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# eBay: The Cyber Swap Meet

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# EBAY: THE CYBER SWAP MEET

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## I. INTRODUCTION

Online auction sites, such as eBay,<sup>1</sup> provide a cyber marketplace where online sellers sell a significant amount of stolen property to online buyers.<sup>2</sup> Although the National Stolen Property Act prohibits the sale and receipt of

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<sup>1</sup> Note that although the subject of this article pertains to all online auction sites, eBay serves as the test case because the company is the largest online auction site. Wendy Tanaka, *Competition, Fraud May Harm eBay*, FORT WORTH STAR-TELEGRAM (Tex.), July 5, 2003, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html> [hereinafter Tanaka].

<sup>2</sup> Although the Federal Bureau of Investigation, Internet Fraud Complaint Center, and National Consumer League do not document the amount of eBay's stolen property sales, eBay admits that 1/100 of 1% of all eBay sales are confirmed as fraudulent. *Id.*, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>. Because eBay auctions about 16 million items each day, roughly 548,000 items would be considered fraudulent by eBay's estimation. *Id.*, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>. By contrast, the Sourcebook of Criminal Justice Statistics estimates that in 2001 there were only 445,280 arrests for fraud and the sale and receipt of stolen property in the entire United States. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 342 (30th ed. 2002), <http://www.albany.edu/sourcebook/1995/pdf/t41.pdf> (last visited Sept. 27, 2004) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS]. See also Pat Reavy, *Seller on eBay Arrested in Utah*, DESERT MORNING NEWS (Utah), Nov. 15, 2003, <http://deseretnews.com/dn/view/0,1249,525038137,00.html> [hereinafter Reavy]; Gary Nurenberg, *To Catch a Thief Online*, TECH LIVE, Apr. 22, 2002, <http://www.itsmissing.com/articles/eBayring.html>; Ruth Longoria, *Olympia Police Say They've Cracked Stolen Goods Ring*, THE OLYMPIAN (Wash.), <http://www.itsmissing.com/articles/auctioncrime2.html> (last visited Sept. 29, 2004) [hereinafter Longoria].

stolen property,<sup>3</sup> eBay is not liable because the company does not take part in the transaction between seller and buyer.<sup>4</sup> Law enforcement officials, though, have difficulty apprehending online sellers of stolen property because eBay's cyber market is larger and less regulated than brick and mortar markets where sellers traditionally sell stolen property.<sup>5</sup> Pawnshops and swap meets, for example, operate at a confined date, time, and location, giving law enforcement officials the opportunity to physically patrol the market for stolen property.<sup>6</sup> Conversely, because eBay's international market operates twenty-four hours a day/seven days a week,<sup>7</sup> law enforcement officials lack the resources to comb through eBay's sixteen million daily sales for stolen property.<sup>8</sup>

Additionally, most states require pawnshop owners, swap meet operators, and swap meet vendors to provide local police departments with extensive personal and merchandise information to help law enforcement officials solve stolen property crimes.<sup>9</sup> Yet, because states do not regulate eBay to the extent of pawnshops and swap meets,<sup>10</sup> eBay can permit sellers to become registered members by simply providing an email address and credit card number.<sup>11</sup> In most cases, however, this information is not enough for law

<sup>3</sup> The National Stolen Property Act states:

[w]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2004).

<sup>4</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>5</sup> Dana Littlefield, *Stolen Items Find Way onto Internet*, THE SAN DIEGO UNION TRIB., Nov. 16, 2003, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html) [hereinafter Littlefield]. See also John Johnson, *eBay: A Thief's Dream; A Cop's Nightmare*, FRAMINGHAM METRO WEST DAILY NEWS (Mass.), Mar. 14, 2003, <http://www.tecrime.com/llartB08.htm> [hereinafter Johnson].

<sup>6</sup> Mary Anne Ostrom, *Online Auctions are the Newest Place to Hawk Stolen Goods*, SAN JOSE MERCURY NEWS (Cal.), June 10, 2002, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm> [hereinafter Ostrom] (stating that online auctions offer more anonymity than physical locations like flea markets where police routinely patrol).

<sup>7</sup> See Adam Lashinsky, *Meg and the Machine: Unstoppable eBay is No. 8 among Fortune's Fastest-Growing Companies. But Driving this Train is Harder than you Think*, FORTUNE, Sept. 1, 2003, at 72 [hereinafter Lashinsky].

<sup>8</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html).

<sup>9</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>10</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>11</sup> eBay Website, *eBay Registration*, at [https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co\\_partnerid=2&usage=0&ru=default](https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&usage=0&ru=default) (last visited Sept. 30, 2004).

enforcement officials to successfully identify and apprehend online sellers of stolen property from this global marketplace.<sup>12</sup> Failure to punish, or even to prevent, stolen property crimes gives little hope or recourse to the victims of these crimes: uninformed online buyers and the original owners of the stolen property.<sup>13</sup>

The solution is for Congress to pass federal legislation modeled after the California Business & Professional Code sections 21660-21669. The Proposed Legislation treats eBay as a swap meet operator in order to prevent the sale and receipt of stolen property.<sup>14</sup> The Proposed Legislation requires eBay to provide more identifying eBay seller information to law enforcement agencies in order to improve law enforcement efforts to solve stolen property crimes. Additionally, the Proposed Legislation provides a strong deterrent for sellers of stolen property who will be more likely to look to other less-regulated markets to sell stolen property.

Federal legislation is appropriate for two important reasons. First, eBay is unlikely to fix the problem because self-regulation is not in eBay's economic interest. eBay has an economic incentive to maintain a safe marketplace and to create preventive programs only if the costs of liability outweigh the costs of self-regulation.<sup>15</sup> Currently, eBay is deriving direct financial benefit from sales of stolen property<sup>16</sup> and is not liable for the illegal sales that occur in eBay's marketplace.<sup>17</sup> Because eBay's costs of liability for sales of stolen property are virtually non-existent, only federal legislation will induce eBay to take corrective action.

Second, federal legislation is appropriate because eBay's market is a source of substantial multi-state activity.<sup>18</sup> eBay's market implicates national interests because state law enforcement officials are unable to effectively

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<sup>12</sup> See Johnson, *supra* note 5, <http://www.tecrime.com/llartB08.htm>.

<sup>13</sup> Kari Pugh, *Stolen Merchandise Unusual, eBay Says*, FREE-LANCE STAR (Va.), Jan. 15, 2004, <http://www.tecrime.com/llartB05.htm>. These owners—often large and small retailers—are forced to compete with individuals selling stolen merchandise at less than cost. Retail Council of Canada, *How Can Regulation of Flea Markets Help Combat Retail Loss?*, <http://www.retailcouncil.org/rpn/leg/fleamarkets.asp> (last visited Sept. 29, 2004). The National Stolen Property Act also benefits uninsured homeowners who lose their property without compensation or recourse. See 18 U.S.C. § 2315 (2004).

<sup>14</sup> Sections 21660-21669 of the California Business & Professions Code state, in pertinent part, "[t]he swap meet operator shall provide [the form disclosing vendor information] required by subdivision (a) of Section 21663 to the chief of police . . . within 24 hours, or, before the end of the first working day of the swap meet." CAL. BUS. & PROF. CODE § 21664 (2004).

<sup>15</sup> See Barbara Strong Goss, Note, *Subsequent Remedial Measures in Strict Liability: Later Opinions as Evidence of Defects in Earlier Reasoning*, 32 CATH. U.L. REV. 895, 931 n. 219 (1983).

<sup>16</sup> See Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>.

<sup>17</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>18</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

prevent online stolen property crimes.<sup>19</sup> Federal investigative skills and resources are beyond the usual capacity of state law enforcement, and these resources supplement state law enforcement efforts to prevent online stolen property crimes.<sup>20</sup> Additionally, federal legislation provides uniformity to the prohibition of the online sale and receipt of stolen property in order to prevent forum shopping and the inequitable administration of justice.<sup>21</sup>

Finally, the Proposed Legislation will not burden eBay because the company has already dealt with modifications in different contexts. eBay maintains control to remove all prohibited items and violating users when the company feels appropriate.<sup>22</sup> Furthermore, eBay has already taken the necessary steps to avoid trademark infringement and copyright liability by establishing the Verified Rights Owner (VeRO) program.<sup>23</sup> The VeRO program, however, helps eBay members report intellectual property violations, but protects neither the rights of online buyers nor original owners of stolen property from the sale and receipt of real property on eBay.<sup>24</sup>

This article advocates that federal legislation is needed to prevent the sale and receipt of stolen property on eBay. Part II details the character and magnitude of eBay stolen property sales. Part III supports a statutory solution that accommodates the interests of both eBay and the public. Finally, Part IV responds to potential criticisms, and concludes that federal legislation is appropriate to uniformly apply the law of brick and mortar swap meets to online auctions.

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<sup>19</sup> ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 48 (1999), <http://www.abanet.org/crimjust/fedcrimlaw2.pdf> at 48.

<sup>20</sup> *Id.*, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>.

<sup>21</sup> *Id.*, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>, at 44.

<sup>22</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004). eBay's user agreement states that the company reserves the authority to suspend or terminate membership if eBay believes the member's actions "may cause legal liability for you, our users, or us." eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004). In addition, eBay reserves authority to remove prohibited items from listing, as well as to conduct other activities. eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>23</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited Sept. 27, 2004).

<sup>24</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited Sept. 27, 2004).

