

Antiquity Meets the Modern Age: eBay's Potential Criminal Liability for Fake and Stolen

International Antiquity Sales

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Antiquities and cultural property—authentic, fake, legitimate, and stolen—have been sold internationally for centuries.¹ The number of these sales has drastically increased with the advent of internet sales platforms.² The proliferation of illicit sales has led the international community to combat them, but, as illustrated in Part I, below, a quick perusal of eBay, Inc., (“eBay”) on any given day still will show thousands of questionable antiquities listed for sale.³ Why is this avenue of illicit trade still so prolific and why has U.S. law had seemingly little to no deterrent effect upon it?

This Article will focus specifically on how the United States, Germany, and France have responded to international guidelines, eBay's responses thereto, and whether eBay could be potentially criminally liable under current U.S. statutes. Part I will provide an overview of the international eBay marketplace, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) 1970 Convention on the Means of Prohibiting and Preventing the

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¹ *E.g.*, LANEY SALISBURY AND ALY SUJO, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* 234 (2009).

² *E.g.*, Karen Bruhns, *SAA Bulletin, Networks*, (Vol. 18, Mar. 2000) available at: <http://www.saa.org/Portals/0/SAA/Publications/SAABulletin/18-2/saa11.html>

³ INTERPOL, *Conclusions 7th International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiquities*, <http://www.interpol.int/Public/WorkOfArt/Conferences/20080617/Conclusions.pdf> (June 2008) (“INTERPOL *Conclusions*”). See Also: <http://www.artbusiness.com/sigwarn.html>

Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”) and significant differences in its implementation in the United States and Germany. Part II will further analyze U.S. eBay and German eBay website policies in light of both nations’ other laws concerning stolen antiquities and why the U.S. site seemingly lags behind in reducing illicit on-line sales. Part III analyzes potential criminal liability for the U.S. eBay. Part IV examines how courts in the U.S., Germany, and France differ in their respective treatment of internet auction site liability with regards to counterfeit goods being sold via its platform, as well as what the U.S. eBay platform could do to prevent the trade in fake antiquities by drawing parallels to its policies preventing sales of counterfeit trademarked goods. Part V will explore possible solutions for the shortfalls in the U.S. eBay’s monitoring procedures and concludes that eBay has exposure to criminal liability because of the shortcomings of its U.S. policies when taken in context of its international platform policies and international trademark policies. Nonetheless, although it is clearly possible for U.S. eBay to do much more to prevent the widespread use of its platform to trade internationally in stolen and fake antiquities, its potential criminal liability given the current state of the U.S. legal framework is negligible.

I. THE eBAY ANTIQUITIES MARKETPLACE AND INTERNATIONAL RESPONSE

The antiquities market traditionally had three main venues: public auctions, private transactions, and sales from dealers whose stock may be publicly announced or quietly and privately displayed.⁴ The fourth venue, internet sales platforms, has proven to be a boundless arena catering to a vast audience. Since its creation, eBay has been the epicenter of internet

⁴ Christopher Chippindale & David Gill, *On-line Auctions: A New Venue for the Antiquities Market*, CULTURE WITHOUT CONTEXT, 2001, at 9-10, available at <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue9/chippindale-gill.htm#2>.

sales, controlling 95 percent of all online auctions.⁵ Currently, eBay has more than 116 million active users⁶ and in 2008 had around half a million online stores.⁷ On August, 10, 2013, there were 22 categories listed under “Antiques,” with a sub-category search of “Antiquities” containing an additional 16 categories yielding 31,579 items.⁸

Two main questions arise when determining the legality of eBay antiquities transactions. First, are the items authentic or forgeries? And second, can the seller convey title? Professor Charles Stanish, Director of the Cotsen Institute of Archaeology at the University of California at Los Angeles, states there are three types of antiquities on eBay.⁹ In his article *Forging Ahead*, he estimated around thirty percent are obvious fakes or tourist art, while only five-percent are real objects.¹⁰ The third type, which he labels “ambiguous objects,” accounts for the largest percentage.¹¹ These objects would need to be viewed before an informed decision could be made concerning their authenticity.¹²

According to Professor Stanish, high quality manufacturing of counterfeited items has caused rapid growth in the appearance of “ambiguous objects” and made it more difficult to determine and prove what is real, illicit, or fake.¹³ The problem came to the attention of the INTERPOL Expert Group on Stolen Cultural Property, which met in March 2006 to discuss

⁵ Ried Goldsborough, *Distinguishing Bargains From Counterfeit Scams on eBay*, Dec. 15, 2008, <http://www.infotoday.com/linkup/lud121508-goldsborough.shtml>.

⁶ eBay Inc. Fact Sheets, 2013, http://legacy.ebayinc.com/assets/pdf/fact_sheet/eBay_Marketplaces_Fast_Facts_Q12013.pdf.

⁷ Goldsborough, *supra* note 5.

⁸ eBay Website, *Antiquities Category*, at http://antiques.shop.ebay.com/Antiquities-/37903/i.html?_catref=1&_trksid=p3910.c0.m449 (last visited Aug. 10, 2013).

⁹ Charles Stanish, *Forging Ahead*, *Archaeology*, (May/June 2009), available at <http://www.archaeology.org/0905/etc/insider.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

cultural property internet sales.¹⁴ The fifty-six member states present at the meeting recognized that the illicit cultural property internet trade had become a serious problem and that the authenticity of the objects for sale varied considerably.¹⁵ Guidelines were needed to address who should verify authenticity, at what point in the auction verification should be made, and who is responsible when illicit items are auctioned.

Following the meeting, The International Criminal Police Organization (“INTERPOL”), The United Nations Educational, Scientific and Cultural Organization (“UNESCO”), and The International Council of Museums (“ICOM”), issued a list of *Basic Actions to Counter the Increasing Illicit Sale of Cultural Objects through the Internet*.¹⁶ The objective was to create guidelines for member states and internet platforms, but the document is not legally binding.¹⁷ The 2006 list had an attached footnote explaining the guidelines “are neither ‘Recommendations,’ nor ‘Declarations, Charters and similar standard-setting instruments’ adopted by the General Conference of UNESCO, nor ‘Resolutions’ adopted by the General Assembly of Interpol.”¹⁸

The list states that internet sales platforms are strongly encouraged to place a disclaimer on their sites and disclose all pertinent information regarding suspicious sales.¹⁹ Member states were also invited to create a central authority “responsible for the protection of cultural properties, in charge of permanently checking and monitoring sales of cultural objects via the

¹⁴ UNESCO, *Basic Actions concerning Cultural Objects being offered for Sale over the Internet*, at 1, <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf> (last visited Aug. 10, 2013).

¹² *Id.*

¹³ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

Internet.”²⁰ This authority should run checks on the authenticity of items and keep record of the results of its checks along with all register information.²¹ Each nation is responsible for creating its own legal measures for tracking and seizing illicit objects and returning those objects to their rightful owners.²²

Another international conference was held in 2008, and the concluding memorandum recommended that member states reach agreements with internet platforms to reduce illegal sales and monitor this type of trade.²³ The concluding memorandum recommended that the member states circulate the INTERPOL-UNESCO-ICOM joint letter on Basic Actions so internet sales platforms and nations could implement the guidelines.²⁴

While UNESCO recommendations do not create legal obligations and rights between state parties, they do have legal implications amongst member states.²⁵ This concept was provided for in UNESCO document (UNESCO/CUA/68, 9 August 1955, 3-4).²⁶ It provides,

The adoption of a recommendation by the General Conference in fact gives rise, for the Member States as a body – and thus even for those who do not vote for its adoption – to specific obligations under the Constitution and Rules of Procedure. In the first place, the adoption of a recommendation by the General Conference commits every Member State, in virtue of Article IV, Paragraph 4, of the Constitution, to submitting the Recommendation to its competent authorities within a period of one year from the close of the session of the Conference at which the Recommendation was adopted.²⁷

The “realization that national law of the States could not be unified, because of the very different approaches of their legal systems, led to the abandonment of an intended convention on the

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3.

²³ Interpol, *supra* note 3, at 2.

²⁴ *Id.*

²⁵ PATRICK J. O’KEEFE & LYNDEL V. PROTT, CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS 205 (2011).

²⁶ *Id.*

²⁷ *Id.*

protection of archaeological sites, to be replaced by a recommendation which could be adjusted to diverse national legal systems and at least harmonize the rules.”²⁸ A presumed advantage of recommendations is that they create a “best practice” for industry experts across the numerous jurisdictions.²⁹ Many countries have been proactive in following these guidelines, and some are demanding internet platforms to follow suit to conduct business in their country.

