eBay liable for information originating with a third-party user of its service. (*Ibid.*) For purposes of this motion it is undisputed that eBay is an interactive computer service provider as defined in section 230(f)(2). (Plaintiff's Separate Statement of Undisputed Material Facts ("Plaintiff's Material Facts"), ¶10, pg. 6.) Additionally, eBay has satisfied its burden of establishing that it is not an information content provider as defined in section 230(f)(3). The undisputed facts establish that the descriptions of the goods and services auctioned over the eBay service are created entirely by the sellers. (Plaintiff's Material Facts, ¶2, pg.2.) eBay is not responsible for the creation or development of information relating to any of the products for which it provides auction services. While eBay may add additional information to its web pages, such as logos, category headings and seller rating, this information is not unlike the information added to many web pages, the purpose of which is to facilitate ease of use and access to the content provided by the third-party. eBay, therefore, is not an information content provider or joint information content provider with respect to the description of auctioned goods.

The more difficult question is whether plaintiff is seeking to hold eBay responsible for content provided by third parties. Plaintiff does not claim that there is anything improper about the manner in which eBay conducts its auction business, other than that it auctions sound recordings that may not lawfully be sold. However, plaintiff contends that eBay's services continue more than mere publication of product descriptions prepared by others, and are instead independent acts of eBay in furtherance of illegal sales. Therefore, plaintiff claims, this suit does not seek to hold eBay responsible for the publication of information provided by others, but for eBay's own participation in selling contraband musical recordings.

Despite plaintiff's attempt to characterize eBay as an active participant in the sale of products auctioned over its service, plaintiff is seeking to hold eBay responsible for informing prospective purchasers that illegal recordings may be purchased--information that originates with the third part sellers who use the computer service. The uncontroverted facts establish that eBay's role does not extend beyond the scope of the federal immunity. eBay provides an interactive computer service by which sellers of goods and services describe over the internet the products they wish to sell, and sell them to the person who agrees, by submitting a bid through eBay's web site in accordance with the rules of the service, to pay the highest price for the product. eBay provides interactive computer services for which it charges a fee, just as America Online provides interactive services for which it charges a fee. eBay does not select items to be auctioned, does not

inspect or come into possession of those items at any time, does not describe the items to prospective bidders, and does not determine the minimum price which the seller will accept for the item. eBay does advertise and promote its auction service, and charges a fee for the use of its service. However, neither aggressive advertising nor the imposition of a fee--including a fee based in part on the price at which an item is sold--transforms an interactive service provider into a seller responsible for items sold. (*Cf. Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44, 51-52 (America Online immune from liability for libelous statements contained in the Drudge Report even though America Online paid Drudge to include the Report on its service and actively advertised the Report by, among other things, issuing a press release which made "clear the kind of material Drudge would provide to AOL subscribers--gossip and rumor--and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report."))

Plaintiff points to several other features of eBay's service which he contends transform defendant from a mere computer services provider to an active participant in the sale of the auctioned goods and services. eBay provides insurance for all auctioned items up to \$200, less a \$25 deductible. (Perkins' declaration, Ex. I.) Coverage is available where a buyer pays for an item but does not receive it or where the buyer receives "an item that is less than what is described" (*Ibid.*) Providing insurance, however, is not selling, or offering to sell, the insured merchandise. Providing limited insurance for all items auctioned over its service may encourage buyers to use the service, but does not make eBay the seller. If a seller misrepresents an auctioned item, giving rise to coverage, the insurer will have a subrogation claim against the seller, but not against eBay, (*See, e.g., Fireman's Fund Ins. Co. v. Wilshire Film Ventures, Inc.* (1997) 52 CalApp. 4th 553, 555-556.) eBay also provides escrow and payment services, for which additional fees are charged. eBay refers users to i-Escrow, which accepts payment from the buyer, and in turn pays the seller when the buyer has received and approved the auctioned merchandise. eBay's Billpoint service enables buyers to pay for auctioned items by credit card or electronic check. Neither the escrow service nor the Billpoint, however, renders eBay a seller. Both are merely additional services which promote the provident and efficient use of eBay's auction service, irrespective of the legality or illegality of the item being auctioned. These additional features are available with respect to all goods and services auctioned--they are not limited to recordings, much less to illegal recordings.

Plaintiff attempts to draw a distinction between eBay's interactive service, which he argues is based on a sales model, and other interactive services which are based on bulletin board models. While the majority of cases addressing CDA immunity may fit the bulletin board description, nothing in those cases or in the statutory language so limits the CDA's application. A principle objective of the immunity provision is to encourage commerce over the Internet by ensuring that interactive computer service providers are not held responsible for how third parties use their services. "It is the policy of the United States 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." (47 U.S.C.A. §230(b)(2).) This policy is based in part on Congress' finding that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." (47 U.S.C.A. §230 (a)(5).) To

accomplish this objective, the immunity extends beyond the publication of harmful material over the Internet, and encompasses the distribution of such material in transactions effected over the Internet. (See *Doe v. America Online* (Fla. Dist. Ct. App. 1998) 718 So.2d 385, (review granted, April 12, 1999, 729 So.2d 390) (immunity extends to action by a mother against America Online for selling and distributing pornographic material of her minor son in violation of Florida law).) Plaintiff's attempt to impose responsibility on eBay as the seller of items auctioned over its service is no different from the unsuccessful attempts that have been made to hold computer service providers liable as distributors rather than as publishers of defamatory or pornographic materials. (*Doe v. America Online*, *supra*, 718 So.2d. 385; *Zeran*, *supra*, 129 F.3d. 327, 332.)