## II. THE PROBLEM

### A. Evidence of Stolen Property Crimes

Although eBay's market contains a significant amount of stolen property sales,<sup>25</sup> the actual number is difficult to quantify because most investigative agencies classify online stolen property sales under the broad category of Internet Auction Fraud.<sup>26</sup> Internet Auction Fraud is the purposeful manipulation of the internet auction process whereby online sellers take advantage of an internet auction webpage to attain the highest online bid.<sup>27</sup> Internet Auction Fraud includes: stolen property sales, misrepresentation,<sup>28</sup> triangulation,<sup>29</sup> fee stacking,<sup>30</sup> multiple bidding,<sup>31</sup> and shill bidding.<sup>32</sup> Internet Auction Fraud does not include non-payment or non-shipment of goods because these acts occur on non-auction Internet sites.<sup>33</sup> Although the Federal Bureau of Investigation (FBI), Federal Trade Commission (FTC), and the National Consumer League (NCL) cannot distinguish the percentage of stolen property sales from Internet Auction Fraud, the number of

<sup>25</sup> See *supra* note 2 and accompanying text.

<sup>26</sup> E-Mail from Shawn Hutton, Research Associate, Internet Fraud Complaint Center (Jan. 16, 2004) (on file with author).

<sup>27</sup> *Id.*

<sup>28</sup> Misrepresentation is defined as "when the seller's purpose is to deceive the buyer regarding the true value of an item." IFCC & FBI, *Internet Auction Fraud Report* at 6 (2001), <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf> [hereinafter *Internet Auction Fraud Report*].

<sup>29</sup> Triangulation is defined as:

involv[ing] three parties: the perpetrator, a consumer, and an online merchant. The perpetrator buys merchandise from an online merchant using stolen identities and credit card numbers. Then, the perpetrator sells the merchandise at online auction sites to unsuspecting bidders (buyers). Next, the perpetrator has the buyer wire transfer him the money and then sends the merchandise to the buyer.

*Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

<sup>30</sup> "Fee stacking involves the seller adding hidden charges to the item after the auction is over in order to obtain more money." *Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

<sup>31</sup> Multiple bidding is fraudulent:

when a buyer places multiple bids (some high and some low) on the same item using different aliases. The multiple high bids by the same buyer cause the price to escalate, which scares off other potential buyers from bidding. Then, in the last few minutes of the auction the same buyer withdraws their high bids, only to purchase the item with the much lower bid.

*Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

<sup>32</sup> "Shill bidding is intentional fake bidding by the seller to drive up the price of his/her own item that is up for bid." *Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

<sup>33</sup> *Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

fraudulent eBay sales and Internet Auction Fraud user complaints suggest that eBay's market contains a significant amount of stolen property sales.<sup>34</sup>

eBay maintains that only about 1/100 of 1% of its 16 million daily transactions are confirmed as fraudulent;<sup>35</sup> however, even this low percentage translates into about 16,000 fraudulent items listed daily, and 584,000 fraudulent items listed each year.<sup>36</sup> By contrast, in 2001, there were a combined 445,280 arrests in the United States for fraud and stolen property sales.<sup>37</sup> Admittedly, confirmations of online fraud are not necessarily comparable to arrests. Still, the fact that eBay, a single online auction marketplace, contains nearly 140,000 more cases of confirmed fraud and stolen property sales than the number of arrests for those acts in the entire United States suggests that the public should be more wary of eBay's marketplace.<sup>38</sup>

Furthermore, the large number of Internet Auction Fraud user complaints suggests that eBay's market contains a significant amount of stolen property sales.<sup>39</sup> In May 2000, the FBI and National White Collar Crime Center created the Internet Fraud Complaint Center (IFCC) to centralize internet fraud complaints, quantify fraud patterns, and provide statistical data of current fraud trends.<sup>40</sup> In 2002, the IFCC Website referred 48,522 complaints to law enforcement agencies, an increase from 16,755 from

<sup>34</sup> E-Mail from Shawn Hutton, Research Associate, IFCC (Jan. 16, 2004) (on file with author).

<sup>35</sup> Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>. This number is a considerably low estimate because it reflects only those cases settled through the eBay buyer protection claim process. Katie Hafner, *With Internet Fraud Up Sharply, eBay Attracts Vigilantes*, N. Y. TIMES, Mar. 20, 2004.

<sup>36</sup> The number of fraudulent items listed each day and year is determined by the following computation and explanation: 16 million items a day multiplied by 1/100, and then multiplied by 1% equals 1,600 items listed per day. This figure multiplied by an average of 365 days per year yields 584,000 items listed per year.

<sup>37</sup> SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 2, at 342, <http://www.albany.edu/sourcebook/1995/pdf/t41.pdf>. In 2001, there were an estimated 323,308 arrests for fraud and 121,972 arrests for the sale and receipt of stolen property. *Id.*, <http://www.albany.edu/sourcebook/1995/pdf/t41.pdf>. A comparison of the number of arrests for robbery (108,400), rape (27,220), embezzlement (20,157), and arson (18,749) highlight the large volume of fraud and stolen property crimes. *Id.*, <http://www.albany.edu/sourcebook/1995/pdf/t41.pdf>. See also U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention and National Center of Juvenile Justice Website, *Easy Access to FBI Arrest Statistics: 1994-2001*, at [http://ojjdp.ncjrs.org/ojstatbb/ezaucr/asp/ucr\\_display.asp](http://ojjdp.ncjrs.org/ojstatbb/ezaucr/asp/ucr_display.asp) (last visited Sept. 29, 2004) (corroborating the aforementioned figures).

<sup>38</sup> SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 2, at 342, <http://www.albany.edu/sourcebook/1995/pdf/t41.pdf>.

<sup>39</sup> National White Collar Crime Center & FBI, *IFCC 2002 Internet Fraud Report* (Jan. 1, 2002 - Dec. 31, 2002), [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf) [hereinafter *IFCC 2002 Internet Fraud Report*].

<sup>40</sup> IFCC Website, *IFCC Homepage*, at <http://www.ifccfbi.gov/index.asp> (last visited Sept. 29, 2004).

2001.<sup>41</sup> Internet Auction Fraud, by far the most common IFCC complaint, constitutes 46.1% of the referred complaints.<sup>42</sup> This marked a 7.7% increase from 2001 levels of Internet Auction Fraud.<sup>43</sup> Further, the aggregate amount of the reported claims was \$54 million, representing almost a 32% increase from the prior year.<sup>44</sup> Although the IFCC does not document the percentage of Internet Auction Fraud complaints that represent online stolen property sales, evidence suggests this percentage is significant because online stolen property crimes constitute 1/6 of the most common IFCC complaint category.<sup>45</sup>

In response to the growing rate of cyber crimes, the FBI launched Operation Cyber Sweep in November 2003.<sup>46</sup> This initiative targeted traditional cyber crimes that have migrated to the internet, like the sale and receipt of stolen property.<sup>47</sup> The early results of this initiative seem to be reasonably successful as the investigations targeting 350 subjects resulted in 125 arrests/convictions.<sup>48</sup> Among the most prominent, Operation Cyber

<sup>41</sup> *IFCC 2002 Internet Fraud Report*, *supra* note 39, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf), at 4 (2003). Note, that the IFCC only referred complaints that the organization considered legitimate. The IFCC received complaints for Internet Auction Fraud, Non-Delivery and Non-Payment, Credit Card Fraud, Investment Fraud, Business Fraud, Confidence Fraud, Identity Theft, Check Fraud, Nigerian Letter Fraud, and Communications Fraud.

<sup>42</sup> *Id.*, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf), at 6.

<sup>43</sup> *Id.*, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf), at 5.

<sup>44</sup> *Id.*, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf). Admittedly, given eBay's volume and revenue of \$1.2 billion in 2002, the aggregate amount of reported claims constitutes a small percentage. *Id.*, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf). This percentage is further reduced because this total is derived from all other online auction websites in addition to eBay. However, this aggregate amount does not represent an accurate depiction of the total loss because this figure represents only the amount of property lost from claims that have been first reported, and then referred, to the IFCC. Moreover, according to David H. Freedman, author of *What eBay Isn't Telling You*, the incidents of fraud on eBay are vastly underreported because:

[a]n untold number of victims simply don't bother to report a fraud, either out of embarrassment, a feeling that the process will be too time-consuming, or a belief that it won't do any good. In addition, fraud can be reported vicariously to eBay, the IFCC, the National Consumers League, or local police, leading each to end up with low figures.

David H. Freedman, *What eBay Isn't Telling You*, BUSINESS 2.0 (August 2002), at [http://www.genesisystems.com/tips/int\\_tip13.htm](http://www.genesisystems.com/tips/int_tip13.htm).

<sup>45</sup> See *Internet Auction Fraud Report*, *supra* note 28, at 6, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>. Internet Auction Fraud includes: stolen property sales, misrepresentation, triangulation, fee stacking, multiple bidding, and shill bidding.

<sup>46</sup> IFCC, *Cyber Sweep Summary*, <http://www.ifccfbi.gov/strategy/CyberSweepSummary.pdf> (last visited Sept. 27, 2004) [hereinafter *Cyber Sweep Summary*].

<sup>47</sup> *Id.*, <http://www.ifccfbi.gov/strategy/CyberSweepSummary.pdf>.

<sup>48</sup> U.S. Department of Justice & FBI, *Sampling of Investigations from Operation Cyber Sweep*, <http://www.fbi.gov/cyber/cysweep/cysweep1.htm> (last visited Sept. 30, 2004) [hereinafter *Sampling of Investigations from Operation Cyber Sweep*].



Sweep uncovered a ring of twenty or more individuals in Chicago whose eBay sales of stolen property amounted to over \$3 million.<sup>49</sup> These investigations target only the buyers and sellers of stolen property because eBay is not subject to traditional stolen property laws.