For example, France has a central authority, the Office Central de lute contre le trafic des Biens Culturels (“OCBC”), which encouraged eBay to create an interface that the OCBC can use to conduct searches for stolen property.³⁰ eBay transfers data for verification, and the OCBC uses the interface to check for legitimacy of sale items.³¹

In the United Kingdom, the British Museum and the Museums, Libraries and Archives Council (“MLA”) have partnered with eBay UK to combat illicit antiquities sold on its eBay.co.uk website. The British Museum (on behalf of the MLA), also manages the central authority called the Portable Antiquities Scheme (“PAS”). The PAS works with eBay to stop the sale of illicit items; PAS created a detailed, easily understandable informational guide on buying/selling antiquities that eBay exhibits to buyers and sellers.³² The PAS monitors antiquities and reports illicit items to the Art and Antiques Unit of the Metropolitan Police, which has jurisdiction to criminally prosecute anyone failing to report a find in the U.K. under the Treasure Act.³³

²⁸ *Id.*

²⁹ *Id.* at 206.

³⁰ Edouard Planche, *Fighting against illicit trafficking of cultural goods on the Internet: UNESCO and its Partners’ Response*, CITIES WORLD (Issue No. 19 Feb. 2010), available at <http://www.cites.org/eng/news/world/19/5.shtml>.

³¹ *Id.*

³² UK eBay Website, Antiquities Buying Guide, at <http://pages.ebay.co.uk/buy/guides/antiquities/> (last visited Aug. 10, 2013).

³³ Portable Antiquities Scheme Treasure Act Advice, <http://finds.org.uk/treasure/advice/schemeandebay>.

Pilot projects also were started in Austria, Switzerland, and Germany, whereby the sale of cultural property on eBay was allowed only if the seller could prove authenticity and provide provenance.³⁴ To prove an item was authentic, the seller had to provide a legible document demonstrating authenticity; otherwise, the object would be removed from the site.³⁵ The program yielded such positive results in Switzerland that the government signed a memorandum of understanding with eBay, under which the sale of cultural property must be certified by Swiss or foreign authorities before it is completed.³⁶

Germany, discussed in the next Part, also has been a notable frontrunner in its efforts to stop the illicit sale of cultural property and antiquities on internet platforms, while the United States is notably lacking from the list of proactive countries in this area.

II. DOMESTIC DIFFERENCES BETWEEN THE UNITED STATES AND GERMANY

As previously mentioned, UNESCO recommendations leave individual countries to enact legislation they deem fit to regulate the illicit cultural property trade.³⁷ This leeway has given member states the ability to accept only certain provisions of UNESCO as well as create new administrative oversight entities.³⁸ This Part will compare the legal framework in the United States and Germany to understand why the United States lags behind in deterring illicit on-line antiquities sales.

Both the United States and German eBay sites have posted policies regarding cultural property; however these policies differ significantly. The most significant difference between the two policies is that the German eBay site allows cultural property sales only if an individual can

³⁴ Planche, *supra* note 30.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Leah J. Weiss, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 *Cardozo Arts & Ent. L.J.* 837, 846-847 (2007).

³⁸ *Id.* at 846.

provide legitimate proof of provenance, whereas the U.S. site broadly restricts the description of items or categories they can be placed for sale in, but only bans from sale some Native American items. It does not require provenance except for an export license for imported goods.

both the United States and Germany have passed legislation to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, but each nation took different approaches legally and, philosophically. The U.S. passed the Convention on Cultural Property Implementation Act (“CCPIA”).³⁹ Germany passed the Act on the Return of Cultural Property (Kulturgüterrückgabegesetz – KultGüRückG).⁴⁰ The remainder of this Part contrasts these two very different laws from each other.

The United States took an import restriction approach. The CCPIA is not a criminal statute, but rather it is a customs law found in Title 19 of the U.S. Code (“Customs Duties”).⁴¹ The CCPIA fails to address how to deal with artifacts found within U.S. borders (or brought into the country prior to 1970) and instead concentrates mainly on the import aspect of the UNESCO Convention.⁴² For imports, the U.S. takes the UNESCO Conventions’ stance under Articles 7(b) and 9 to strike bilateral agreements with other States, while otherwise imposing no restrictions on exports except in emergency situations.⁴³

³⁹ 19 U.S.C. §§ 2601-2613 (2007).

⁴⁰ KultGüRückG [Act on the Return of Cultural Property], May 8, 2007, BGBl I at 2547, *available at* Gesetz im Internet, http://www.gesetze-im-internet.de/englisch_kultg_r_ckg/.

⁴¹ *See also, e.g.,* U.S. v. Schultz, 333 F.3d 393, 409 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004) (discussing differences between customs laws and criminal laws).

⁴² Weiss, *supra* note 37, at 853. *See also* Patrick J. O’Keefe, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 9, at 106 (2000).

⁴³ O’Keefe, *supra* note 42, at 66.

In contrast, the German Act focuses on exports. Under the Chapter 5 provisions, individuals can be punished criminally for illegal exports.⁴⁴ Also, the German Act in Chapter 4 Section 18 imposes obligations on auction houses or antique dealerships to keep record of sales,⁴⁵ whereas the United States has no such requirement (beyond general tax recordkeeping obligations). Because Germany via the language in its Act, is concerned with the export of its own cultural property, not only internationally but even amongst its' own states, it is logical that eBay's German policies would be stringent. Whereas the U.S. statute concerns itself with imports and is not focused on in-state or interstate sales, only U.S. eBay's international buying policy is strict. Perhaps this is one reason for the drastically different policies between the U.S. and German eBay websites.

A. U.S. eBAY CULTURAL PROPERTY POLICY REFLECTS DOMESTIC LAW PROTECTING NATIVE AMERICAN ARTIFACTS

U.S. eBay guidelines mostly concern Native American artifacts. For instance, the U.S. eBay guideline for “artifacts, grave-related items, and Native American arts and crafts policy” contains the list of items that are restricted or banned.⁴⁶ The cultural sensitivity and legal concerns surrounding Native American items are reflected in the detailed nature of the list. There are three main statutes that inform the list: The Indian Arts and Crafts Act, The Native American Graves and Repatriation Act (“NAGPRA”), and the Federal Cave Protection Act.⁴⁷ In turn, we will first analyze the U.S. eBay policies for consistency with the language of the three statutes.

First, the Indian Arts and Crafts Act in relevant part provides:

Misrepresentation of Indian produced goods and products.

⁴⁴ Act on the Return of Cultural Property, *supra* note 40, at 2547.

⁴⁵ *Id.*

⁴⁶ eBay Website, Policy on Artifacts, <http://pages.ebay.com/help/policies/artifacts.html> (last visited Aug. 10, 2013).

⁴⁷ *Id.*

(a) It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

(b) Penalty. – Any person that knowingly violates subsection (a) shall-

(1) in the case of a first violation by that person-

(A) if the applicable goods are offered or displayed for sale at a total price of \$1,000 or more, or if the applicable goods are sold for a total price of \$1,000 or more-

(i) in the case of an individual, be fined not more than \$250,000 or imprisoned not more than five years, or both; and

(ii) in the case of a person other than an individual, be fined not more than \$1,000,000; and

(B) if the applicable goods are offered or displayed for sale at a total price less than \$1,000, or if the applicable goods are sold for a total price of less than \$1,000-

(i) in the case of an individual, be fined not more than \$25,000, imprisoned for not more than 1 year, or both; and

(ii) in the case of a person other than an individual, be fined not more than \$100,000. and

(2) in the case of a subsequent violation by that person, regardless of the amount for which any good is offered or displayed for sale or sold-

(A) in the case of an individual, be fined under this title, imprisoned for not more than 15 years, or both; and

(B) in the case of a person other than an individual, be fined not more than \$5,000,000.⁴⁸

The U.S. eBay policy on “Native American arts, crafts, or jewelry” provides “any item described as Alaska Native, American Indian, or Native American must be made by an enrolled member of a state or federally recognized tribe or by someone certified as an Indian artisan by a recognized Indian Tribe;” it also directs questions to the Indian Arts and Crafts Board providing the contact number and website.⁴⁹ The policy then gets more detailed in restricting Non-Native American Crafts from being posted in specific Native American categories and additionally provides specific requirements for the descriptions to be used when posting items created by non-tribe

⁴⁸ 18 U.S.C. 1159 (2010).

⁴⁹ eBay Website Policy on Artifacts, *supra* note 46.

members.⁵⁰ The policy bans items described as “Alaska Native style, American Indian style, Native American style or other descriptions that may suggest the item was made by a Native American.”⁵¹ It also provides that “items not made by Native Americans can’t be listed in Native American categories and unknown artisan or tribal affiliation for arts and crafts made in 1935 or later can’t be described as Alaska Native, American Indian, or Native American.”⁵² When attempting to list an item for sale, if one uses the any of the above terms in the subject line, eBay had created an automatic pop-up disclaimer that notifies the individual of the above policy and the ramifications if the seller does not abide by its’ terms, but that pop-up no longer seems in operation as of the date this article is published. This detailed policy for “Native American arts, crafts, or jewelry” certainly covers all aspects of the Act and looks to follow the intent of preventing the items covered under the Act from being sold or offered for sale via the U.S. eBay platform.