At bottom, plaintiff's contention is that eBay should be held responsible for failing to monitor the products auctioned over its service. The very description of some recordings (e.g. "bootleg" tapes) identifies some as contraband so that plaintiff contends, eBay must be deemed to have notice that these may not lawfully be sold, and by failing to intervene must be deemed to have knowingly joined in the unlawful sale. However, cases decided under the CDA uniformly have held that notice of postings which indicate illegality does not defeat immunity. (See *Zeran*, *supra*, 129 F.3d at 331-334, *Doe v. America Online*, *supra*, 718 So.2d at 388-389.) The courts have recognized that imposing liability based on notice of content in the interactive computer service context would create an incentive for providers to restrict speech and abstain from self-regulation, thereby defeating the purposes of section 230. (*Ibid.*)

The record reflects that at any given time, eBay has over 4 million listings on its website, approximately 275,000 in the music category alone. (Plaintiff's Material Facts, ¶12, pg. 7.) However many of these products may be contraband, and however many it might be possible for defendant to identify as such, Congress intended to remove any legal obligation of interactive computer service providers to attempt to identify or monitor the sale of such products. While such a service may be aware that a fraction of the large volume of data exchanged over its facilities involves unlawful activity, and might be able to detect a certain portion of these the threat of liability for failing to monitor effectively would, in the judgment of Congress, deter companies such as eBay from making their service available as widely and as freely as possible. Moreover, removing any legal obligation to monitor was thought to encourage voluntary efforts to screen out offensive or unlawful materials that might not be made by service providers if the failure to detect an inappropriate use of their system could be a predicate for liability. (*Zeran*, *supra*, 129 F.3d at 331.) The record reflects that eBay has adopted procedures to curtail the use of its service to sell inappropriate items. Plaintiff contends that these measures are inadequate, but imposing liability for defendant's failure to do more would require precisely the monitoring of third party content that Congress determined should not be mandated.

While the description of a recording as "bootleg" certainly suggests that the recording is on that may not lawfully be sold, an inspection of the product nonetheless may be necessary to be sure.[FN1] Moreover, if eBay were responsible for permitting the sale of unauthorized recordings over its service, the company would be obliged to investigate in

countless cases where the description of the item was more ambiguous, or where information from other sources provided a basis for suspicion. And if liability were imposed for the sale of unauthorized recordings in violation of the Penal Code provisions relied on here, there is no reason why liability would not extend to the auction of any other form of contraband, or of goods or services that violates some other legal duty that eBay was bound to know or that was brought to its attention. The burden that such an obligation would place on a service such as eBay likely would force it to cease, or at least significantly restrict, its operation. If such an obligation is to be imposed, it is Congress that must be asked to re-evaluate the immunity conferred by section 230.

There is, to be sure, some point at which the existing immunity would no longer apply. Although the limits of the immunity have not yet been clearly defined, any limitation placed on the immunity presumably would begin at the point at which providing otherwise lawful goods or services with knowledge that they are being put to an illegal use becomes the commission, or the aiding and abetting, of a crime. Criminal liability in such circumstances normally requires the intent to further or facilitate the crime. (*See People v. Lauria* (1967) 251 Cal.App.2d 471; *People v. Beeman* (1984) 35 Cal.3d 547; *United States v. Blankenship* (7th Cir. 1992) 970 F.2d 283.) Using the rather extreme hypothetical situation discussed at the hearing, if an interactive computer service were shown to be actively involved in the sale of drugs or other contraband, the fact that sales were consummated over the computer service would not necessarily provide a shield from liability. In order for liability to arise and the immunity to be lost, it would be necessary to show actual, rather than constructive, knowledge of illegal sales, and some affirmative action by the computer service, beyond making its facilities available in the normal manner, designed to accomplish the illegal sales. (*See People v. Lauria, supra; People v. Beeman, supra, compare also Wilcox v. First Interstate Bank of Oregon* (D. Ore. 1985) 605 F. Supp. 593, 594, *affid. As mod.* (9th Cir. 1987) 815 F.2d 522; *C-O-Two Fire Equipment Co. v. United States* (9th Cir. 1952) 197 F.2d 489, *cert. den.* (1952) 344 U.S. 892 (mere parallel activity by competitors does not constitute illegal agreement to restrain trade absent conduct inconsistent with best interests of competitors considered independently).) The uncontroverted circumstances in this case do not rise to such a level.

Accordingly, defendant's motion for summary judgment must be granted.

Dated: November 7, 2000
STUART R. POLLACK
Judge of the Superior Court

FOOTNOTES:

FN1. In some cases, falsely describing an article as illicit may add to its value. *See, e.g.*, the lyrics to the Credence Clearwater hit song "Bootleg":

"Take you a glass of water,
make it against the law.

See how good the water tastes
when you can't have any at all."

See also the Eminem hit song, "My Name Is...(Bootleg Version)," which may be considerably more popular than the alternative version, "My Name Is"