### B. *Traditional Stolen Property Laws and their Inapplicability to eBay*

Historically, the National Stolen Property Act (NSPA) of 1934 provides for the prosecution of stolen property crimes.<sup>50</sup> The NSPA imposes liability on whoever knowingly sells or receives stolen property.<sup>51</sup> The NSPA serves two important functions: to inhibit the sale of stolen property, and to help law enforcement agencies solve stolen property crimes.

First, the NSPA prevents the flow of stolen property into interstate commerce by imposing liability on both the buyer and seller of stolen property.<sup>52</sup> The law deters buyers and sellers, who are less likely to engage in stolen property sales if the parties know they are each liable for the sale and receipt of stolen property.<sup>53</sup> Although some uninformed buyers are inclined to purchase under-priced stolen merchandise, these buyers do so at their own risk because police have authority to confiscate stolen property from uninformed buyers without compensation.<sup>54</sup> Additionally, because cautious buyers and sellers create difficulty for thieves to profit from their unlawful acts, the NSPA also deters theft at the earliest stage.

The second purpose of the NSPA is to help state and local law enforcement locate and apprehend stolen property sellers.<sup>55</sup> Law enforcement authorities have difficulty apprehending sellers because, as United States Supreme Court Justice Thurgood Marshall wrote, sellers of stolen property use “the channels of interstate commerce to make a successful getaway and thus make the state’s detecting and punitive processes impotent.”<sup>56</sup> Additionally, Justice Marshall reasoned, the NSPA is also one of the “most effective ways of preventing further frauds,”<sup>57</sup> considering that the money raised from the illegal sales is often eventually recycled back into the black

<sup>49</sup> *Id.*, <http://www.fbi.gov/cyber/cysweep/cysweep1.htm>.

<sup>50</sup> *See supra* note 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> ItsMissing.com Website, *What the Press Say About US* (Mar. 26, 2003), at <http://www.itsmissing.com/index.php?action=StaticPage&cpage=press>.

<sup>55</sup> 18 U.S.C. § 2315 (2004).

<sup>56</sup> *Moskal v. United States*, 498 U.S. 103, 110 (1990) (quoting *United States v. Sheridan*, 329 U.S. 379, 384 (1946)).

<sup>57</sup> *Id.*

market for use in other illegal behavior, such as theft or selling drugs.<sup>58</sup> Although Justice Marshall was describing the impact of stolen property sold at brick and mortar marketplaces, the same policy concerns exist for online stolen property sales because the result of these sales still directly affect the physical world.<sup>59</sup>

The brick and mortar market operator is not liable, however, for violating the NSPA because the operator does not take part in the individual transaction and lacks knowledge of stolen property sales on his premises.<sup>60</sup> Yet, because operators can provide a market for stolen property sales, many state legislatures also impose liability on brick and mortar market operators for stolen property sales.<sup>61</sup> For example, some states require pawnbrokers to fingerprint sellers who consign items and to transmit inventory serial numbers to the local police department.<sup>62</sup> Similarly, many states require swap meet operators to record and to transmit personal information about the seller and his inventory to the local chief of police.<sup>63</sup> These laws are designed to improve law enforcement efforts to trace and locate stolen property.

However, federal and state laws do not apply to online auction sites like eBay. eBay is not liable under the NSPA because the company does not take part in individual transactions, and instead functions as a *venue* where buyers and sellers conduct business.<sup>64</sup> Further, unlike state regulation of pawnshops and swap meets, states have yet to regulate eBay to prevent the sale and receipt of stolen property. Even if state legislatures drafted new laws targeting eBay, the new laws would be ineffective because eBay's global market presents a greater problem to state and local law enforcement officials than traditional local pawnshops and swap meets.<sup>65</sup> eBay's global market allows for the unlawful sale of stolen property across state and

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<sup>58</sup> Ben Schmitt, *Dealers in Stolen Goods Targeted*, DETROIT FREE PRESS, Sept. 11, 2003, [http://www.freep.com/news/locway/nloot11\\_20030911.htm](http://www.freep.com/news/locway/nloot11_20030911.htm).

<sup>59</sup> Andrew L. Shapiro, *Constitutional Issues Involving Use of the Internet: The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703, 714 (1998) [hereinafter Shapiro] (“[I]f cyberspace is taken seriously, then what transpires in our online interactions will have a deep, tangible impact on our lives.”). See also David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN L. REV. 1367 (1996) [hereinafter Johnson & Post].

<sup>60</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>61</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>62</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>63</sup> CAL. BUS. & PROF. CODE § 21664 (2004).

<sup>64</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>65</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html); Johnson, *supra* note 5, <http://www.tecrime.com/lartB08.htm>.

national boundaries.<sup>66</sup> This geographic problem forces law enforcement officials to investigate and prosecute unlawful behavior on eBay from among millions of daily transactions between parties from all over the world.<sup>67</sup> State laws are not capable of dealing with this volume of interstate commerce.<sup>68</sup> As a result, eBay will continue to provide a market for the sale and receipt of stolen property.

### C. eBay and its Design

eBay is an online marketplace that allows “anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats, including a fixed price format and an auction-style format.”<sup>69</sup> The eBay registration process takes only a few minutes to complete. eBay merely requires its members to provide a valid credit card number and email address;<sup>70</sup> eBay does not require any other identification. Once registered, a member can list an item for auction for as little as \$.30,<sup>71</sup> and eBay ensures that the item will be available to be viewed and to be purchased by any other registered user for a maximum window of ten days.<sup>72</sup> When the auction is concluded, eBay notifies both the seller and the winning bidder via e-mail, and collects a commission fee from the final sale.<sup>73</sup> The parties then arrange for payment, with the buyer usually sending payment through cash, check, money order, or PayPal to an address the seller provides.<sup>74</sup> Once the seller

<sup>66</sup> The National Stolen Property Act states:

[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (2004).

<sup>67</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html); Johnson, *supra* note 5, <http://www.tecrime.com/llartB08.htm>.

<sup>68</sup> James Strazella, *The Federalization of Criminal Law*, 1999 A.B.A. SEC. PUB. CRIM. JUST. L. REP. 48, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf> [hereinafter Strazella].

<sup>69</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>70</sup> eBay Website, *eBay Registration*, at [https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co\\_partnerid=2&usage=0&ru=default](https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&usage=0&ru=default) (last visited Sept. 30, 2004).

<sup>71</sup> eBay Website, *eBay Fees Overview*, at <http://pages.eBay.com/help/sell/fees.html> (last visited Sept. 30, 2004).

<sup>72</sup> eBay Website, *eBay Fees Overview*, at <http://pages.eBay.com/help/sell/fees.html> (last visited Sept. 30, 2004).

<sup>73</sup> eBay Website, *eBay Seller's Guide: I've Sold or Won an Item—Now What?*, at <http://pages.eBay.com/help/sellerguide/after-whatnow.html> (last visited Sept. 30, 2004).

<sup>74</sup> eBay Website, *eBay Seller's Guide: I've Sold or Won an Item—Now What?*, at <http://pages.eBay.com/help/sellerguide/after-whatnow.html> (last visited Sept. 30, 2004). See PayPal

receives payment, he/she is expected to send the merchandise described in the auction.<sup>75</sup>

Finally, once both buyer and seller receive their confirmation of acceptance, the parties can each choose to leave reputation feedback for the other party.<sup>76</sup> Other users can view this feedback as guidance in order to determine if a party is reliable.<sup>77</sup> eBay designed the feedback system to provide buyers and sellers with additional confidence in eBay sales.<sup>78</sup>

Thus far, eBay's design seems successful. eBay members sell and buy a combined total of about 16 million items daily.<sup>79</sup> In 2002, these sales earned eBay a profit of \$250 million, a 277% increase from 2001.<sup>80</sup> Additionally, the number of eBay's registered users nearly doubled from 42.4 million in 2001 to 61.7 million in 2002.<sup>81</sup> Currently, eBay comprises 90% of the online auction market.<sup>82</sup>

However, eBay's design is also the cause of a significant amount of stolen property sales.<sup>83</sup> Unlike brick and mortar markets such as pawnshops and swap meets, eBay offers stolen property sellers a system in which they can sell items all over the world, and still remain mostly anonymous.<sup>84</sup> One could buy and sell on eBay without ever knowing the other party's real name, address, phone number, or physical characteristics.<sup>85</sup> According to the

Website, *PayPal: About Us*, at <http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/about-outside> (last visited Sept. 30, 2004) (describing "PayPal, [as] an eBay Company, [that] enables any individual or business with an email address to securely, easily and quickly send and receive payments online").

<sup>75</sup> eBay Website, *eBay Seller's Guide: I've Sold or Won an Item—Now What?*, at <http://pages.eBay.com/help/sellerguide/after-whatnow.html> (last visited Sept. 30, 2004).

<sup>76</sup> eBay Website, *eBay Seller's Guide: I've Sold or Won an Item—Now What?*, at <http://pages.eBay.com/help/sellerguide/after-whatnow.html> (last visited Sept. 30, 2004).

<sup>77</sup> eBay Website, *eBay Seller's Guide: I've Sold or Won an Item—Now What?*, at <http://pages.eBay.com/help/sellerguide/after-whatnow.html> (last visited Sept. 30, 2004).

<sup>78</sup> eBay Website, *eBay Company Overview*, at <http://pages.eBay.com/community/abouteBay/overview/trust.html> (last visited Sept. 23, 2004).

<sup>79</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html); Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>.

<sup>80</sup> See Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>; Lashinsky, *supra* note 7, at 72.

