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Mazur v eBay Inc.

2008 WL 618988 (N.D. Cal. 4 March 2008)

A Californian federal court finds that the Communications Decency Act protects eBay from liability for the content of third party sites, but not from claims that it is defrauding its customers by falsely representing the safety of its Live Auction service.

Does a website that provides a forum for auctions or other social and commercial interactions have a legal duty to ensure that these interactions are safe and fair? In *Mazur v. eBay Inc.*, a federal court in California addressed two questions about eBay's responsibility for the safety of its users:

- does the Communications Decency Act (CDA) shield eBay from liability for its screening of auctions or its statements about auction safety; and
- can eBay's allegedly false statements about auction safety support liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), a statute originally designed to go after organized crime?

The court found that the CDA protected eBay from liability for its alleged failure to screen sellers, and provided immunity for some, but not all, of its statements about auction safety and screening. But it separately ruled that eBay's allegedly false statements are actionable under RICO, potentially creating a vast new field of both civil and criminal liability for online businesses.

CDA immunity

Courts have generally held that section 230(c)(1) of the CDA¹ gives websites broad immunity from liability for information generated by third parties, but not for information that the websites themselves provided. Some courts have also held that a website's editing of another party's content does not necessarily render the website a 'content provider' and thereby deprive it of CDA immunity - but the line between a website's mere editing (immune) and its provision of its own content (not immune) can be difficult to discern. The court's March 2008 decision in *Mazur* has

added to the muddle by holding that eBay could not assert CDA immunity for its allegedly false assertions that its Live Auctions are 'very safe' and 'run by reputable international auction houses', but that it could claim immunity for its promise that it screened the auction houses². The courts' inability to draw a clear line between editing and content provision could become a serious problem for websites. Until this issue is settled, websites should proceed with caution both in editing third-party content and in making claims about their services involving third-party content.

eBay user Michele Mazur alleged that Hot Jewelry Auctions.com (HJA) had conducted fraudulent auctions through eBay's Live Auction service, and claimed that eBay had intentionally defrauded its customers by falsely representing the safety of these Live Auctions. eBay moved to dismiss, arguing that the CDA barred Mazur's claims. The court disagreed, in part, holding that the CDA did not 'immunize eBay for its own fraudulent misconduct', and that eBay could be held liable for 'misconduct with respect to [its] own statements regarding the safety, circumstances and caliber of its live auctions'. The court found that eBay's statements about its live auctions were a 'promise' of safety that helped establish 'an expectation' concerning the 'procedures and manner' in which participating sellers would conduct their auctions. The court also found that eBay's assertions of auction safety were not dependent on user feedback or the representations of auction houses, but were instead attributable to eBay itself.

However, the court found that the CDA did immunize eBay for its alleged failure to screen sellers despite knowing of their illegal

conduct. Moreover, the court held that eBay's statements regarding its screening were also not actionable because 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish . . . - are barred'. The court reasoned that 'screening a potential auction house when deciding whether to include it in Live Auctions is akin to deciding whether to publish and therefore eBay is immune under section 230 for its screening decisions' - but the court failed to distinguish between screening itself and affirmative statements that eBay made about its screening. It is difficult to see why statements about the safety of auctions are actionable, while statements about screening of auctioneers are not. If a website makes affirmative statements on its own, those statements would not seem to be third-party content, and therefore should not be protected by immunity. In other words, if a website fails to screen third-party content, it cannot be held liable for that content. However, if it says it screens third-party content and then doesn't, then it is not being held liable for the third-party content, but for the falsity of its own promise.

Compounding the confusion, the court added that eBay's promise that it "carefully screens" for "reputable" auction houses' was not actionable because the words 'carefully' and 'reputable' "both indicate opinion and are therefore not actionable". Again, though, it is difficult to see why these supposed statements of opinion are not actionable, but statements that Live Auctions are 'very safe' and 'run by reputable international auction houses' are.

