

PRIVATE POWERS

Legal Analysis of Private Powers

Jesse Russell

Eastern Michigan University

Legal Analysis of Private Powers

Introduction

Most US citizens are familiar with the rights appointed to us by the amendments of The Constitution. For example, among these rights is The First Amendment, known to many as the right to freedom of speech, religion, and assembly. These Amendments provide a boundary that the US Government shall never cross, as these rights are vital for the personal liberty of all American citizens. However, the Government isn't the only force that citizens should fear overstepping boundaries. In most cases, The Constitution does not apply to private corporations in which consumers choose to use their services. (*Hudgens v. NLRB*, 1976) Does this mean that these companies can infringe on the liberty rights of its consumers? This paper will analyze this problem and determine how far companies can legally go regarding the restriction of their own platforms.

The X-Bay Problem

X-Bay is a US based online marketplace that wishes to restrict certain groups' abilities to sell on their website, including Pro-Life organizations, governmental employees, and items of low-quality. Can the company do this without infringing upon its users' rights? Some answers can be found in *Cyber Promotions, Inc. v. American Online, Inc.* (1996) In this case, Cyber Promotions (known as "Cyber" from here on) filed a lawsuit against American Online ("AOL") for restricting Cyber from disseminating copious amounts of unsolicited advertising emails to AOL's users. This flooded AOL's servers and caused them to overload. Cyber claimed that AOL's action against this violated their First Amendment rights and would put Cyber out of business. In Cyber's plea, they argue that AOL is performing state action, which would require them to abide by the First Amendment. They argue that because AOL is offering a public service

for anyone to use, they may act as a government entity, pointing to *Marsh v. Alabama* (1946). The court ruled that the case does not apply here, as AOL is not operating as a municipal authority like that of the Gulf Shipping Corporation. Ultimately, *Cyber Promotions, Inc. v. American Online, Inc.* (1996) ruled in favor of AOL, claiming that they had no government involvement, therefore had the ability to restrict its users. This case directly applies to the X-Bay situation. Provided X-Bay is entirely private, with no government involvement whatsoever, they should be able to get away with stopping groups they disagree with from selling on their website. X-Bay also wants to set their own price floors for sellers to offer their products on its website. In this case, the same rule above would apply. Since X-Bay is a private corporation, they have no liability to allow all users onto their website and can therefore weed out any potential low-quality items with price floors.

X-Bay would like to offer a service where third parties can sell on their website, and X-Bay will handle the logistics, such as storing inventory and shipping out the items. This system is quite like Amazon's fulfillment service, which was involved in a liability case that X-Bay may want to consider. In *Erie Insurance Co v. Amazon.com, Inc* (2019), Trung Cao had purchased a head lamp from Amazon.com. This headlamp was defective and caused a housefire, totaling over \$300,000 in damages to the home. Erie Insurance Co filed suit against Amazon, claiming negligence and that Amazon is liable for the damages. Under Maryland law, sellers are liable for defects in the items they sell, but the disagreement lies within the definition of "seller." The courts determined that Amazon was NOT the seller, but in fact simply a distributor. Due to this fact, Amazon was not seen as liable and the company "Dream Light" was instead responsible. It's also important to note that Amazon DOES have their own product that they sell on their website, so they would be held liable for defects in these products. If we apply this case law to

X-Bay, hosting a third party fulfillment service would not hold the company liable, and therefore would be a low risk endeavor for the company. The company should, however, be cautious of its own products because they can and will be held accountable for items they offer under their brand.

The next legal issue X-Bay is less of a concern from X-Bay and more of a concern regarding the ISP they use to host their website, CrapCast. This ISP does have some legally questionable business practices that may get them into trouble. CrapCast wants to monitor and record all of its internet traffic, as well as block and slow down any connections to sites they disagree with. These practices were combatted legally with the concept of Network Neutrality. Network Neutrality was put into place by the FCC in 2015, through the Protecting and Promoting Open Internet (2015) federal regulation. In this, the FCC declared that ISPs cannot block, slow, prioritize, or throttle traffic to certain websites. This stopped ISPs from assimilating the role of the judge, jury, and executioner of the internet world. ISPs couldn't charge more for a user to use a certain website, slow down speeds to controversial websites astronomically, and make deals with websites to provide a faster track to premium paying users. This ensured the internet could remain an open place for all to use and voice their opinions. In 2017, however, newly appointed FCC Commissioner Ajit Pai pushed for the regulations to be repealed and the vote passed. (Klar, 2020) Due to this repeal, ISPs now have the ability to do all of the actions that CrapCast wishes that are listed above. This isn't all CrapCast would like to do, though. They also have colluded with Derizon Wireless to set a minimum price floor to charge their customers. Under Section I of the Sherman Antitrust Act (1890), companies may not collude with each other and agree on price regulations similar to what they have done. Under this, CrapCast would be opening themselves up to lawsuits and legal penalties should they proceed with this practice.

References

Cyber Promotions, Inc v. American Online, Inc, 948 F. Supp. 436 (E.D. Pa. 1996)

Erie Insurance Co. v. Amazon.com, Inc, 925 F.3d 1356 (4th Cir. 2019)

Hudgens v. NLRB, 424 U.S. 507, 513 (1976)

Klar, R. (2020, October 27). FCC reaffirms order rolling back net neutrality regulations.

Retrieved November 22, 2020, from <https://thehill.com/policy/technology/522947-fcc-reaffirms-order-rolling-back-net-neutrality-regulations>

Marsh v. Alabama, 326 U.S. 501 (1946)

Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (2015)

Sherman Antitrust Act, 26 Stat. 209 (1890)