<sup>81</sup> Lashinsky, *supra* note 7. Furthermore, in 2003, Fortune Magazine ranked eBay the eighth fastest growing company in the United States. *Id.*

<sup>82</sup> See Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>.

<sup>83</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>84</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>. Note that although eBay knows the identity of the seller based on the registration information the seller provided, the buyer is unaware of this information even though he—not eBay—is liable for receiving stolen property. See *id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>85</sup> *Internet Auction Fraud Report*, *supra* note 28, at 10, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>.

IFCC, 34% of Internet Auction Fraud complainants do not know the gender of the fraudulent party.<sup>86</sup> Moreover, 25% of Internet Auction Fraud complainants are unaware of the fraudulent party's physical address, and another 14% know only the fraudulent party's P.O. Box.<sup>87</sup>

Despite the faceless nature of sales on eBay,<sup>88</sup> the company takes fewer precautions to prevent the sale and receipt of stolen property than brick and mortar locations that sell second-hand goods.<sup>89</sup> Admittedly, eBay operates with greater volume than local pawnshops or swap meets and may not be expected to handle additional precautions.<sup>90</sup> Yet, this may not be a valid excuse because many states require swap meet operators to obtain police permits to conduct swap meets only in locations where the operator can effectively control the flow of persons and merchandise.<sup>91</sup>

Furthermore, although eBay has the discretion to warn, investigate, suspend, or sanction reported violators,<sup>92</sup> eBay fails to deter stolen property sellers because eBay's high level of volume limits the company from investigating every potential seller.<sup>93</sup> Sellers of stolen property also tend to submit faulty registration information and to maintain several eBay accounts in order to sell large amounts of stolen property surreptitiously.<sup>94</sup>

Additionally, many states require operators to arrange the booths and merchandise so police have access for inspection at all times.<sup>95</sup> In contrast, eBay's design requires law enforcement officials to comb through millions of eBay listings to inspect potentially stolen property.<sup>96</sup> eBay does not patrol its site for potential violators until users or law enforcement officials contact the company about specific individuals.<sup>97</sup> Ironically, the ease with which

<sup>86</sup> *Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>, at 12.

<sup>87</sup> *Id.*, <http://www.ifccfbi.gov/strategy/AuctionFraudReport.pdf>, at 11.

<sup>88</sup> Most sales on eBay are conducted without the parties ever meeting each other face-to-face.

<sup>89</sup> See discussion *supra* Part I.

<sup>90</sup> *Id.*

<sup>91</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>, and accompanying text. See also SAN DIEGO MUNICIPAL CODE § 33.3204 (amended Feb. 23, 1987), <http://clerkdoc.sannet.gov/legtrain/mc/MuniCodeChapter03/Ch03Art03Division32>.

<sup>92</sup> eBay Website, *eBay Listing Policies for Sellers*, at <http://pages.eBay.com/help/policies/listing-ov.html> (last visited Oct. 1, 2004).

<sup>93</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html).

<sup>94</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>95</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>

<sup>96</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html).

<sup>97</sup> eBay Website, *eBay's Role*, at <http://pages.eBay.com/help/confidence/isgw-fraud-eBays-role.html> (last visited Sept. 30, 2004). eBay's defensive approach is understandable because the company is not liable for the sale and receipt of stolen property that occurs on the website. See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

one can launder stolen items through eBay induces many law enforcement officials to even alert theft victims to check eBay when they find their property is missing!<sup>98</sup> eBay's design enables sellers of stolen property to operate without the fear of state and local law enforcement, or the justice system.<sup>99</sup>

On the other hand, one criticism of this view is that eBay has already implemented procedures to protect auctions from fraud. In particular, eBay practices sophisticated anti-fraud procedures that will not only help catch sellers of stolen property, but will also "assist prosecutors building legal cases by sending notices to other bidders who may have bought stolen goods."<sup>100</sup> Moreover, eBay is not a convenient place for the sale of stolen property because, unlike pawnshops or flea markets, eBay provides a national market that can be viewed by law enforcement officials across the county.<sup>101</sup> Sellers of stolen property are likely to operate more cautiously than to use eBay and risk confrontation with law enforcement.

However, the website's data is neither as public nor as easily accessible as this criticism suggests.<sup>102</sup> Although eBay's market may be accessed worldwide and is exponentially larger than local pawn shops or flea markets, the volume and time limit of eBay's sales substantially diminish the ability of law enforcement officials to view and investigate all the listings.<sup>103</sup> Sellers of stolen property seem to be aware of this obstacle facing law enforcement and remain undeterred despite eBay's public global market.<sup>104</sup>

<sup>98</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm> (noting that "[a]fter a golfer reported his stolen clubs were listed for auction on eBay, the Norman, Okla., police joined the bidding, bought the clubs and solved the mystery behind the region's rash of golf club thefts.").

<sup>99</sup> This occurs because technology is progressing at a faster pace than legislation. Efforts to curb dishonest activities in cyberspace lack the precedent to define such behavior as *unlawful*, and attempts to find the appropriate analogy to existing law often yields improper application. See Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 564 (2001).

<sup>100</sup> See Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>101</sup> *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>. Rob Chestnut, a former prosecutor who is now eBay's Director of Trust and Safety, stated, "[i]f you're the bad guy, you want to be discreet and low key. You would use a pawn shop or flea market, not a public site like eBay." *Id.*, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

<sup>102</sup> In response to cyber crimes, many police departments are spending a great deal of resources training officers in the basics of tracing email addresses and IP addresses in order to combat the sale and receipt of stolen property. See Johnson, *supra* note 5, <http://www.tecrime.com/llartB08.htm>.

<sup>103</sup> See Reavy, *supra* note 2, <http://deseretnews.com/dn/view/0,1249,525038137,00.html>. Furthermore, Midvale police detective Doug McGrath stated that, "[t]here are just too many victims, too much property and too much involved." *Id.*, <http://deseretnews.com/dn/view/0,1249,525038137,00.html>.

<sup>104</sup> See *IFCC 2002 Internet Fraud Report*, *supra* note 39, [http://www1.ifccfbi.gov/strategy/2002\\_IFCCReport.pdf](http://www1.ifccfbi.gov/strategy/2002_IFCCReport.pdf), at 5 (noting in the report that there was a 7.7% increase in auction fraud from 2001 to 2002).

Furthermore, sellers of stolen property are even more encouraged by eBay's defensive approach to preventing stolen property sales. Unless a user or law enforcement official alerts eBay to a potential crime, the company is unlikely to investigate.<sup>105</sup> This approach fails to deter future sellers of stolen property in a way that preemptive safeguards might. In addition, eBay's defensive approach does not account for all the unreported stolen property sales.<sup>106</sup> The sellers and buyers of stolen property are equally liable under the NSPA, and are unlikely to incriminate themselves by reporting their wrongdoing to eBay or law enforcement officials.<sup>107</sup> Therefore, both reported and unreported sales of stolen property continue to exist in eBay's market.

As the rate of stolen property sales on online auctions continues to increase,<sup>108</sup> the absence of any federal or state legislation to deal with this issue is a cause for concern.

### III. THE SOLUTION

#### A. Statutory Proposal

The solution is for Congress to pass federal legislation modeled after the California Business & Professions Code, chapter 9, sections 21660-21669, to treat eBay as a swap meet operator in order to prevent the sale and receipt of stolen property.<sup>109</sup> Specifically, section 21664 requires swap meet operators<sup>110</sup> to file a form with the chief of police within 24 hours of each swap meet.<sup>111</sup> Swap meet vendors<sup>112</sup> are responsible for completing the form, which contains a checklist of personal information questions.<sup>113</sup> This list

<sup>105</sup> eBay Website, *eBay Security Center: Law Enforcement & Other Resources*, at <http://pages.eBay.com/securitycenter/howcontact.html> (last visited Sept. 23, 2004).

<sup>106</sup> eBay Website, *eBay's Role*, at <http://www.eBay.com/help/confidence/isgw-fraud-eBays-role.html> (last visited Sept. 30, 2004).

<sup>107</sup> 18 U.S.C. § 2315 (2004).

<sup>108</sup> See *supra* Part II.A.

<sup>109</sup> See *supra* note 14.

<sup>110</sup> The California Business & Professional Code defines swap meet operators as: "[a]ny person, partnership, organization or corporation that controls, manages, conducts, or otherwise administers a swap meet." CAL. BUS. & PROF. CODE § 21661 (2004).

<sup>111</sup> *Id.* § 21664. Failure to submit these reports is a misdemeanor and may be punishable by up to 6 months in jail, as well as by fines of \$50 for the first violation, \$100 for the second violation, and \$200 for the third and subsequent violations. *Id.* § 21667.

<sup>112</sup> The California Business & Professional Code defines swap meet vendors as: "[a]ny person, partnership, organization, or corporation who exchanges, sells, or offers for sale or exchange any merchandise at a swap meet." *Id.* § 21661.

