



By Thomas and Charles Danziger

We would have trouble bringing some of our clients home for dinner. Take Tobias, for example.

He called us from Berlin and said he was a wealthy businessman looking to refine his extensive collection of S&M-themed artwork and gadgets – some of it, apparently, quite valuable. He planned to buy and sell pieces through an American online auction site and wanted to discuss any possible legal issues.

We were skeptical at first, but Tobias insisted that his call was no gag – though he did have some nice gags in his collection.

We began reviewing the list of items he wanted to sell and compared it with the roster of impermissible material described on the auction site itself. Like eBay, Tobias's auctioneer specifically prohibited the online sale of firearms, ammunition, knives, and weapons. "Does that mean that I couldn't sell a monogrammed whip?"

Tobias asked sadly. "Afraid not," we replied.

Some non-lethal items on Tobias's list (such as works by the bondage artist John Willie) raised a concern based on obscenity laws. Though we concluded that these objects did not violate U.S. statutes, we cautioned him to check with an attorney in Germany to ensure that he was not running afoul of obscenity laws there.

"But the auction site is posted in the U.S.," Tobias objected, "and I'm doing deals on the Internet. Why would German law even matter?"

We explained that even in borderless cyberspace, collectors are still within the reach of the law. Although there are no international standards governing online content, the 2001 federal case *Yahoo! v. La Ligue Internationale Contre le Racisme et l'Antisémitisme* (LICRA) may serve as a precedent for a country to apply its own laws to prohibit material from being offered on a site there, even when the material is perfectly legal in the country in which the

listing is posted. Tobias asked for more information and – not wanting to keep him tied up – we summarized the case.

LICRA sued Yahoo in France to stop the sale of Nazi paraphernalia on the company's U.S. auction site on the basis that these items violated a local French law prohibiting the purchase, possession and exhibition of such items. Yahoo tried to accommodate the French court by blocking the auction of the offending material on its French site and generally restricting the auction of material that promotes hate speech on its U.S. site.

Nonetheless, the French court remained unsatisfied, and assessed Yahoo penalties of \$13,000 per day. In response, Yahoo filed a complaint in the U.S. District Court for the Northern District of California, seeking a declaratory judgment that the French decision was unenforceable in the U.S.

The U.S. court sided with Yahoo on the First Amendment grounds and refused to enforce French order. The court observed that "Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression; the law of various nations against advocacy of gender equality or homosexuality; or even the United Kingdom's restrictions on freedom of the press."

We pointed out to Tobias that even though the French decision was ultimately unenforceable in America, it effectively forced Yahoo to limit what it showed on its U.S. Web site.

Tobias next wanted to discuss some of the specific objects on his wish list. He was particularly keen on purchasing what the auction site described as a "rare portfolio of illustrations by the erotic artist Aubrey Beardsley."

The timing of the Beardsley auction raised a red flag: The sale was slated to begin on a Friday night and end on a Sunday. Some unscrupulous sellers deliberately conduct sales over a weekend, knowing that online auctioneers tend to have fewer staff to handle problems and post complaints from users on a timely basis.

On closer inspection, the site also contained a link in small print to a page entitled "Additional Information." There we found a laundry list of qualifications and disclaimers, including the point that the works were merely "attributed to" the artist. The disclaimers were so extensive; in fact, that a buyer could not have obtained a refund had the illustrations been done by Babar the Elephant. Moral: Whether you're buying a Biedermeier chest or a bondage bed, always read the disclaimers carefully.

In addition to the advice we would provide any potential buyer at a live auction, we offered Tobias some specific tips about protecting himself in an online auction. We suggested that he review the site's "feedback" on the seller to determine if past buyers had reported bad experiences; verify the seller's credentials (assuming he had any); and obtain (and verify) the seller's contact information. We also suggested that he save all e-mail correspondence, in case of a problem later on.

Tobias was well aware of how many works sold online are fake. He had read our March 2004 article in *Art & Auction*, so he knew about the famous case involving three con artists who tried to sell a fake Richard Diebenkorn painting (among other works) on eBay and engaged in fraudulent "shill bidding" to artificially drive up the price from 25 cents to \$135,805 (In shill bidding, multiple "shills" acting in concert compete

against buyers to inflate the price of an item with no intention of actually purchasing it.) We told Tobias that the culprits in the Diebenkorn case were indicted for wire and mail fraud and fined, and one of them was sentenced to almost four years in prison.

Tobias made some enthusiastic remark about handcuffs, but we quickly moved on, explaining how online auction fraud seems to be on the rise, although there are no reliable statistics. This is either because many victims fail to report fraud or are simply unaware that they have been defrauded, as a result of such practices as shill bidding.

Tobias then said that he was considering purchasing a pair of custom-made boots and a saddle (don't ask), supposedly made by a famous luxury goods company. We cautioned him that online auctions were increasingly plagued with the problem of counterfeit luxury goods. This past June, Tiffany & Co. sued eBay in federal court in New York, claiming trademark infringement. According to the plaintiff, random purchases of "Tiffany" jewelry on eBay showed that 73 percent of the items were actually fake. Other manufacturers, such as Rolex, have brought similar suits against online auction sites in Europe.

Tobias didn't seem particularly concerned. "If I do run into a problem with a fake," he replied, "I'll just hold the auction site liable!"

There was a kink in his reasoning. In our experience, it is even more difficult to win in an action for fraud or misrepresentation against online auctioneers than against traditional auction houses. Whereas a traditional auction house is directly involved in appraising and cataloguing the items it sells, an online auction site typically views

itself as a mere electronic forum where parties can meet and decide among themselves how much risk they want to take. Even eBay shies away from calling itself an "auction site," and its own online "Company Overview" refers instead to a "global trading platform" where buyers can "purchase items in an auction-style format." As a result, the online sites have customarily taken the legal position that they are not responsible for the authenticity of goods sold.

U.S. courts have generally accepted this view and have been reluctant to hold Web site operators liable for the wrongdoing of others. For example, in *Gentry v. eBay, Inc.*, a 2002 case involving the fraudulent sale of sports memorabilia posted on eBay, the California Court Appeals found that the auction site was not liable because third parties conducted the sale. Moreover, the Communications Decency and Telecommunications Act specifically gives "federal immunity to any cause of action that would make interactive service providers liable for information originating with a third-party user of the service."

At the end of our conversation, we casually asked Tobias how he had made his fortune. "Trading bonds," came the quick reply.