Second, NAGPRA provides in its relevant part as follows in § 1170(b):

Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.⁵³

The Act defines the types of cultural items that subject one to liability⁵⁴ and is almost exactly mirrored in the U.S. eBay policy on “Native American grave-related or culturally significant items.” The eBay policy bans “items from Native American or Native Hawaiian grave sites, such as: funerary object placed with the dead, grave marker, human remains, and sacred items

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 18 U.S.C. § 1170 (2011).

⁵⁴ 25 U.S.C. § 3001 (2010).

used by Native American religious leaders in ceremonial practices such as: ceremonial masks, and prayer sticks,” all of which is covered by the Act.⁵⁵ Although the language of the Act uses broader language when describing cultural items, the general labels eBay provides as examples would be considered in compliance with the terms of the act.

Lastly, the Federal Cave Protection Act provides in relevant part that:

(2) Any person who possesses, consumes, sells, barter or exchanges, or offers for sale, barter or exchange, any cave resource from a significant cave with knowledge or reason to know that such resource was removed from a significant cave located on Federal lands shall be punished in accordance with subsection (b) of this section.⁵⁶

The U.S. eBay policy for “Cave Formations” provides the following:

Restricted, listings for government survey markers (like those used by the U.S. Geological Survey) have to show proof that the government has transferred ownership to the eBay seller. This proof can be either a photo or a scanned image of the document. Not Allowed, speleothems, stalactites, and stalagmites taken from caves on federal land.⁵⁷

This policy reflects the Federal Cave Protection Act using the same terms provided for in the definition section of the Act⁵⁸ and also refers sellers to follow the law under the act before listing these types of items.⁵⁹

The restrictions U.S. eBay has placed on antiquities, however, is far more limited and states only that “items have to be authentic, sellers have to include either a photo or a scanned image of an official document that clearly shows both the item’s country of origin and the legal details of the sale (it has to be approved for import or export).”⁶⁰ U.S. eBay does not generate pop-ups for antiquities not covered by the the Indian Arts and Crafts Act, NAGPRA, or the

⁵⁵ eBay Website Policy on Artifacts, *supra* note 46.

⁵⁶ 16 U.S.C. 4306 (2007).

⁵⁷ eBay Website Policy on Artifacts, *supra* note 46.

⁵⁸ 16 U.S.C 4302 (2007).

⁵⁹ eBay Website Policy on Artifacts, *supra* note 46.

⁶⁰ *Id.*

Federal Cave Protection Act, and as previously described, there seem to be many objects listed for sale in violation of the general antiquities restriction. Thus, U.S. eBay does not truly make a concerted effort to specifically restrict the sale of looted or fake antiquities.

On the other hand, eBay has a generic stand-alone policy prohibiting the sale of “Stolen Property and property with removed serial numbers.” The policy overview for “Stolen property” states: “We don't allow the sale of stolen property on eBay because it violates state, federal, and international law. We also strongly support efforts by law enforcement to investigate attempts to sell stolen property on our site. If we see this activity taking place, we'll proactively notify law enforcement and help in their efforts to investigate and prosecute members who violate this policy.”⁶¹ The eBay policy neither directly mentions nor reflects the Cultural Property Implementation Act nor the National Stolen Property Act (NSPA), key statutory schemes reflecting the federal policy of deterring the international trade in black market antiquities in the United States. Also, there is no pop-up disclaimer with rules to follow triggered for potential violations of the stand-alone stolen property policy. eBay may continue to avoid liability by hiding behind the massive numbers of buyers and sellers trading on its site, thus shrugging off responsibility for the sale in stolen and fake antiquities on its' trading platform. However, there are some relatively simple additions that could enhance the policy's effectiveness, minimize eBay's liability risk, and put it more in line with the UNESCO recommendations and U.S. public policy. Some suggestions include flagging specific items, notifying the seller immediately once she tries to post items in specific antiquity categories of the potential risks, and investigating items listed over \$5,000, the minimum value covered by the NSPA (although objects may be

⁶¹ eBay Website, Policy on Stolen Property, <http://pages.ebay.com/help/policies/stolen.html>, (last visited Aug. 10, 2013).

aggregated for valuation purposes).⁶² A pop-up disclaimer, as used in other categories, could be put in place. If U.S. eBay truly wanted to prevent its platform from being used to traffic in illicit antiquities, it could utilize an additional pop-up to require items selling for more than \$5,000 to be “submitted for review” before allowing the item to be sold. The U.S. eBay site is ambiguous, and while it attempts to provide the individual more detailed information regarding the sale of cultural property, in reality, it only redirects the user to other websites to research the relevant law on his own.

For example, the U.S. eBay website’s international policy redirects the user to other countries’ eBay website policies, such as eBay Germany. In contrast to the German policy described below,⁶³ there is no U.S. eBay requirement to show legitimate provenance or ownership.⁶⁴ Even if a U.S. user is directed to a foreign eBay site, such as German eBay, unless one was familiar with eBay Germany or thought to translate the webpage, the user still would not be aware of the foreign ownership documentation requirement. The U.S. International Policy section includes a disclaimer stating “members are responsible for ensuring that their transactions are lawful in both the country of the seller and the country of the buyer” and eBay encourages “all members to learn about the laws of their own country as well as the countries where they plan to do business.”⁶⁵ It is not until one clicks through to the “additional information” section of the international policy before one is invited to “read about laws and special issues involving the importation of cultural items,”⁶⁶ which simply is a link to the U.S.

⁶² *Cf.* *United States v. Medford*, 194 F.3d 419, 425 (3d Cir. 1999) (aggregating cultural objects values for sentencing under the Theft of Major Artwork statute).

⁶³ *See* Section II(B).

⁶⁴ eBay Website, Policy on International Trading, <http://pages.ebay.com/help/policies/international-trading.html> (last visited Aug. 19, 2013).

⁶⁵ eBay Website Policy on International Trading, *supra* note 63.

⁶⁶ *Id.*

Department of State's Cultural Heritage Center.⁶⁷ This site does provide more in depth details on these issues including the UNESCO Convention if one knows where to look,⁶⁸ but it would not be beneficial to the average individual selling items. The ultimate discretion is left to the individual to determine whether an item is acceptable for sale, and the United States does not have a central authority dedicated solely to verifying or monitoring the legitimacy of these items for sale.

The Office of Investigations, part of the U.S Immigration and Customs Enforcement, has worked on cultural property investigations and a cybercrime center has assisted with the authentication of artifacts as well as collected information from eBay and PayPal,⁶⁹ but it lacks a specialized unit of experts dedicated solely to the issue. At the third annual meeting of INTERPOL Expert Group on Stolen Cultural Property in 2006, the trio of INTERPOL, UNESCO, and ICOM, noted the benefit a nation's having such an authority because of the "sheer volume and diversity of items offered, the variety of venues or platforms for the sale of cultural objects on the internet and the limited reaction time available owing to short bidding periods during a sale."⁷⁰ Without a specialized unit of experts, the United States has little chance of keeping up with the monitoring or prohibition of illicit sales. And, eBay's policies are ineffective at combating the use of its platform for sales of stolen and fake antiquities—and accordingly raises the question whether U.S. eBay is complicit in the widespread illegal sales via its site to the point of potential liability, as addressed in Part III, below.

⁶⁷ U.S. Department of State Website, Cultural Heritage Center, at <http://eca.state.gov/cultural-heritage-center> (last visited Aug. 19, 2013).

⁶⁸ *Id.*

⁶⁹ INTERPOL, *Minutes 7th International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiquities*, at 3, available at:

<https://www.interpol.int/Public/WorkOfArt/Conferences/Default.asp>

⁷⁰ UNESCO Basic Actions, at

<http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf>

B. GERMANY eBAY POLICY ON CULTURAL PROPERTY

The German eBay policy on archaeological finds is far more restrictive and comprehensive than the U.S. eBay policies from a property protection standpoint. The two main differences between the U.S. and German eBay websites are a provenance requirement and an expert check to monitor items prior to posting for sale.

First, the German eBay website provides in its “Our principle” section: “It is forbidden to offer archeological findings without documents proving compliance with the legal provisions relating to archaeological finds and the rightful ownership (proof of origin or provenance or pedigree). The certificate of origin must be shown in the offer and legible.”⁷¹ Under the subsequent section the site prohibits “especially endangered cultural assets, which are listed in the red list of the International Council of Museums (ICOM).”⁷² The site then provides that “antiquities may only be offered with documentation of proof of origin, a Pedigree or Provenance (discussed below), with the exception of certain fossils and coins (parts of old collections), and acquired in accordance with National Monument Protection laws and international cultural protection agreements.”⁷³

The German eBay site requirement to provide documentation (Pedigree) became effective for the trade of archaeological finds on the German eBay market place on July 1, 2008.⁷⁴ A Pedigree is verifiable proof that the offered object has complied with the special legal provisions that apply to archaeological finds.⁷⁵ If the seller cannot submit a Pedigree, or if it is incorrect, not comprehensible, non-traceable, or incomplete, then the proof of the adherence to

⁷¹ eBay Germany Website, Policy on Artifacts, <http://pages.ebay.de/help/policies/artifacts.html> (last visited Aug. 10, 2013).