<sup>113</sup> *Id.* § 21663(a).

includes: the vendor's personal address and driver's license, how the vendor acquired the merchandise for sale, a description of the merchandise, and sales data.<sup>114</sup>

This California State legislature drafted sections 21660-21669 of the California Business & Professions Code to assist law enforcement officials in apprehending stolen property sellers and recovering stolen property.<sup>115</sup> The swap meet vendor's personal information allows police to compare the operators' reports with police reports of stolen property in order to more accurately locate the stolen item and/or thief.<sup>116</sup> More importantly, the legislation provides a strong deterrent for sellers of stolen property, who are more likely to look to other less-regulated markets in order to sell stolen property.<sup>117</sup>

Admittedly, direct application of sections 21660-21669 to eBay is impractical because of the high volume of eBay sales. Yet, courts and legislatures have "proven receptive to the idea that internet law can both rely on a framework designed for the physical world and yet modify that framework to take account for the peculiarities of cyberspace."<sup>118</sup> Viable examples of

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<sup>114</sup> The complete list of report requirements on vendors are:

- (1) The name and address of the vendor;
- (2) A description of the merchandise offered for sale or exchange, including serial numbers and personal identification marks, or if there is no serial number, other identification marks or symbols, if any, or a general description of the item;
- (3) A certification by the vendor that to his or her knowledge and belief, the information contained on the form is true;
- (4) The make, year, color, state of registration, and license number of the vehicle or vehicles in which the merchandise is transported to the swap meet;
- (5) the California seller's permit number, if any, of the vendor;
- (6) The vendor's motor vehicle driver's license number and its state of issuance or California identification card numbers;
- (7) If the vendor is an agent of an individual, company, partnership or corporation, the name and business address of the principal;
- (8) The dates of sale for which the report is made;
- (9) A receipt number given by the operator for the dates of the sale or the space used by the vendor;
- (10) A requirement that the vendor check an appropriate box that sets forth his or her permit number for sales tax purposes.

*Id.*

<sup>115</sup> *Id.* § 21660.

<sup>116</sup> See Steve H. Nickles & Edward S. Adams, *Pawnbrokers, Police, and Property Rights—A Proposed Constitutional Balance*, 47 ARK. L. REV. 793, 794 (1994). Pawn shop regulations require owners to submit additional personal information to assist law enforcement authorities in tracing and recovering stolen property. *Id.* Pawnshop regulations are similar to the requirements of sections 21660-21669 of the California Business & Professional Code.

<sup>117</sup> See Jarret C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 FLA. ST. U. L. REV. 995, 1038-39 (1996). Similar to pawnshops, the regulation of swap meets encourages the professional thief to look elsewhere to sell his stolen property. See *id.*

<sup>118</sup> Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 529 (2003) [hereinafter Lemley].



such physical-to-virtual modifications include: personal jurisdiction, dormant commerce clause jurisprudence, and freedom of speech.<sup>119</sup>

The Proposed Legislation provides as follows:

### § 1. Definitions

- (a) As used in this article, the term “online auction” means a website in which participants bid for products and services over the internet, and meets one of the following conditions:
  - (1) A fee is charged for the privilege of offering or displaying merchandise for sale or exchange.
  - (2) A fee is charged to prospective buyers for admission to the website where merchandise is offered or displayed for sale or exchange.
- (b) The term “online auction,” as used in this article, is interchangeable with and applicable to “internet auction,” “web auction,” or similar terms. The primary characteristic is that these activities involve a series of sales sufficient in number, scope, and character to constitute a regular course of business.
- (c) “Operator,” as used in this article, means any person, partnership, organization, or corporation that controls, manages, conducts, or otherwise administers an online auction.
- (d) “Vendor,” as used in this article, means any person, partnership, organization, or corporation who exchanges, sells, or offers for sale or exchange any merchandise at an online auction.

### § 2. Responsibility of Operators

- (a) The operator shall provide computerized forms approved by the U.S. Department of Justice for the use of vendors who are registered users of the online auction site.
- (b) After the operator confirms that the information the vendor provided on the computerized form is accurate, the operator shall provide this completed computerized form to the Internet Fraud Complaint Center (IFCC). These reports shall be held permanently and shall not be utilized by any other

governmental agency for the purpose of providing a permanent record of property ownership, nor shall information derived from these reports form the basis for any record other than reports which assist in tracing and recovering stolen property.

### § 3. Vendor Report Requirements

- (a) Every vendor shall report all merchandise offered or displayed for sale or exchange on a computerized form, prescribed or approved by the U.S. Department of Justice, containing all the following information:
  - (1) The name and address of the vendor;
  - (2) The auction number and dates of sale for which the report is made;
  - (3) A description of the item offered for sale or exchange, including serial numbers and personal identification marks, or if there is no serial number, other identification marks or symbols, if any, or a general description of the item;
  - (4) The vendor's motor vehicle driver's license number and its state of issuance, or the online auction vendor's bank name, account type, routing number, and account number;<sup>120</sup>
  - (5) If the vendor is an agent of an individual, company, partnership, or corporation, the name and business address of the principal;
  - (6) A certification by the vendor that to his or her knowledge and belief, the information contained on the form is true;
- (b) Every vendor shall submit to the operator the computerized form disclosing the information required by § 3(a). The vendor shall submit the completed computerized form to the operator prior to listing the item for sale.

### § 4. Penalties

- (a) A violation of any provision of this article is a misdemeanor and may be punishable by a fine of

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<sup>120</sup> The requirement regarding bank account information is already disclosed when vendors register for PayPal—an eBay-owned payment service provider.

fifty dollars (\$50) for the first violation, one hundred dollars (\$100) for the second violation, and two hundred dollars (\$200) for the third and subsequent violations.<sup>121</sup>

The Proposed Legislation requires eBay to provide identifying eBay seller information to the IFCC in order to improve law enforcement efforts to solve stolen property crimes. Identifying information diminishes the seller's level of anonymity and increases the risk of being caught. Consequently, the Proposed Legislation will deter sellers from using eBay to sell stolen property.

Furthermore, the disclosure requirement should not significantly upset or inconvenience eBay sellers since most eBay sellers already disclose personal information when registering to become a Verified Member of eBay,<sup>122</sup> or PayPal, an eBay owned payment service provider.<sup>123</sup> The disclosure process should not take much longer than the few minutes an eBay user already spends in order to register an item for sale. Moreover, in order to alleviate privacy concerns, the identifying seller information should be subject to the eBay and PayPal privacy policy.<sup>124</sup> In particular, both eBay and PayPal participate in the Better Business Bureau's BBBOnline privacy program, and disclose eBay and PayPal information practices to TRUSTE

<sup>121</sup> Proposed Legislation. The penalties noted in section 4 are equivalent to the fines for a violation of the California Business & Professional Code listed in section 21667. For example, if eBay sells items at a rate of 16 million per day, a penalty of \$2,000 per violation would equal a substantial penalty of \$32 million per day.

<sup>122</sup> eBay currently offers members an opportunity to become a verified member in order to provide buyers and sellers an additional level of confidence that the person with whom they are dealing is reliable. This process asks members to provide a social security number, driver's license number, and date of birth to be confirmed by a secured third-party company. However, the fee for this service is \$5.00, and participation is optional. eBay Website, *eBay ID Verify*, at <http://pages.eBay.com/services/buyandsell/idverify-login.html> (last visited Sept. 29, 2004).

<sup>123</sup> Although not required, eBay recommends its users to pay for a winning auction with PayPal in order to ensure safer transactions. eBay Website, *eBay Security Center: Paying Safely*, at [http://pages.eBay.com/securitycenter/paying\\_safely.html](http://pages.eBay.com/securitycenter/paying_safely.html) (last visited Sept. 19, 2004). In order to receive payment in PayPal, a member must register for either a Premier or Business account. PayPal Website, *PayPal Accounts*, at <https://www.PayPal.com/us/cgi-bin/webscr?cmd=p/gen/accounts> (on file with the *University of Miami Business Law Review*). This requires bank account verification, which PayPal confirms electronically. PayPal Website, *PayPal Verification*, at <https://www.PayPal.com/us/cgi-bin/webscr?cmd=p/gen/verification-faq> (on file with the *University of Miami Business Law Review*). Currently, PayPal boasts 50 million account members worldwide. PayPal: About Us, at <http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/about-outside> (last visited Sept. 19, 2004).

<sup>124</sup> eBay Website, *eBay Privacy Policy*, at <http://pages.eBay.com/help/policies/privacy-policy.html> (last visited Sept. 19, 2004); PayPal Website, *PayPal Privacy Policy*, at [http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy\\_privacy-outside](http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy_privacy-outside) (last visited Sept. 19, 2004).

for review.<sup>125</sup> TRUSTe is “an independent, non-profit organization . . . [that] promot[es] the use of fair information practices.”<sup>126</sup> Using eBay’s and PayPal’s privacy policy will ensure that the identifying seller information will never be shared with third parties, except for in limited circumstances.<sup>127</sup>

The disclosure requirement also should not impose a heavy burden on eBay because a similar system is already in place with PayPal. The operator’s requirement to confirm the vendor’s information is not a legitimate cause for concern because, like PayPal’s process, the confirmation would only authorize the online auction operator to make necessary inquiries to validate registration—not to guarantee any user’s identity.<sup>128</sup>

Additionally, the information forms could be accessed electronically in order to meet the high volume demands of eBay users.<sup>129</sup> For example, local pawnshops in Nashville, Tennessee connect directly with the police department’s database to allow for a more timely identification of stolen property.<sup>130</sup> Specifically, the Nashville Police Department’s internet site allows pawnshops to upload new inventory information daily. The pawnshop’s data is electronically checked against Nashville’s stolen property files.<sup>131</sup> The pawnshop then receives a report the next day from Nashville’s

<sup>125</sup> PayPal Website, *PayPal Privacy Policy*, at [http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy\\_privacy-outside](http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy_privacy-outside) (last visited Sept. 19, 2004).

<sup>126</sup> PayPal Website, *PayPal Privacy Policy*, at [http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy\\_privacy-outside](http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy_privacy-outside) (last visited Sept. 19, 2004).