It remains to be seen whether the lines drawn by the district court in *Mazur* will survive scrutiny by the

US Court of Appeals for the Ninth Circuit. In the meantime, websites must contend with a growing body of confusing case law regarding the line between editing and content provision. Perhaps Adlai Stevenson said it best when he quipped that '[a]n editor is someone who separates the wheat from the chaff and then prints the chaff'.

RICO liability

In July 2008, the same court held that eBay's allegedly false statements about the safety of its 'Live Auction' service could support Mazur's claim against the company under section 1962(c) of RICO³. RICO is primarily a criminal statute, and one designed to help law enforcement go after organized crime. Although it provides for a civil cause of action by injured parties, the substantive prohibitions that may give rise to civil liability are the same as those that may give rise to criminal liability. Thus, although Mazur is a civil suit, the court's ruling amounts to a remarkable statement that eBay's description of its auction service constitutes criminal behavior. While the Federal Trade Commission (FTC) has brought actions for 'unfair' or 'deceptive' acts in commerce against companies whose actual privacy practices did not live up to their stated policies, allowing RICO civil actions or even criminal prosecutions to be brought on the basis of similar misstatements is a giant leap beyond FTC actions - and could have enormous negative ramifications for websites.

Section 1962(c) makes it unlawful to engage in 'a pattern of racketeering activity', defined as the commission of at least two predicate criminal acts within a ten-year period. Plaintiff Michele Mazur alleged RICO violations stemming from eBay's alleged participation in a 'shill bidding'

scheme. According to Mazur, several third-party auction houses entered fake floor bids in their own auctions, which were made available to online bidders through eBay's Live Auction service. Mazur claimed that these shill bids artificially inflated bidding prices, and that eBay was part of a conspiracy to profit from these higher prices. The court granted eBay's motion to dismiss most of Mazur's RICO claims, but refused to dismiss a claim based on eBay's 'allegedly misleading' promise on its website that Live Auctions were 'safe' and 'carefully screened'. The court found that this single web posting could establish the requisite 'pattern of racketeering activity', since each dissemination of the purportedly misleading statement to a Live Auction participant could be a separate act of mail or wire fraud, which are considered predicate acts under RICO.

The court relied on the Supreme Court's ruling in *H. J. Inc. v. Northwestern Bell Tel. Co.*⁴, which established a two-pronged test for showing a pattern of racketeering activity:

- the racketeering predicates must be 'related;' and
- the predicates must 'amount to or pose a threat of continued criminal activity'.

The court found that the alleged acts of mail and wire fraud were related, since they all derived from 'a singular posting on eBay's website, which ha[d] been available to the public for many years'. Turning to the second prong, the court noted that eBay did not 'specifically challenge' the plaintiff's claim that the allegedly fraudulent acts 'amount[ed] to continued criminal activity'. Nonetheless, the court found that the posting likely met the second prong's continuity requirement, since its 'dissemination [was]

continuous and applie[d] to every single Live Auction'. However, it does not appear that eBay argued that the posting should not be considered a violation of the mail or wire fraud statutes at all.

The court's rulings on Mazur's other two RICO claims were more favorable to eBay. The court dismissed Mazur's claim under § 1962(a) - which alleged that eBay 'furthered its racketeering activity through the reinvestment of racketeering monies back into the enterprise' - since Mazur did not allege that this purported reinvestment caused an injury that was 'separate and distinct' from the injury flowing from the alleged shill bidding. It dismissed Mazur's conspiracy claim under § 1962(d), since any financial incentive eBay may have had to encourage shill bidding did not, by itself, demonstrate collusion with the third-party auction houses.

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1. 47 U.S.C. § 230(c)(1).

2. See *Mazur v. eBay*, No. C 07-03967 MHP, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. 4 March 2008).

3. 18 U.S.C. § 1962. See *Mazur v. eBay*, No. C 07-03967 MHP, 2008 U.S. Dist. LEXIS 57105 (N.D. Cal. 25 July 2008).

4. 492 US 229 (1989).



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