⁷² *Id.*

⁷³ eBay Germany Website Policy on Artifacts, *supra* note 70.

⁷⁴ <http://coinarchaeology.blogspot.com/2008/07/ebayde-germany-new-rules-on-selling-of.html>

⁷⁵ *Id.*

the laws is not satisfactorily authenticated, and the sale on the eBay market place is not permitted.⁷⁶ This is one of the two of the main differences between the U.S. and German eBay sites—eBay Germany requires documented proof of ownership and legality while U.S. eBay does not.

The other main difference between the two sites' policies regards a centralized authority to oversee and monitor the sales. German eBay has a permanent authority overseeing authenticity of the items for sale, as well as the Pedigree. This authority is the Association of National Archaeologists (Der Verband der Landesarchäologen or VLA), which works in close co-operation with eBay Germany to prevent illicit online sales of archaeological objects.⁷⁷ A team of experts from the VLA verifies items for legitimacy.⁷⁸ If an item is legitimate, but the seller lacks a Pedigree, the VLA will assist the seller in the purchase of a Pedigree.⁷⁹ However, if the authenticity of an item or its provided Pedigree cannot be verified, then the VLA has the authority to halt the auction.⁸⁰ The policies are clearly written and can be easily understood by sellers and buyers. It also takes the discretion of posting items for sale from the individuals and places it in the hands of experts (the VLA) who make the final determination to allow or disallow the auction.

The German eBay policy seems as though it would effectively prevents the sale of stolen or fake antiquities. Although there are still flaws, the VLA authentication and title control mechanism looks to be the best practice in the industry so far and has been praised for its success

⁷⁶ *Id.*

⁷⁷ Verband der Landesarchäologen website, <http://www.landesarchaeologen.de/verband/kommissionen/illegale-archaeologie/> (last visited Aug. 27 2013).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

such that Austria, France, Switzerland, and the U.K. now also use similar practices;⁸¹ the Swiss eBay practices have been lauded in being effective.⁸² One suggestion was made during the 7th Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques to assist nation's investigations; a representative of the General Secretariat proposed to extend the minimum time period for which items are posted for sale to two weeks thus allowing agencies or experts ample time to investigate as remedy to the time constraints for investigating items on eBay.⁸³

When comparing the two sites policies on cultural property sales, putting them in context with a typical eBay transaction, one can easily deduce why the German site policy would be much more effective in policing illicit sales. Having a documentation requirement before a sale can be posted essentially stops the illicit item from ever being put on the marketplace (so long as investigators are schooled in false documentation). Although the U.S. site seems to comply with the necessary laws, it falls short on the level of detail and preventative measures the German eBay site has implemented. The U.S. eBay lacks a team of experts like the German VLA and does not require documentation of provenance, although it is apparent from its German operation that such restrictions would be possible (although admittedly the scale of the U.S. operations is considerably larger).

III. POTENTIAL CRIMINAL LIABILITY

⁸¹ INTERPOL, *Minutes 7th International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiquities*, at 2, available at <https://www.interpol.int/Public/WorkOfArt/Conferences/20080617/minutes.pdf>, see also: A. Gach, *Illicit Trade and Interpol*, *Forum Archaeologiae* (2010) available at <http://homepage.univie.ac.at/elisabeth.trinkl/forum/forum0610/55gach.htm>

⁸² Swiss/eBay success here: <http://coinsweekly.com/index.php?pid=4&id=12> and the FOC's press release here: <http://www.news.admin.ch/message/index.html?lang=fr&msg-id=29602>

⁸³ Interpol Minutes at 2.

If a U.S. prosecutor were interested in pursuing the issue, current U.S. statutes could apply to hold eBay criminally liable for its part as a third party providing the platform for illegal sales. While many may assume that eBay escapes liability under the U.S. law because it does not participate as a buyer or seller in the sale,⁸⁴ this Part and the next demonstrates that the risk of eBay being held criminally liable for third parties' illegal sales is currently low.

A. The Gap in eBay's Policies and the National Stolen Property Act

For example, on the U.S. eBay website in the "Policy Overview" for Artifacts, grave-related items, and Native American arts and crafts policy, one will find the following language "Any restriction or ban on selling these items is generally based upon various laws that we need to follow, including: The Indian Arts and Crafts Act, The Native American Graves Protection and Repatriation Act, and The Federal Cave Protection Act."⁸⁵ There is no mention of the NSPA⁸⁶ or customs statutes. The NSPA § 2314 provides: "Whoever 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...shall be fined under this title or imprisoned not more than ten years, or both."⁸⁷ To obtain a conviction under § 2314, the United States only needs to prove "first, that the defendant have transported 'goods, wares, [or] merchandise' in interstate or foreign commerce; second, that those goods have a value of '\$5,000 or more;' and, third, that the defendant 'know the same to

⁸⁴ David Rubenstein, *eBay: The Cyber Swap Meet*, 13 U. Miami Bus. L. Rev. 1 (2004).

⁸⁵ eBay Policy on Artifacts, *supra* note 46.

⁸⁶ 18 U.S.C. §§ 2314-2315 (2012).

⁸⁷ 18 U.S.C. § 2314 (2012). However, 2315 states: "Whoever receives [or] possesses any goods of the value of \$5,000 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 shall be fined under this title or imprisoned not more than ten years, or both." The difference occurs in the description of liability, section 2314 describes liability by transporting, transmitting or transferring, while section 2315 provides liability for receiving or possessing. For the point of this article, the analysis for eBay's potential criminal liability does not change much under Section 2315, as opposed to under Section 2314. This article's analysis will focus on 2314.

have been stolen, converted or taken by fraud.”⁸⁸ For criminal prosecution under customs regulations, a similar *mens rea* or knowledge requirement would apply in a typical antiquities case.⁸⁹

In a typical sale of a stolen antiquity on eBay, a seller in one place offers an object for sale to anyone who chooses to view the auction, most of whom are located in another jurisdiction.⁹⁰ No one employed by eBay seems to usually look at the auction page.⁹¹ Presumably, the seller has knowledge that the antiquity was stolen or is a fake. The buyer at the time of purchase may, depending on various factors, be in a position to at least suspect the antiquity was stolen, but very well could be without any knowledge whatsoever that the antiquity was, in fact, stolen. For the purpose of this analysis, let us assume a completely innocent buyer and focus first on the seller’s potential criminal liability. Let us assume also that the object in question has a market value that exceeds \$5,000 if the object were to be offered for sale at an auction in a traditional brick-and-mortar auction house within the United States, but that the actual price the item sold for was below \$5,000, which encompasses the majority of items listed on eBay in the antiquity category.⁹²

Is the seller in the typical stolen antiquity eBay transaction criminally liable under Section 2314? Yes. The first requirement that goods, wares or merchandise have been transported interstate or foreign commerce is satisfied due to the fact that the eBay forum is

⁸⁸ Dowling v. U.S., 105 S. Ct. 3127, 3131 (1985).

⁸⁹ Cf. Urice, at ___. This article does not reach the issue of civil forfeiture. *See, e.g., id.*

⁹⁰ eBay Factsheet,

http://legacy.ebayinc.com/assets/pdf/fact_sheet/eBay_Marketplaces_Fast_Facts_Q12013.pdf. *See also* http://ec.europa.eu/competition/sectors/media/ebay_frontier_report.pdf.

⁹¹ <http://www.artbusiness.com/eBay.html>.

⁹² eBay Website, Antiquities Category, at http://antiques.shop.ebay.com/Antiquities-/37903/i.html?_catref=1&_trksid=p3910.c0.m449 (last visited Sept. 7, 2011). In the “Antiquities” category there were 20,933 items listed on the above date as “buy it now”. Of the 20,933 items, only 286 items were priced above \$5,000, 15 items were listed between \$4,900-\$5,000, and the ranged from \$1-\$4,899, with the vast majority under \$500.

global and individuals can sell items to any country or state, therefore these goods typically are traveling in interstate or foreign commerce. The second element is dependent on the facts of individual cases, but so long as the item being sold is valued at “\$5,000 or more”, this element would be met as well.⁹³ The third element “knowing the same to have been stolen” can be met even by circumstantial evidence either by showing how the individual obtained the goods or his expertise in the field could presume his knowledge that the item was stolen. Under the *McClain* doctrine one may be prosecuted under the National Stolen Property Act for removing an object from a source nation in violation of a clear national ownership law,⁹⁴ which, perhaps, must be effectively enforced by the source nation.⁹⁵

B. THE REQUISITE LEVEL OF “KNOWLEDGE”

Now we turn to the core question of this Article: Could eBay be held liable criminally? The movement in interstate commerce and valuation would not change depending on the potential defendant; thus what is at stake is whether eBay meets the “knowing” element. First, it must be determined what constitutes “knowledge” under § 2314. The U.S. Court of Appeals for the Second Circuit in *U.S. v. Jacobs*, held that “18 U.S.C. § 2314 – which criminalizes transporting stolen property ‘knowing the same to have been stolen’ - does not require proof of the defendant’s “actual knowledge”.”⁹⁶ The court elaborated that the requisite “knowledge” could be present by “deliberate closing of the eyes to what would otherwise be obvious and

⁹³ Cf. *United States v. Medford*, 194 F.3d 419, 425 (3d Cir. 1999).

