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## Developments in Service Provider Liability

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Courts both in the United States and abroad have continued to wrestle with the issue of liability for service providers, with seemingly divergent results. Thus, during November, a court in California continued the expansion of the scope of service provider immunity in a case involving online auctioneer eBay, while a court in France ordered Yahoo! to modify its service to prevent French users from accessing Nazi-related items. These divergent trends, toward greater immunity in the United States and greater liability in Europe, were previously discussed in our [April 28, 2000 Internet Alert](#).

### **Expansion of Immunity Under the Communications Decency Act**

**In the United States, Congress has granted Internet Service Providers (ISPs) and other "service providers" broad immunity from liability for defamation and limited immunity for copyright infringement. The Communications Decency Act of 1996 (CDA) states that "[n]o provider...of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The effect of this provision is to shield ISPs from liability as publishers, even if they exercise some control over the content. Likewise, as discussed in our [April 11, 2000 Internet Alert](#), the Digital Millennium Copyright Act of 1998 (DMCA) provides that an "online service provider" will not be liable for copyright infringement if it qualifies under any of the safe harbors created by that statute. These statutes have been cited in numerous cases protecting online service providers from liability for defamatory,**

obscene and other content posted by their users.

In a recent [San Francisco Superior Court case](#), eBay was awarded summary judgment in a case alleging that it allowed users to sell bootlegged recordings of Grateful Dead performances. Instead of focusing on copyright infringement (as previous cases of this nature have done), the plaintiff claimed that eBay, by allowing these sales, was committing an "unfair business practice" in violation of California's Business and Professions Code. The Judge granted summary judgment for eBay, holding that under the CDA, a service provider could not be treated as the publisher of content posted on its site, and that eBay could not be held liable for committing an unfair business practice under the California statute.

Instead of limiting his ruling to the application of the CDA to this particular activity, the judge went further, stating that the CDA created a general "federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party."

The eBay case continues a trend started by the expansive language of the U.S. Court of Appeals for the Fourth Circuit's opinion in [Zeran v. AOL](#). Other recent cases involving CDA immunity have dismissed state law claims for negligent dissemination of e-mail, intentional infliction of emotional distress and posting of allegedly inaccurate stock price information.

#### **French Court Orders Yahoo! to Modify Service**

In contrast to the U.S. trend toward greater immunity for service providers, courts in Europe have, in a number of recent cases, held service providers liable on various grounds for content posted by third parties. Some of these cases were discussed in our [April 28, 2000 Internet Alert](#).

On November 20, however, a French court broke new ground by ordering Yahoo! to comply with a French law prohibiting the display or sale of objects that incite racial hatred, and in particular to block French users' access to Nazi-era memorabilia

offered on the site. While Yahoo!'s French language site already complies with the legislation and prohibits the posting of Nazi items, the court held that the English-language U.S. site, which is, by its nature, accessible worldwide, must also comply with the French law. The court has given Yahoo! three months to implement a filtering system that would block French users' access to these items, and has imposed a fine of approximately \$13,000 for each day that Yahoo! exceeds this deadline. Yahoo!, through its attorneys, has reportedly stated that France has no jurisdiction over it and that it will ignore the decision, including the levying of any fines, unless a U.S. court enforces those fines.

This ruling marks a significant step in the assertion of international jurisdiction over service providers. Unlike earlier actions brought in foreign courts against overseas subsidiaries of U.S. companies -- such as the widely publicized German criminal action against CompuServe's German subsidiary and its managing director for publishing adult content in violation of Germany law -- the French action is also directed against the U.S. Yahoo! entity. This ruling is believed to mark the first time that a major service provider has been ordered to modify its service substantially (i.e., not simply by removing some form of illegal content, but by implementing complex filtering technology that must be developed specifically for this purpose). In addition, in late November, a similar case was brought in a German state court in Munich, alleging that Yahoo! auctions permitted the sale of copies of Hitler's "Mein Kampf" in violation of German law. These cases differ from law enforcement and other legal actions brought in the United States, in that they impose liability on the service provider, rather than, or in addition to, the individual posters of illegal or infringing content. For a discussion of recent U.S. legal actions to curb illegal conduct over the Internet, see our [July 24, 2000 Internet Alert](#).

It is unclear how the French ruling will interact with the new European E-commerce Directive, which grants some level of immunity to passive providers of information services (see our [March 14, 2000 Internet Alert](#)). This directive, which was adopted by

**the European Council and Parliament this June, must be implemented in the national law of each EU member country by January 2002.**

#### **Conclusion**

**At the same time that U.S. courts continue to limit the liability of service providers under the Communications Decency Act and the Digital Millennium Copyright Act, courts in other countries have expanded this liability, and sought to require service providers to modify their services to comply with local regulations. Thus, U.S.-based service providers should continue to be cautious, and not rely too heavily on immunities and safe harbors provided under U.S. law, until a more consistent approach to liability is developed internationally.**

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