<sup>127</sup> eBay Website, *eBay Privacy Policy: 3. Our Use of Your Information*, at <http://pages.eBay.com/help/policies/privacy-policy.html> (last visited May 15, 2004); PayPal Privacy, *PayPal Privacy Policy: B. Information We Collect*, at [http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy\\_privacy-outside](http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/policy_privacy-outside) (last visited May 15, 2004).

<sup>128</sup> PayPal Website, *PayPal User Agreement: 2.3 Identity Authentication*, at <http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/ua-outside> (last visited Sept. 26, 2004). The PayPal Website states that: [w]e use many techniques to identify our users when they register on our site. Verification of Users is only an indication of increased likelihood that a User’s identity is correct. You authorize PayPal, directly or through third parties, to make any inquiries we consider necessary to validate your registration. This may include ordering a credit report and performing other credit checks or verifying the information you provide against third party databases. However, because user verification on the Internet is difficult, PayPal cannot and does not guarantee any user’s identity.

PayPal Website, *PayPal User Agreement: 2.3 Identity Authentication*, at <http://www.PayPal.com/cgi-bin/webscr?cmd=p/gen/ua/ua-outside> (last visited Sept. 26, 2004).

<sup>129</sup> See generally San Antonio Police Department: RITE Protect, at <http://www.sanantonio.gov/sapd/RITEprotect.htm> (last visited Sept. 19, 2004) (showing how technology and the internet help manage large amounts of data).

<sup>130</sup> James R. Wolf, *Nashville’s Police Department is using the Internet to Fight Crime and Return Stolen Property*, GOVERNMENT TECHNOLOGY, <http://www.govtech.net/magazine/govinternetguide/October1997/nashvillepd.php> (last visited Sept. 19, 2004) [hereinafter Wolf].

<sup>131</sup> *Id.*, <http://www.govtech.net/magazine/govinternetguide/october1997/nashvillepd.php>.

central computers listing any items matched in the stolen property database.<sup>132</sup> The software also allows police to place a hold on any suspicious items.<sup>133</sup> Although the Nashville system was implemented for pawnshops, eBay could implement a similar system for online auctions.

Finally, the Proposed Legislation requires detailed merchandise information, which will improve the ability of law enforcement officials to trace and locate stolen property. The Proposed Legislation requires the online auction vendor to submit serial numbers or, alternatively, any identifying marks or symbols.<sup>134</sup> Currently when victims report a theft, law enforcement officials record the serial numbers of the stolen property into a local stolen property database.<sup>135</sup> The information allows law enforcement officials to confirm when they have located a stolen item.<sup>136</sup> Yet, verifying stolen property is more difficult on eBay because the company does not require any other identifying characteristics about the item except for the title of the auction.<sup>137</sup> Requiring detailed merchandise information will benefit victims of theft because law enforcement officials, as well as the former owners, will be able to cross-reference eBay serial numbers with those in the law enforcement stolen property database.<sup>138</sup> Although most homeowners do not record the serial numbers of their personal property, the homeowners will still benefit from the level of deterrence that will be increased by the requirement of additional property information. While this additional information will not prevent all sales of stolen property, requiring detailed information will constitute an improvement over the current system.

### B. Policy Rationale

Treating eBay like a swap meet makes sense because of the similar function of the two markets. California law defines a swap meet as, “an

<sup>132</sup> *Id.*, <http://www.govtech.net/magazine/govinternetguide/october1997/nashvillepd.php> (“A 24-hour delay was purposely built into the system. This delay reduces the chances of an in-store confrontation and increases the likelihood that the item will be pawned and ultimately recovered.”). eBay’s essentially *faceless* transactions may enable eBay to make an easier transition to this type of system than pawnshops.

<sup>133</sup> *Id.*, <http://www.govtech.net/magazine/govinternetguide/october1997/nashvillepd.php>.

<sup>134</sup> See Proposed Legislation § 3(a)(3), *supra* Part III.A.

<sup>135</sup> See Wolf, *supra* note 130, <http://www.govtech.net/magazine/govinternetguide/october1997/nashvillepd.php>.

<sup>136</sup> *Id.*, <http://www.govtech.net/magazine/govinternetguide/october1997/nashvillepd.php>.

<sup>137</sup> eBay Website, *eBay Registration*, at [https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co\\_partnerid=2&usage=0&rui=default](https://scgi.eBay.com/saw-cgi/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&usage=0&rui=default) (last visited Sept. 30, 2004).

<sup>138</sup> See Wolf, *supra* note 130, <http://www.govtech.net/magazine/govinternetguide/October1997/nashvillepd.php>.

event at which persons offer personal property for sale or exchange, and a fee is charged for the privilege of displaying property or for admission of prospective buyers.<sup>139</sup> eBay satisfies even the narrowest description of a swap meet because both are markets that charge a fee for the sale of personal property. Moreover, eBay's *event* occurs millions of times, twenty-four hours a day, and geographically spreads far beyond the reach of a local swap meet.<sup>140</sup>

One criticism of this view could be that a comparison between eBay and swap meet operators may seem misguided due to the obvious differences between the two markets. Swap meets are physical, tangible marketplaces.<sup>141</sup> Their physical structure limits the number of customers who can enter.<sup>142</sup> In addition, swap meets are traditionally local in nature and have specific hours of operation. This format allows vendors and buyers to conduct face-to-face transactions, thus diminishing the opportunity for fraudulent practices.<sup>143</sup> Finally, these factors allow law enforcement officials to efficiently patrol the swap meet grounds for any unlawful behavior. Owners in search of their stolen property can also personally explore the swap meet for their former items.

By contrast, eBay is a virtual online marketplace that never ceases in operation and can attract an infinite number of customers from all over the world.<sup>144</sup> The transactions are essentially *faceless* and are fostered based upon community assumptions of trust.<sup>145</sup> Lastly, in contrast to brick and mortar spaces where human senses can perceive events occurring immediately nearby, the nature of the cyberspace does not permit human senses to perceive what is happening *next door*.<sup>146</sup> This factor diminishes the ability for both the former owner to search for his stolen property, as well as the police to observe illicit behavior that occurs on the site.<sup>147</sup>

Although distinctions exist in terms of the size and scope of eBay and swap meets, the differences do not outweigh the similarities. Both markets establish boundaries for operation in terms of time of availability and access to the venue. Operation hours serve as a boundary for swap meets, while

<sup>139</sup> B.E. Witkin, *Special Statutes Regulating Sales*, 3 WITKIN SUMM. CAL. LAW SALES § 320 (2004).

<sup>140</sup> eBay Website, *eBay Company Overview*, at <http://pages.eBay.com/community/abouteBay/overview/index.html> (last visited Sept. 23, 2004).

<sup>141</sup> See CAL. BUS. & PROF. CODE § 21661 (2004).

<sup>142</sup> See Lemley, *supra* note 118, at 526.

<sup>143</sup> *Id.*

<sup>144</sup> eBay Website, *eBay Company Overview*, at <http://pages.eBay.com/community/abouteBay/overview/index.html> (last visited Sept. 23, 2004).

<sup>145</sup> See Lemley, *supra* note 118, at 526.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

eBay limits auctions to a ten-day maximum listing window.<sup>148</sup> Furthermore, swap meets usually restrict access by requiring the possession of a ticket, while eBay limits access by the requirement of a password.<sup>149</sup> Most importantly, both eBay and swap meets provide a market where sales of stolen property occur.<sup>150</sup> Unlawful behavior cannot continue to remain unchecked simply because the act occurs in cyberspace, or is too difficult to control.<sup>151</sup>

Another criticism of treating eBay like swap meets may be that California swap meet laws are rarely enforced and do not effectively prevent stolen property sales.<sup>152</sup> The sale of stolen property is not a rampant problem at swap meets.<sup>153</sup> In fact, sections 21660-21669 of the California Business & Professions Code passed because the California State legislature never saw accurate statistics regarding stolen property sales.<sup>154</sup> Large retail lobbying groups proposed the laws to promote the assumption that flea markets are a haven for stolen goods.<sup>155</sup> In actuality, sections 21660-21669 place unfair burdens on swap meet operators that are not imposed on ordinary retailers, nor second-hand retailers or pawnbrokers.<sup>156</sup>

Yet, these contentions are not viable because the California legislature created sections 21660-21669 because it is rationally related to a legitimate public purpose: to assist in tracing and recovering stolen property.<sup>157</sup> The California law also deters sellers of stolen property from using swap meets as a market for illegal sales. These purposes allow the legislature to impose

<sup>148</sup> eBay Website, *eBay Listing Duration*, at <http://pages.eBay.com/help/sell/duration.html> (last visited Nov. 7, 2004).

<sup>149</sup> eBay Website, *eBay Protecting Your User Account*, at [http://pages.eBay.com/help/newtoeBay/account\\_protection.html](http://pages.eBay.com/help/newtoeBay/account_protection.html) (last visited Dec. 7, 2004).

<sup>150</sup> *Sampling of Investigations from Operation Cyber Sweep*, *supra* note 48, <http://www.fbi.gov/cyber/cysweep/cysweep1.htm>.

<sup>151</sup> Johnson & Post advocate that, “[c]yberspace could be treated as a distinct marketplace for purposes of assessing concentration and market power.” See Johnson & Post, *supra* note 59, at 1382. Treating cyberspace as a physical place for legal analysis resolves conflicting claims of different jurisdictions, and allows for the development of new doctrines that take into account the special characteristics of cyberspace. *Id.* at 1384. However, Shapiro comments that creating new laws for cyberspace, akin to a foreign jurisdiction, is not a practical solution because society has not created new laws for other electronic mediums such as the telephone or television. See Shapiro, *supra* note 59, at 711. In addition, online human action can cause injury in real space. *Id.* Separate jurisdictions will only make legal recourse more difficult to obtain. *Id.* at 715. This is why federal legislation is needed to prevent the sale and receipt of stolen property in the eBay marketplace.