⁹⁴ *United States v. McClain* (*McClain I*), 545 F.2d 988 (5th Cir. 1977). *U.S. v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); see also: Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 161 (2010).

⁹⁵ *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003); see also Urice, *supra* note 93, at 130.

⁹⁶ *U.S. v. Jacobs*, 475 F.2d 270, 288 (2d Cir. 1973).

‘reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth...’⁹⁷

In *Jacobs*, the Defendants were charged with conspiring in violation of 18 U.S.C. § 371⁹⁸ to violate either 18 U.S.C. §§ 2314 and 2315 by trafficking stolen U.S. Treasury Bills “knowing that they had been stolen.”⁹⁹ The facts of the case are as follows: several U.S. Treasury Bills totaling more than \$1.5 million dollars were stolen from the vaults of Brown Brothers Harriman & Co. in early August 1970.¹⁰⁰ Ten of these bills were found to be in possession of one co-Defendant in mid-September 1970.¹⁰¹ Subsequently, co-Defendant approached Jacobs, a friend and business associate, to find a way to sell them.¹⁰² After several rejections from attempts to sell at banks, Jacobs went to his attorney, the other co-Defendant, whom agreed to find a buyer, and the three signed a written agreement to share a 10% fee.¹⁰³

The Circuit Court of Appeals for the District of Columbia in two subsequent decisions has reaffirmed this principle, first in *United States v. Gallo* and then in *United States v. Alston-Graves*. In *Gallo*, the defendant appealed a conviction of transporting gold coins in interstate commerce knowing them to have been stolen.¹⁰⁴ The defendant objected to testimonial evidence provided by three thieves who testified as follows: they went to the defendant’s shop with a stamp collection they had stolen from the owner’s residence, which was also when they stole the

⁹⁷ *Id.*

⁹⁸ 18 U.S.C. § 371 (2012). “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”

⁹⁹ *Jacobs*, *supra* note 93, at 273.

¹⁰⁰ *Id.* at 274.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 275.

¹⁰⁴ *United States v. Gallo*, 543 F.2d 361 (D.C.Cir.1976).

coins.¹⁰⁵ They had attempted to cut the owner's name off of the stamps, however they missed a few pages, and the defendant noticed the owner's name, cut it out himself, and therefore was found to have known that the stamps came from the owner.¹⁰⁶ The defendant purchased the stamps two months prior to purchasing the coins.¹⁰⁷ Additional testimony by the thieves provided that one mentioned the coin collection to the defendant, who then said he knew of it and wanted it, and that the thief had previously sold stolen goods to the defendant.¹⁰⁸ Also, following the break-in, the thief called the defendant to tell him he had the coin collection and was told by the defendant to come to his store the following morning.¹⁰⁹

According to Black's Law Dictionary, *Actual knowledge* is defined as "direct and clear knowledge," whereas, *Implied Actual knowledge* is "knowledge of information that would lead a reasonable person to inquire further."¹¹⁰ Therefore, if eBay does not need direct and clear knowledge that an item is indeed stolen to satisfy the knowledge element, the question is how much "knowledge" is necessary? In *Schultz*, the court, highlighted that "the NSPA does not include the term "willfully."¹¹¹ The court in *Alston-Graves*, while referring to the *Gallo* opinion and quoted the holding from *Jacobs*, stated the "knowing the same to have been stolen" element of section 2314 "does not require proof of actual knowledge", rather this "seems to have meant that circumstantial evidence of the defendant's knowledge that the property was stolen would suffice."¹¹² The *Alston-Graves* court (citing *Gallo*) went on to add: "It may be true in a given case, such as where the notice was clear and was willfully ignored, that evidence of such facts

¹⁰⁵ *Id at 363.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Black's Law Dictionary (9th ed. 2009).

¹¹¹ U.S. v. Schultz, 333 F.3d 393, 411 (2d. Cir. NY, 2003).

¹¹² U.S. v. Alston-Graves, 435 F.3d 331, 339 (D.C. Cir. 2006).

may be considered by the jury as *part* of the proof that an accused possessed the requisite knowledge.”¹¹³ When discussing the *Gallo* jury instruction, the *Alston-Graves* court noted that part of the instruction states that guilty knowledge “may be satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.”¹¹⁴ This language seems to be more in line with the definition of implied actual knowledge as well as the principle of conscious avoidance.

Applying the principles provided by the courts for the requisite knowledge to the actions or lack thereof by the U.S. eBay site, it certainly seems eBay could be held liable under section 2314 of the National Stolen Property Act, depending on the facts of the case. As stated in previous sections, the participation in international conventions shows some level of knowledge that illicit cultural property is being sold over their website. Evidence of the success of other countries’ websites along with the control mechanisms they have in place demonstrates that eBay generally is aware of the problem, at least in Europe, and is capable of taking steps to prevent it. This coupled with the lack of controls in place to help prevent such items from being sold shows it could be “deliberately closing their eyes” to what is obvious to the international community.

In *Schultz*, the court applied the law of conscious avoidance in its jury instruction, where it stated:

[A] defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law. Therefore, if you find that the defendant, not by mere negligence or imprudence but as a matter of choice, consciously avoided learning what Egyptian law provided as to the ownership of Egyptian antiquities, you may [infer], if you wish, that he did so because he implicitly knew that there was a high probability that the law of Egypt invested ownership of these antiquities in the Egyptian government. You may treat such deliberate avoidance of positive knowledge as the equivalent of such knowledge,

¹¹³ Gallo, *supra* note 101, at 367.

¹¹⁴ *Supra*, note 109. *See also* United States v. Gallo, 543 F.2d 361, 368 n.6 (D.C.Cir.1976).

unless you find that the defendant actually believed that the antiquities were not the property of the Egyptian government.¹¹⁵

The court also noted that the Second Circuit has “repeatedly emphasized that, in giving the conscious avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist.”¹¹⁶ This approach could be applied to U.S. eBay, in that its avoidance of inspecting items, by choice, it is attempting to consciously avoid the fact that illicit cultural property is being sold on its site. The previously stated facts that eBay has admitted it is aware of the existence of illicit items sold on their website certainly could be argued to satisfy the knowledge requirement.

Although eBay is a buyer or seller in an illicit antiquities sale directly triggering the NSPA or a customs violation, a cause of concern for liability arises under 18 U.S.C. § 371, which establishes liability for criminal conspiracy. The language of the statute provides “if two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”¹¹⁷ Therefore, if an individual was in violation of one of the the NSPA or customs, depending on the facts eBay may be considered a conspirator for facilitating the sale of illicit cultural property.

However as we will see in Part IV, eBay’s likely general knowledge that its auction platform has been used to buy and sell illicit goods has not been sufficient for liability in trademark infringement cases brought against eBay in most jurisdictions.

¹¹⁵ Schultz, *supra* note 108, at 413.

¹¹⁶ *Id.*

¹¹⁷ 18 U.S.C. §371 (2012).

IV. INTERNATIONAL STRUGGLE DEALING WITH COUNTERFEIT SALES ON INTERNET AUCTION SITES

The United States, Germany, and France have taken different approaches when dealing with internet auction sites with regards to monitoring items sold via their platform. These types of cases have traditionally been trademark infringement cases brought by the trademark owner. The main case in the United States regarding internet platform liability in the trademark realm is *Tiffany v. eBay*, whereas Germany and France have each produced a trilogy of cases. In Germany this trilogy is commonly known as *Internet Auction I, II, and III*, and the French cases were all brought against eBay by Louis Vuitton Moet Hennessy (LVMH). The main differences between the jurisdictions are the duty to monitor or the scope of monitoring, and potential liability for lack thereof. In turn, we will analyze the U.S. approach, which is highlighted through the *Tiffany* case, and subsequently discuss how Germany and France deal with this same issue. In the end, eBay might try to point to these cases for the broader principle that it need not monitor for illicit goods other than trademark infringing goods, these cases perhaps do apply to counterfeit art sales, which are inapposite to stolen art sales, as concluded in Part IV.D, *infra*.

A. UNITED STATES APPROACH

The U.S. approach is best laid out in *Tiffany Inc. vs. eBay Inc.*,¹¹⁸ where the U.S. Court of Appeals for the Second agreed with the District Court's ruling, which had previously concluded "eBay clearly possessed general knowledge as to counterfeiting on its website,"¹¹⁹ but stated "a service provider must have more than a general knowledge or reason to know that its service is

¹¹⁸ *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, (2d Cir. 2010). See also: *Tiffany Inc. vs. eBay Inc.*, 576 F.Supp.2d 463 (S.D.N.Y. 2008).

