

MEMO# 22314

March 10, 2008

Federal Court Upholds Right Of Software Application Maker To Disable And Remove Another Vendor's Software Without Notice

[22314]

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TO: TECHNOLOGY COMMITTEE No. 6-08 RE: FEDERAL COURT UPHOLDS RIGHT OF SOFTWARE APPLICATION MAKER TO DISABLE AND REMOVE ANOTHER VENDOR'S SOFTWARE WITHOUT NOTICE

The United States District Court for the Western District of Washington at Seattle recently found that the federal Communication Decency Act (the "Act") provides immunity from liability for an interactive computer service that makes available the technical means to restrict access to material that the provider or user finds objectionable. [\[1\]](#) Based on this finding, prior to any trial on the merits, the court dismissed a suit brought by a software application maker against an anti-malware software application maker. The court's decision is currently on appeal to the Ninth Circuit. The facts of this case are briefly summarized below.

The parties in this case are Zango, the Plaintiff, and Kaspersky Labs, Inc., the Defendant. Zango is an internet company that provides consumers free access to a catalog of online videos, games, music, tools, and utilities that are sponsored by advertisements. [\[2\]](#) Kaspersky is an anti-malware software application maker, that provides the technical means to the users of its software to restrict access to content that it, as a provider, considers to be sexually explicit, harassing, or otherwise objectionable. According to Zango, it sued Kaspersky when it discovered that Kaspersky, without notice to the consumer, was both disabling and removing Zango's software that has previously been

consensually installed by the consumer and preventing the new installations of that software. Based on these allegations, Zango sued under the Washington Consumer Protection Act, alleging that Kaspersky had interfered with its contractual rights and business expectancy. Its suit sought imposition of an injunction.

Kaspersky argued that Zango's suit should be dismissed without further proceedings because the Act provides immunity to Kaspersky for its software. At issue were the provisions of 47 U.S.C. Section 230(c)(2)(A) and (B) of the Act, which provide as follows:

(c)(2) No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph A. [Emphasis added.]

Zango argued that Kaspersky was not entitled to immunity under the Act because it was not an “interactive computer service,” Zango's software was not “otherwise objectionable,” and Kaspersky had not acted in good faith. The court considered each of these issues in turn.

On the issue of whether Kaspersky was an interactive computer service, the court found that it was because it (1) is an access software provider [\[3\]](#) and (2) allows multiple users to access a computer server. The court next turned to the issue of whether Zango's software was “otherwise objectionable.” Zango argued that its software did not provide objectionable material and therefore Kaspersky's blocking of such software was not protected. According to the court, however, Zango was misreading the statute:

Section 230(c)(1)(A), which provides the definition of the relevant material described in Section 230(c)(2)(B), does not require that the material actually be objectionable; rather, it affords protection for blocking material ‘that the provider or user considers to be’ objectionable. 47 U.S.C. Section 230(c)(2)(A). There is no question that Kaspersky considers the software to be objectionable. (Decision at p. 4)

On the issue of whether Kaspersky was acting in good faith, the court found that “[b]y its own terms . . . Section 230(c)(2)(B) has no good faith requirement.” (Decision at p. 7)

Based upon these findings, the court concluded that Kaspersky was “immune from liability for all of Plaintiff Zango’s claims under Section 230(c)(2)(B); thus, the Court need not reach the issue of whether it would be separately immune under Section 230(c)(2)(A).” On this basis, the court dismissed Zango’s suit.

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[Attachment](#)

endnotes

[\[1\]](#) See Zango, Inc. v. Kaspersky Lab, Inc., Case No. C07-0807-JCC (W.D. Wash. Aug. 28, 2007) (the “Decision”).

[\[2\]](#) Zango also offers a “premium version” of its software that, for a fee, provides the same content without advertisements.

[\[3\]](#) According to the court, the term “access software providers” includes any provider or software of tools that, among other things, filters, screens, allows, or disallows, content.