<sup>152</sup> Telephone Interview with John Chism, President, National Flea Market Association (Jan. 16, 2004) (notes on file with author).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> CAL. BUS. & PROF. CODE § 21660 (2004).

exclusive restrictions on swap meets in order to protect the public from the sale and receipt of stolen property.

Similarly, regulating eBay like a swap meet is rationally related to the legitimate public purpose of preventing stolen property sales and aiding police recovery of stolen items. However, unlike state regulation of swap meets, federal legislation is needed to handle the complexity of the eBay problem.

### C. *The Need for Federal Legislation*

Federal legislation is necessary because self-regulation is not in eBay's financial interest, and eBay's market implicates national interests.<sup>158</sup> eBay is aware that the company is built on consumer trust; limiting the amount of fraud on its site is vital to the success of the business.<sup>159</sup> Yet, eBay has an economic incentive to prevent stolen property sales only if the costs of liability outweigh the costs of self-regulation. Because eBay is currently not liable for sales of stolen property on the website, self-regulation is not in eBay's financial interest. Therefore, federal legislation will induce eBay to take corrective action.

Second, federal legislation is appropriate because eBay's market is a source of substantial multi-state activity.<sup>160</sup> The federal government has the authority to regulate eBay under the Commerce Clause because eBay transactions often transcend state and national boundaries.<sup>161</sup> eBay's market further creates difficulty for state law enforcement officials who do not have the resources to trace and recover stolen property throughout the country.<sup>162</sup> Federal investigative skills and resources can complement state police and help prevent stolen property crimes.<sup>163</sup> Additionally, federal legislation provides uniformity to the prohibition of the online sale and receipt of stolen property in order to prevent forum shopping and the inequitable administration of justice.<sup>164</sup>

One criticism of this view may be that government agencies should resist the temptation of imposing regulations on eBay because the company is in the best position to design and implement creative programs to respond

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<sup>158</sup> See *supra* Part I.

<sup>159</sup> See David H. Freedman, *What eBay Isn't Telling You*, BUSINESS 2.0 (August 2002), at [http://www.genesisystems.com/tips/int\\_tip13.htm](http://www.genesisystems.com/tips/int_tip13.htm).

<sup>160</sup> See generally Strazella, *supra* note 68, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>, at 48.

<sup>161</sup> See Johnson & Post, *supra* note 59, at 1367.

<sup>162</sup> See generally Strazella, *supra* note 68, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>, at 48-49.

<sup>163</sup> *Id.*, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>, at 48.

<sup>164</sup> *Id.*, <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>, at 44.



to the sale and receipt of stolen property.<sup>165</sup> eBay is a consumer business and has a strong economic interest in ensuring the company's marketplace is as safe and secure as possible.<sup>166</sup> Through eBay's own initiative, the company has implemented many security programs such as: the Trust & Safety (SafeHarbor) Answer Center,<sup>167</sup> Verified Member Program,<sup>168</sup> eBay Purchase Protection for transactions under \$200,<sup>169</sup> and Square Trade online dispute resolution.<sup>170</sup> eBay also takes preemptive steps to police the site from fraud and copyright abuses.<sup>171</sup> Moreover, if the concern over the sale and receipt of stolen property substantially hurt eBay sales, the company would have already responded with preventive programs. The fact that eBay has not yet created programs to prevent the sale and receipt of stolen property demonstrates that this issue is not a legitimate cause for concern.

Additionally, critics may argue that requiring eBay to conform to swap meet operator restrictions places a burden on online auction sites that will be costly and impractical.<sup>172</sup> The system will not be feasible for the smaller auction sites and will force them out of business.<sup>173</sup> Further, the cost to eBay of implementing the system is likely to ultimately fall on the consumer.<sup>174</sup> The nature of online auctions, specifically the volume of sales and the brief window of time for each listing, make evaluating the legality of each particular item an extremely difficult enterprise.<sup>175</sup>

However, these contentions are not viable because the Proposed Legislation allows eBay to take precautions while still maintaining the company's

<sup>165</sup> Brad Handler, *Public Comments of, eBay, Inc.: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace* (March 26, 1999), at <http://www.ftc.gov/bcp/icpw/comments/eBay.htm>.

<sup>166</sup> Brad Handler, *Public Comments of, eBay, Inc.: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace* (March 26, 1999), at <http://www.ftc.gov/bcp/icpw/comments/eBay.htm>.

<sup>167</sup> eBay Website, *eBay Answer Center: Trust & Safety (SafeHarbor)*, at <http://answercenter.eBay.com/forum.jsp?forum=2> (last visited Sept. 29, 2004).

<sup>168</sup> eBay Website, *eBay ID Verify*, at <http://pages.eBay.com/services/buyandsell/idverify-login.html> (last visited Sept. 29, 2004).

<sup>169</sup> eBay Website, *Buyer Protection on eBay*, at <http://www.eBay.com/help/confidence/isgw-fraud-protection.html> (last visited Sept. 29, 2004).

<sup>170</sup> Square Trade Website, at [http://www.squaretrade.com/cnt/jsp/odr/overview\\_odr.jsp?marketplace\\_name=eBay&campaign=EB\\_Y\\_OD\\_8](http://www.squaretrade.com/cnt/jsp/odr/overview_odr.jsp?marketplace_name=eBay&campaign=EB_Y_OD_8) (last visited Sept. 29, 2004).

<sup>171</sup> Brad Handler, *Public Comments of, eBay, Inc.: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace* (March 26, 1999), at <http://www.ftc.gov/bcp/icpw/comments/eBay.htm>.

<sup>172</sup> The Committee on Trademarks and Unfair Competition, *Online Auction Sites and Trademark Infringement Liability*, 58 THE REC. 236, 255 (2003) [hereinafter *The Committee on Trademarks and Unfair Competition*].

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

niche in the online auction world as a marketplace.<sup>176</sup> eBay has demonstrated that it has the power to control aspects of its site by removing prohibited listed items or convicting fraudulent users.<sup>177</sup> eBay can afford to exercise this discretion and still maintain the efficiency of the market.<sup>178</sup> This demonstrates that eBay has the same ability to add regulations to prevent the sale and receipt of stolen property without compromising the eBay marketplace. Moreover, the additional cost of implementing the regulations should not be viewed as an undue burden on eBay because the company designed the marketplace that facilitates stolen property sales.<sup>179</sup> Finally, the Proposed Legislation will be economically fair to eBay in the long run because these measures will ensure a safer marketplace and improve customer confidence in eBay.

#### IV. LIMITING PRINCIPLE

The Proposed Legislation will not burden eBay because the company has already dealt with modifications regarding prohibited items,<sup>180</sup> as well as trademark and copyright infringement.<sup>181</sup> Although eBay created programs to protect members from intellectual property violations, eBay has yet to create modifications that will protect the rights of online buyers or original owners of stolen property from the sale and receipt of real property on eBay.<sup>182</sup>

As previously stated, eBay has demonstrated that it has the power to control aspects of its site by removing prohibited listed items or convicting

<sup>176</sup> eBay, through its own design, fundamentally adapted a swap meet format to the Internet. See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html); Brad Handler, *Public Comments of, eBay, Inc.: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace* (March 26, 1999), at <http://www.ftc.gov/bcp/icpw/comments/eBay.htm>.

<sup>177</sup> The Committee on Trademarks and Unfair Competition, *supra* note 172, at 255.

<sup>178</sup> In 2002, eBay earned \$250 million on revenue of \$1.2 billion. See Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>.

<sup>179</sup> See The Committee on Trademarks and Unfair Competition, *supra* note 172.

<sup>180</sup> eBay's user agreement states that the company reserves the authority to suspend or terminate memberships if eBay believes the members' actions "may cause legal liability for you, our users, or us." eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004). In addition, eBay reserves authority to remove *prohibited* items from listing, as well as to conduct other activities. eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>181</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited May 15, 2004).

<sup>182</sup> See eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited May 15, 2004).

fraudulent users.<sup>183</sup> Currently, the company prohibits seventy-four different categories of items for sale in the eBay market.<sup>184</sup> These categories range from the sale of items that violate federal law, such as drugs and stolen property, to personal items such as electronics and used clothing.<sup>185</sup> Additionally, eBay prohibits many of these categories so as not to interfere with existing state laws.<sup>186</sup> Prohibited examples include: fireworks, perishable food, and slot machines.<sup>187</sup> Listings that violate eBay's policies may result in a formal warning, the termination of all violating listings, or even temporary or indefinite suspension of a user's account.<sup>188</sup> eBay can afford to exercise this discretion and still maintain the efficiency of the market.<sup>189</sup>

Similarly, eBay modified its design to guard against potential trademark and copyright infringement, even before courts addressed the application of secondary trademark liability to online auction sites.<sup>190</sup> The Lanham Act provides civil remedies for trademark holders against trademark infringement, but does not specify whether a cause of action exists for contributory or vicarious liability.<sup>191</sup> However, in *Inwood Labs v. Ives Labs*,<sup>192</sup> the United States Supreme Court found that contributory infringement may exist depending upon a defendant's intent and knowledge of the wrongful activities.<sup>193</sup> The Court reasoned that a party which "intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark

<sup>183</sup> See The Committee on Trademarks and Unfair Competition, *supra* note 172, at 255.

<sup>184</sup> eBay Website, *eBay Prohibited and Restricted Items: Overview*, at <http://pages.eBay.com/help/policies/items-ov.html> (last visited Sept. 30, 2004).