¹¹⁹ *Tiffany Inc. v. eBay Inc.*, 576 F.Supp.2d 463, 508 (S.D.N.Y. 2008).

being used to sell counterfeit goods and some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.”¹²⁰

The facts provide that Tiffany became aware of counterfeit merchandise being sold on eBay’s site and subsequently conducted two surveys to determine the breath of this practice. During the course of the surveys, Tiffany would buy merchandise to inspect and evaluate whether the items were indeed counterfeit.¹²¹ Of the items Tiffany bought and inspected, Tiffany concluded that 73.1% of the items in 2004 were counterfeit and 75.5% in 2005 were counterfeit.¹²² The District Court stated that the buying programs were methodically flawed and that it gave little evidence as to how many items were counterfeit at a given time. Even though the court found that “a substantial number of authentic Tiffany goods are [also] sold on eBay,” the court ultimately decided that eBay knew “that some portion of the Tiffany goods sold on its website might be counterfeit.”¹²³ The District Court noted that during the last six weeks of 2004 alone, 125 customers complained to eBay about Tiffany items they had purchased and come to believe to be counterfeit.¹²⁴ However, the court went on to state even had eBay been able to inspect the goods, in many instances it would likely not have the expertise to determine whether the items were counterfeit.¹²⁵ Interestingly, the court then described several programs and tools eBay set up to combat counterfeit listings such as; buyer protection programs which reimburse buyers if the items are discovered to be counterfeit, a “fraud engine” which is dedicated to searching out illicit listings, and its “Verified Rights Owner (VeRO) Program” which is a notice and takedown system allowing intellectual property owners to report listings to eBay that are

¹²⁰ Tiffany Inc. v. eBay Inc., 600 F.3d 93, 107 (2d Cir. 2010).

¹²¹ *Id.* at 97.

¹²² *Id.*

¹²³ Tiffany Inc. v. eBay Inc., 600 F.3d 93, 98 (2d Cir. 2010). *quoting*: Tiffany Inc. vs. eBay Inc., 576 F.Supp.2d 463 (S.D.N.Y. 2008).

¹²⁴ *Id.*

¹²⁵ *Id.*

infringing rights so eBay can remove such items.¹²⁶ In late 2006, eBay implemented an additional measure that delayed buyers the ability to view listings of certain brand names for 6 to 12 hours, restricting one-day and three-day auctions in order to give rights-holders more time to review those listings.¹²⁷ The District Court stated “eBay consistently took steps to improve its technology and develop anti-fraud measures as such measures became technologically feasible and reasonably available.”¹²⁸ Although eBay seemed to be taking preventative measures, at the same time it was also promoting the availability of Tiffany items on its website by purchasing sponsored-link advertisements on various search engines. Tiffany criticized eBay of this and demanded eBay end this practice, which they told Tiffany it had ceased but was later found eBay continued to do so through a third party.¹²⁹ Tiffany then brought suit against eBay, however the District Court found in favor of eBay on all of its claims, Tiffany appealed.

On appeal, the main issue Tiffany argued was that of contributory trademark infringement, the court noted “for culpably facilitating the infringing conduct of the counterfeiting vendors.”¹³⁰ The District Court applied the test laid out by the U.S. Supreme Court in *Inwood Labs., Inc. v. Ives Labs., Inc.*,¹³¹ which states: “[I]f a manufacturer or distributor 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 infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.”¹³² The Court held that the *Inwood* test to e-Bay.

¹²⁶ *Id* at 99.

¹²⁷ *Id* at 100.

¹²⁸ Tiffany, *supra* note 121, at 100.

¹²⁹ Tiffany, *supra* note 118, at 103.

¹³⁰ *Id.*

¹³¹ *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982).

¹³² *Id* at 854. *see also* 95 Trademark Rep. 977.

Tiffany's argument focused on the second method of satisfying the *Inwood* test, alleging that "eBay continued to supply its services to the sellers of counterfeit Tiffany goods while knowing or having reason to know that such sellers was infringing upon Tiffany's trademark."¹³³ While acknowledging that "the evidence produced at trial demonstrated that eBay had generalized notice that some portion of the Tiffany goods sold on its website might be counterfeit," the District Court ultimately concluded that "while eBay clearly possessed general knowledge as to counterfeiting on its website, such generalized knowledge is insufficient under the *Inwood* test to impose upon eBay an affirmative duty to remedy the problem."¹³⁴ The court also noted the high standard of proof in establishing "knowledge" of contributory infringement.¹³⁵ The court concluded in order to establish liability that "Tiffany would have to show that eBay knew or had reason to know of specific instances of actual infringement beyond those that it addressed upon learning of them."¹³⁶

On appeal to the U.S. Court of Appeals for the Second Circuit, Tiffany argued that the District Court's distinction drawn between eBay's general and specific knowledge as to the sale of counterfeit goods through its website and which particular sellers were making the sales was a "false" one not in compliance with applicable law.¹³⁷ Tiffany's reasoning was that the cumulative effect of eBay's knowledge of the widespread counterfeiting problem put eBay on notice that there is a substantial problem of infringement.¹³⁸ The Second Circuit Court was not persuaded and pointed to *Sony Corp. of America v. Universal Studios, Inc.*¹³⁹ In *Sony*,

¹³³ Tiffany, *supra* note 118, at 106.

¹³⁴ Tiffany, *supra* note 121, at 107.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Tiffany, *supra* note 118, at 107.

¹³⁸ *Id.*

¹³⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

respondents Universal brought an action against Sony alleging the video tape recorders (VTR's") which Sony manufactured were being used by consumers to record some of the respondents' copyrighted work and Sony shall be held liable for copyright infringement because of their marketing of VTR's.¹⁴⁰ The Court stated that *Inwood's* narrow standard for contributory trademark infringement did not govern, because "Sony certainly does not induce its customers to make infringing uses of [the plaintiffs'] copyrights, nor does it supply its products to identified individuals known by it to be engaging in continuing infringement of [the plaintiffs'] copyrights."¹⁴¹

The court however did agree with the district court that "if eBay had reason to suspect that counterfeit Tiffany goods were being sold through its website, and intentionally shielded itself from discovering the offending listings or the identity of the sellers behind them, eBay might very well have been charged with knowledge of those sales sufficient to satisfy Inwood's 'knows or has reason to know' prong."¹⁴² The court further reasoned, "a service provider is not, we think, permitted willful blindness."¹⁴³ The trial court judge reasoned "Willful blindness requires 'more than mere negligence or mistake' and does not lie unless the defendant knew of a high probability of illegal conduct and purposefully contrived to avoid learning of it, for example, by failing to inquire further out of fear of the result of the inquiry."¹⁴⁴

¹⁴⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417.

¹⁴¹ *Id.* at 439 n. 19, 104 S.Ct. 774 (quoting *Inwood*, 456 U.S. at 855, 102 S.Ct. 2182).

¹⁴² *Tiffany*, *supra* note 118, at 109.

¹⁴³ *Id.*; *see also* *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992) – owner of flea market which leased space to sellers of counterfeit goods, and 95 Trademark Rep. 977, 988 – "Hence, after *Hard Rock*, a landlord or lessor could be held liable for contributory infringement if it knew or had reason to know of the infringing activity taking place on its premises, or was willfully blind to that behavior, and failed to take action to address the infringement."

¹⁴⁴ *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 463, 515 (S.D.N.Y.2008) (quoting *Nike Inc. v. Variety Wholesalers, Inc.*, 274 F.Supp.2d 1352, 1369–70 (S.D.Ga.2003)).

Therefore, although eBay generally knows illicit cultural property is being sold on its website, this general knowledge is insufficient; it must be shown eBay had knowledge of the specific item or individual in question and engaged in willful blindness. Another question stems from this approach, that being, how much should eBay be required to inquire or investigate whether items are illicit. If it has no duty to monitor, then it could virtually always claim it did not know the individual or the item in question had been stolen. On the other hand, if is forced to investigate, it will find more stolen items and subject itself to liability if it fails to act on that knowledge.

In the United States, failure to monitor or non-inspection of items has not been held against eBay.¹⁴⁵ Indeed, it has been held that e-Bay has virtually no obligation to monitor as to counterfeit goods. In *Stoner v. eBay Inc.*, the Plaintiffs argued that “eBay should be held responsible for failing to monitor products auctioned over its service,” due to the fact that the descriptions of some items contain language that identifies that they are indeed illicit (*e.g.* they would be described in the posting as “bootleg tapes”).¹⁴⁶ The Plaintiffs alleged that sales postings constituted notice to eBay, and that by failing to intervene, eBay participated in the illegal sale.¹⁴⁷ With respect to a duty of identifying such objects, the court stated that “Congress intended to remove any legal obligation of interactive computer service providers to attempt to identify or monitor the sale of such products,” referring to 47 U.S.C. § 230, even though many are possible to identify as illegal.¹⁴⁸ Section (b) Policy of 47 U.S.C. § 230, provides:

It is the policy of the United States –

¹⁴⁵ *Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637, at 3 (Cal. Super. Nov. 1, 2000). See also *Tiffany Inc. vs. eBay Inc.*, 600 F.3d 93, (2d Cir. 2010).

¹⁴⁶ *Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637, 3 (Cal. Super. Nov. 1, 2000).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents

In the Court's view, this was Congress' intention, because the threat of liability for failure to monitor would deter companies like eBay from making their services widely available, and removing this obligation would encourage platforms to screen out unlawful material voluntarily.¹⁴⁹ The court held that "in order for liability to arise and the immunity to be lost, it would be necessary to show actual, rather than constructive, knowledge of illegal sales, and some affirmative action by the computer service, beyond making its facilities available in the normal manner, designed to accomplish the illegal sales."¹⁵⁰

Likewise, in *Tiffany*, the Court acknowledged that eBay "never saw or inspected the merchandise in the listings", but nonetheless stated "even had it been able to inspect the goods, moreover, in many instances it likely would not have had the expertise to determine whether they were counterfeit."¹⁵¹

The U.S. approach gives internet auction websites a pass, at least as to counterfeit items. While acknowledging that eBay has preventative measures in place, the U.S. approach focuses on free market "let the buyer beware" philosophy, rather than prevention. Foreclosing on the idea of "generalized knowledge" for liability and requiring "specific knowledge" leaves a loophole for internet auction sites to avoid liability for goods with counterfeit trademarks. This

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Tiffany*, *supra* note 118, at 98.

creates no incentive for internet platforms to legitimately monitor items or enhance monitoring capabilities; rather it creates a rationale for platforms to stay the course. Nonetheless, eBay has posted a general statement that its platform should not be used for illegal activity.¹⁵²

B. GERMAN APPROACH

The German approach has been carved out through a trilogy of cases, commonly known as Internet Auction I, II, and III.¹⁵³ This approach differs from the U.S. approach because the German courts have issued injunctions against a German auction site.

First, in *Internet Auction I*, the claimants were the manufacturer and trademark owner of Rolex.¹⁵⁴ The defendant was an internet auction site similar to that of eBay. The process to post an item for sale is also similar to that of eBay, where the buyer or seller go through a registration process.¹⁵⁵ The auction site contained a page listing general conditions, which stated that the seller “gives a guarantee to the defendant and bidders that the item... does not infringe any copyright, patent, trademark, trade secrets or other intellectual property rights.”¹⁵⁶ The court with regards to the items the claimants complain about stated, “the fact that these are not counterfeits is not concealed from bidders, this is indicated not only by the minimum offer, but also by the descriptions of the goods.”¹⁵⁷ Some of the examples the court provided are as follows: “ROLEX Submariner Autom., high-quality replica, blue, Rolex high-quality replica in heavy version... complete with markings, No cheap Chinese product!, No difference from the

¹⁵² <http://www.ebaymainstreet.com/issues/prohibiting-illegal-activity-across-our-platforms>

¹⁵³ See *Internet Auction I*, Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 11, 2004 Case No. I ZR 304/01 (Ger.), reported in English at [2006] ECC 9, [2005] ETMR 25 and [2005] IIC 573; *Internet Auction II*, Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 19, 2007, Case No. I ZR 35/04 (Ger.) reported in English at [2007] ETMR 70 (Ger.); and *Internet Auction III*, Bundesgerichtshof [BGH] Apr. 30, 2008, Case No. I ZR 73/05 (Ger.), available at <http://www.jurpc.de/rechtspr/20080146.htm> (not year reported in English).

¹⁵⁴ *Internet Auction I*, Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 11, 2004 Case No. I ZR 304/01 (Ger.), reported in English at [2006] ECC 9, [2005] ETMR 25 and [2005] IIC 573.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

original, perfectly cloned!!..., Very Fine heavy imitation ... the layman cannot tell the difference between this and the original..., Rolex Submariner without certificate of authenticity...”¹⁵⁸ The claimants sought injunctive relief, disclosure of information and damages.

The defendant argued that no infringement had taken place because the items were offered by private parties; the defendant was not involved in the commercial transaction, and the items were posted for sale without any review by the defendant.¹⁵⁹ The court of appeals found that “the [d]efendant does not have knowledge of the offers before they are published as they are automatically posted on the internet by the seller in the course of the registration process any (intentional) participation by the Defendant must be ruled out.”¹⁶⁰ The court turned its focus to what it termed “disturbance liability;” it stated that “disturbance liability must not be unduly extended to third parties who have not themselves committed the unlawful prejudicial acts, disturbance liability requires the infringement of a duty to investigate on the part of the perpetrator.”¹⁶¹

The court went further to analyze the scope of the investigative duty. The court recognized that an internet auction platform cannot be expected to check each listing before it is posted on the internet, because such a requirement would make the business model infeasible.¹⁶² On the other hand, the Court recognized that internet platforms benefit monetarily from the sale of infringed goods due to the commission they receive.¹⁶³ The court detailed measures that should be taken in regards to monitoring, providing that the auction company must immediately block infringing items of which the auction site has actual knowledge, follow up on such actions

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

as much as possible to ensure they do not recur, and using their technological capability to pinpoint suspicious cases based on relevant search terms.¹⁶⁴ The court further opined, however, that “unreasonable obligations to inspect may not be imposed upon the defendants in a way that would jeopardize their entire business model.”¹⁶⁵

In *Internet Auction II*, the German courts reaffirmed these same principles. Rolex sued Germany eBay (the domain owner of www.ebay.de) for trademark infringement and sought injunctive relief and damages.¹⁶⁶ The facts of this case are similar to *Internet Auction I*. Numerous watches offered for sale on the German eBay platform from June 7, 2000, to January 25, 2001, falsified the Rolex trademark.¹⁶⁷ Some of the items were fakes which was made apparent either by the description of the items, the title, or the extremely low reserve price.¹⁶⁸ The claimant sent the domain owner a letter on September 8, 2000, notifying him of the unlawful use of the trademark and demanded a cease and desists from such use.¹⁶⁹ The court held that, while eBay was not a direct infringer, it is nonetheless liable as an intermediary for the acts of trademark infringement committed by its users.¹⁷⁰ The court restated its principle from *Internet Auction I*, that eBay can not be expected to check every offer for infringement, however it was participating in the sale of counterfeits due to the commission it earns from each sale.¹⁷¹ The court again stated that the claimants were entitled to injunctive relief against the sale of counterfeit “Rolex” watches sold on eBay’s website. However, the court reiterated, it would be unreasonable to hold eBay liable when there are “no characteristic features that are suitable for

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Internet Auction II*, Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 19. 2007, Case No. I ZR 35/04 (Ger.) reported in *English* at [2007] ETMR 70 (Ger.);

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

entry into a search system” and therefore eBay can not be responsible for infringements that they are “unable to detect in a preliminary filter process.”¹⁷² This concept strengthens online auction sites ability to escape liability so long as they can show they have implemented a filter software and it was unable to detect certain offers of sale. This is only beneficial for obvious illicit offers with keywords such as “fake, counterfeit, plagiarism, not genuine, imitation, replica, reproduction, etc” as the court stated these were the type of words the filtering should catch but it ultimately skirts the real problem.

Lastly, *Internet Auction III*,¹⁷³ which also concerned liability for online auction websites like eBay, for its’ role in the sale of counterfeit watches. The court again reaffirmed its holding from the previous two cases thus seemingly cementing the idea that the defendant has a duty to block infringing listings and ensure no further infringements occur between similar listings after being notified of a clear trademark infringement.¹⁷⁴ However, the court reaffirmed that liability is contingent upon infringing listings being detectable by filtering at a reasonable cost, with the possibility of a subsequent manual check.¹⁷⁵

The German approach focuses on the obligation of internet auction sites to remove specific items placed for sale if the trademark owner can demonstrate clear evidence of infringement as well as the obligation to take preventative measures to prevent future infringements as best as possible. The trilogy of cases suggests that eBay will not be held liable for listings that are undetectable with reasonable filtering methods, however, they will be liable if they are put on notice and do not take immediate action. While effective on paper, the focus of an injunction is toward the everyday or multiple item sellers. However, from a buyer’s

¹⁷² *Id.*

¹⁷³ *Internet Auction III*, Bundegerichtshof [BGH] Apr. 30, 2008, Case No. I ZR 73/05 (Ger.), available at <http://www.jurpc.de/rechtspr/20080146.htm> (not yet reported in English).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

standpoint in the U.S., this would be ineffective on a seller who sells an individual item,¹⁷⁶ as courts have continually denied personal jurisdiction for one-time sellers,¹⁷⁷ therefore denying recourse for the buyer of a stolen or infringed good. It also encourages sellers of counterfeit goods to alter how they post items to avoid detection from these types of filters.

C. FRENCH APPROACH

The French approach to dealing with internet auction sites goes one step further in regards to liability and expands it. In June of 2008, the French courts decided three important trademark cases brought by Louis Vuitton Moët Hennessy (LVMH) against eBay accusing it of listing counterfeit goods for sale on its site.¹⁷⁸ This Article will focus on the first two suits involving non-fragrance related items as the third case provides principles that are not as relevant to this discussion.