<sup>185</sup> eBay Website, *eBay Prohibited and Restricted Items: Overview*, at <http://pages.eBay.com/help/policies/items-ov.html> (last visited Sept. 30, 2004).

<sup>186</sup> See eBay Website, *eBay Prohibited and Restricted Items: Overview*, at <http://pages.eBay.com/help/policies/items-ov.html> (last visited Sept. 30, 2004).

<sup>187</sup> eBay Website, *eBay Prohibited and Restricted Items: Overview*, at <http://pages.eBay.com/help/policies/items-ov.html> (last visited Sept. 30, 2004).

<sup>188</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>189</sup> In 2002, eBay earned \$250 million on revenue of \$1.2 billion. See Tanaka, *supra* note 1, <http://www.crime-research.org/eng/news/2003/07/Mess0503.html>.

<sup>190</sup> See Lori L. Jones, *The Online Copyright Auction: How High Will the Bidding Go?*, 2 HIGH TECH. L.J. 45 (2003) [hereinafter Jones]; See also Kelley E. Moohr, *Going Once, Going Twice, Sold! Are Sales of Copyright Items Exposing Internet Auction Sites to Liability?*, 21 LOY. LA. ENT. L. REV. 97 (2000); Charles S. Wright, Note, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005 (2000).

<sup>191</sup> 15 U.S.C. § 1051 (2004).

<sup>192</sup> 456 U.S. 844 (1982).

<sup>193</sup> *Id.* at 855.

infringement . . . is contributorially responsible for any harm done as a result of the deceit.”<sup>194</sup>

Even if an operator does not meet the *Inwood Labs* knowledge requirement, courts will recognize secondary trademark liability if the operator acts *willfully blind*, where he should suspect wrongdoing and deliberately fails to investigate.<sup>195</sup> However, this standard does not confer a duty to seek out and prevent violations; rather, this standard focuses on the operator’s state of mind and what a reasonably prudent person expects to know when possessing control over the marketplace.<sup>196</sup> Further, the degree of control that an operator maintains cannot be too attenuated.<sup>197</sup>

Whether eBay meets all, some, or none of the vicarious trademark liability standards is debatable. eBay seems to meet the *Inwood Labs* knowledge standard because FBI and local law enforcement investigations suggest that eBay should be aware that stolen property is prevalent in the online marketplace.<sup>198</sup> Nevertheless, eBay fails to take the necessary precautions. Conversely, the large volume of sales that eBay conducts on a daily basis prevents the company from discerning which items are stolen property.<sup>199</sup> Without knowing which specific items are stolen, eBay cannot take reasonable steps towards prevention. Similarly, eBay seems *willfully blind* because the company is able to exert control in its marketplace.<sup>200</sup> But, eBay deliberately fails to implement safeguards because they are too costly and eBay is not liable for the unlawful sales.<sup>201</sup> On the other hand, since eBay functions as a marketplace, the company acts independently of the trans-

<sup>194</sup> *Id.* at 854.

<sup>195</sup> See *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (refusing to hold flea market operator contributory liable because he did not have knowledge of the infringement, nor possessed a “duty to seek out and prevent violations”).

<sup>196</sup> *Id.*

<sup>197</sup> *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999) (stating that an internet domain name registrar did not contribute to trademark infringement because the registrar did not *directly control and monitor* the instrumentality used by the third party to infringe upon a corporation’s trademark).

<sup>198</sup> See *Cyber Sweep Summary*, *supra* note 46, <http://www.ifccfbi.gov/strategy/CyberSweepSummary.pdf>; Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>; Longoria, *supra* note 2, <http://www.itsmissing.com/articles/auctioncrime2.html>.

<sup>199</sup> See Littlefield, *supra* note 5, [http://www.signonsandiego.com/news/metro/20031116-9999\\_1mi16eBay.html](http://www.signonsandiego.com/news/metro/20031116-9999_1mi16eBay.html).

<sup>200</sup> The Committee on Trademarks and Unfair Competition, *supra* note 172, at 238-9.

<sup>201</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004). See also Ostrom, *supra* note 6, <http://www.siliconvalley.com/mld/siliconvalley/3443962.htm>.

actions and does not possess control.<sup>202</sup> eBay is willing, though, to cooperate with investigators once a violation has been reported.<sup>203</sup> Lastly, eBay's level of control is debatable. Although the company acts independently of the transaction and appears not to exert any control,<sup>204</sup> eBay is able to remove prohibited items and violators when the company feels appropriate.<sup>205</sup>

eBay appears aware of the possibility that secondary trademark liability may be imposed on the online auction site.<sup>206</sup> This motivated eBay to create the VeRO program in order to protect intellectual property rights.<sup>207</sup> The program provides voluntary daily monitoring and removal by eBay of listings that offer potentially counterfeit or otherwise infringing items.<sup>208</sup> Currently, over 5,000 registered eBay users are part of the program.<sup>209</sup> This program shields eBay from secondary trademark liability, and demonstrates that eBay is able to add modifications—as this work proposes—without harming the efficiency or structure of the site.

Likewise, existing case law and statutes protect eBay from secondary copyright liability.<sup>210</sup> Courts have traditionally been willing to extend secondary copyright liability on operators if they (1) maintain control of the premises, and (2) obtain a financial benefit.<sup>211</sup> However, this standard has been affected by congressional enactment of the Digital Millennium Copyright Act (DMCA) in 1998.<sup>212</sup>

Congress passed the DMCA in order to advance the growth of e-commerce while simultaneously ensuring copyright protection.<sup>213</sup> The act encouraged copyright owners to “publish their work on the internet with the

<sup>202</sup> eBay Website, *eBay User Agreement*, at <http://pages.eBay.com/help/policies/user-agreement.html> (last visited Sept. 29, 2004).

<sup>203</sup> eBay Website, *eBay Security Center: Law Enforcement & Other Resources*, at <http://pages.eBay.com/securitycenter/howcontact.html> (last visited Sept. 23, 2004).

<sup>204</sup> The Committee on Trademarks and Unfair Competition, *supra* note 172, at 255.

<sup>205</sup> *Id.*

<sup>206</sup> See Jones, *supra* note 190, at 46.

<sup>207</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited Sept. 27, 2004).

<sup>208</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited Sept. 27, 2004).

<sup>209</sup> eBay Website, *eBay's Verified Rights Owner (VeRO) Program*, at <http://pages.eBay.com/help/confidence/vero-rights-owner.html> (last visited Sept. 27, 2004).

<sup>210</sup> See *Fonovisa Inc. v. Cherry Auction Inc.*, 76 F.3d 259 (9th Cir. 1996); *Polo Ralph Lauren Corp. v. Chinatown Gift Shop*, 855 F. Supp. 648 (S.D.N.Y. 1994).

<sup>211</sup> See *Fonovisa*, 76 F.3d at 262.

<sup>212</sup> The Committee on Trademarks and Unfair Competition, *supra* note 171, at 242. See The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf> [hereinafter DMCA Summary].

<sup>213</sup> See Jones, *supra* note 190, at 49.

assurance that their work would be protected."<sup>214</sup> At the same time however, the DMCA extended limited liability to four categories of service provider conduct: transitory communications, system caching, storage of information, and information locations tools.<sup>215</sup> The act defines a "service provider" as an "entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."<sup>216</sup> Although the DMCA does not specify whether this definition encompasses online or Internet service providers, courts have interpreted the act broadly.<sup>217</sup>

In *Hendrickson v. eBay*,<sup>218</sup> the court unequivocally decided that eBay satisfied the definition of a service provider within the protected categories of the DMCA.<sup>219</sup> eBay's ability to "remove or block access" to infringing materials under the VeRO program did not constitute having the ability to control.<sup>220</sup> Because eBay failed to meet the first element of the test, the court did not discuss whether eBay received a direct financial benefit.<sup>221</sup> Ultimately, the court protected eBay from secondary copyright liability.<sup>222</sup>

Those who attempt to compare eBay and swap meet operators for the purposes of imposing secondary trademark and copyright liability have achieved limited success. This result is likely to continue due to congressional and judicial support for e-commerce over protecting intellectual property rights.<sup>223</sup> However, without these restrictions in place for online sales of stolen property, legislators and judges may be more apt to protect real property rights.

## V. CONCLUSION

The work provides an optimistic, yet pragmatic, solution to an ongoing problem in online auctions. Without trying to topple the entire eBay empire,

<sup>214</sup> *Id.*

<sup>215</sup> See generally DMCA Summary, *supra* note 212, <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>216</sup> *Id.*, <http://www.copyright.gov/legislation/dmca.pdf>, at 9.

<sup>217</sup> See Jones, *supra* note 190, at 51.

<sup>218</sup> 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

<sup>219</sup> *Id.* at 1088 ("There is no dispute over whether eBay is an Internet 'service provider' within the meaning of Section 512. eBay clearly meets the DMCA's broad definition of online 'service provider.'").

<sup>220</sup> *Id.* at 1093-94.

<sup>221</sup> *Id.* Hypothetically, if the court decided to analyze the direct financial benefit prong, the court would have found that eBay derived a financial benefit from infringing sales since eBay receives a percentage of each auction's final fee. See Jones, *supra* note 190, at 63.

<sup>222</sup> *Hendrickson*, 165 F. Supp. 2d at 1093.

<sup>223</sup> See Jones, *supra* note 190, at 66.

this solution will be a credit to eBay and will shield buyers of stolen property from unlawful sales in the online marketplace. Finally, federal legislation will benefit law enforcement officials who will be able to lend improved assistance to the victims of theft in the face of this growing eBay phenomenon.