In the first two cases, LVMH stated that despite repetitive warnings sent since 1999, eBay did not take any effective measures against counterfeiting because they did not require sellers to authenticate items or permanently closing the account of sellers after the first

¹⁷⁶ 95 TMR 977, 990: "...it has become increasingly clear that only those service providers who have continuing relationships with infringers such that they have knowledge of and/or control over infringing activities can be potential targets of contributory liability claims. Conversely, those entities that have only ephemeral contact with the infringing activity will not be liable."

¹⁷⁷ *Boschetto v. Hansing*, 539 F.3d 1011 (C.A. 9, 2008). Plaintiff-Appellant was winning bidder of a 1964 Ford Galaxie sold on eBay by Defendant-Appellee for \$34,106. Plaintiff arranged for the car to be shipped from Wisconsin to California, once it arrived it failed to meet the advertised description. The court held "the sale of one automobile via the eBay website, without more, does not provide sufficient "minimum contacts" to establish jurisdiction over a nonresident defendant in the forum state." *See Also*: 25 UCLAJELP 1, 38—"The U.S. laws likely allow the U.S. government to enforce the ESA against a foreigner who posts an illegal wildlife item for sale on a U.S.-based Internet auction, yet no U.S. court would uphold jurisdiction."

¹⁷⁸ *SA Louis Vuitton Malletier v. eBay*, Tribunal de Commerce de Paris [T.C.] [Commercial Court] Paris, June 30, 2008; *Christian Dior Couture v. eBay*, Tribunal de Commerce de Paris [T.C.] [Commercial Court] Paris, June 30, 2008; *SA Parfums Christian Dior v. eBay*, Tribunal de Commerce de Paris [T.C.] [Commercial Court] Paris, June 30, 2008.

violation.¹⁷⁹ LMVH also argued that the new measures eBay implemented in November 2006 indicate its past negligence.¹⁸⁰ LMVH sought damages for the 300,000 Dior items and 150,000 Louis Vuitton bags offered on eBay during the first six months of 2006, claiming 90% were counterfeit.¹⁸¹ Like in the German *Internet Auction* cases, eBay was found liable for not taking sufficient measures to prevent infringing items from being sold over its site.¹⁸²

Like in most cases eBay has defended, it argued it could not be held liable because it is merely a hosting service, rather than a broker as LMVH argues, that is exempt from liability under Article 6 of the Act on Confidence in the Digital Economy, which protects businesses that provide host services.¹⁸³ The court was not convinced by eBay's argument and ultimately held its site should be deemed a broker rather than a host site.¹⁸⁴ The Court reasoned, due to the fact that eBay provides "tools, specifically intended to promote and develop sales on its sites through; "sales manager" with the creation of on-line shops, the possibility of becoming a "Power-seller", therefore is a major participant in the sales on its sites and plays a very active role in particular commercial campaigns meant to increase the number of transactions generating commissions its collects."¹⁸⁵ The same facts were provided in *Tiffany*, where the court denied eBay's liability for contributory trademark infringement. However, this court found eBay committed violations

¹⁷⁹ *SA Louis Vuitton Malletier*, T.C. Paris at 7 A; *Christian Dior Couture*, T.C. Paris at 7 A. See also: Sofia Ahmed, *Life, Liberty, and the Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France*. See also Sofia Ahmed, *Life, Liberty, and The Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France*, 5 B.Y.U. Int'l L. & Mgmt. Rev. 247, 265 (2009).

¹⁸⁰ *Id.*

¹⁸¹ See Brian W. Brokate, *What's New in Anticounterfeiting*, 947 PLI/PAT 615, 639 (2008).

¹⁸² *SA Louis Vuitton Malletier*, T.C. Paris at 7 A; *Christian Dior Couture*, T.C. Paris at 7 A. See also: Sofia Ahmed, *Life, Liberty, and the Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France*,. See also Sofia Ahmed, *Life, Liberty, and The Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France*, 5 B.Y.U. Int'l L. & Mgmt. Rev. 247, 266 (2009).

¹⁸³ *SA Louis Vuitton Malletier*, T.C. Paris at 10 A; *Christian Dior Couture*, T.C. Paris at 10 A.

¹⁸⁴ *Id.*

¹⁸⁵ *SA Louis Vuitton Malletier*, T.C. Paris at 10A-11 A; *Christian Dior Couture*, T.C. Paris at 10A-11 A.

which were grossly negligent, even though eBay removes listings it finds infringing marks and had its VeRO program in place which LVMH elected not to participate in.¹⁸⁶ The Tribunal ultimately ordered eBay to pay 38.6 million euros (61 million dollars) for financial and reputational damages for selling fake luxury goods as a result of the three cases.¹⁸⁷

D. CONCLUSION

In the United States, it is unlikely eBay will ultimately be held liable for counterfeit sales by third parties unless Congress acts. Although the above discussion only involves trademark infringement cases, one is left to wonder whether each jurisdiction would apply these principles in an illicit sale of cultural property context. Most likely, if an illicit cultural property case were brought against eBay, these principles would likely be analyzed, and a similar result would occur. Based off of case law and public policy promoting e-commerce, it is likely eBay skirts liability. However, the German trilogy of cases in conjunction with the French decisions may put international pressure on the United States to take a stricter approach and implement more drastic measures when dealing with online auction sites.

V. SOLUTIONS AND OVERALL CONCLUSION

The chance of eBay being held liable under the NSPA is slim; however there is still room for improvement on monitoring if it is willing to take on the obligation. It may be that unless and until Congress considers changing the *status quo* that U.S. eBay will not be willing to try to replicate the results its German, French and Swiss counterparts have achieved – albeit with great assistance from their governments. Congressional action is unlikely any time in the near future

¹⁸⁶ *SA Louis Vuitton Malletier*, T.C. Paris at 12 A; *Christian Dior Couture*, T.C. Paris at 12A.

¹⁸⁷ *SA Louis Vuitton Malletier*, T.C. Paris at 17 A-18 A; *Christian Dior Couture*, T.C. Paris at 17 A-18 A; *SA Parfums Christian Dior v. eBay*, T.C. Paris at 17A-18A, *See Also*: Brian W. Brokate, *What's New in Anticounterfeiting*, 947 PLI/PAT 615, 639 (2008).

given the various crises requiring governmental attention. Even though eBay's monitoring in the U.S. has been held sufficient in the trademark realm, an argument can be made that it should be required to monitor or inspect the items being sold at or near the \$5,000 threshold the NSPA has put in place. On August, 19 2013, there were only 393 items listed in the antiquities category for a price of \$5,000 or more (and 132 items listed between \$4,000 and \$4,999 for a total to 525 items in likely range of having the NSPA apply). Admittedly, this isn't the only category of cultural property sold on eBay, but it represents a large portion. If eBay required the two week window for items to be sold as the General Secretarit member suggested, one would believe this to be sufficient enough time to check these items for at least a modicum of documentation of provenance and authenticity if it had a team of experts in place who can spot (the usually shoddy) counterfeit documents.

A simple requirement of provenance or documentation to authenticate the item, as the German eBay site has had implemented, should be adopted even though the U.S. antiquities community rejected the "blank check" approach to implementing the UNESCO treaty, which would have required valid export permits be presented upon importation of virtually all antiquities. Voluntary adoption of this approach seems to have had success in European nations combatting the use of on-line auction sites to traffic in illicie antiquities. This provides an immediate check before allowing the items to be posted for sale. It also likely would reduce the number of postings, therefore reducing the amount of items to check. Another suggestion would be for the government to strike an agreement with eBay (similar to the U.K or Germany) and have the FBI Art Crime Team assist in monitoring and subsequently prosecuting individuals for illicit items, but such a result is unlikely given current funding problems in the United States.

Although these concepts sound great on paper, implementing them may be a tough obstacle. The above solutions would require an infusion of money from either the government or eBay itself and a drastic policy change, making them unlikely to pan out in the U.S. anytime soon. However, several other countries have been able to successfully implement some or all of the aforementioned solutions and therefore these options should – someday – be analyzed by eBay and the U.S. government. At minimum, eBay should at least be required to search the National Stolen Art File or the Stolen Art Works Database as these are free to the public. Lastly, it could also enlist the services or require sellers of high value works to use the Art Loss Register (“ALR”) for which touts itself as the largest database of stolen works. Although the ALR charges a fee, it provides immediate feedback on the item in question. These types of practices are possible in the high-value auction world, although with mixed results, and could be implemented at an appropriate level in the on-line auction context.¹⁸⁸

While there is a legitimate argument that eBay should be held liable for its role in permitting illicit cultural property to be sold through their website, ultimately, it likely will take governmental action to effectuate change. This is typically the response from courts in the United States, reasoning that Congress effectively has given internet platforms immunity in an effort to promote free trade. It is highly unlikely any new legislation will be passed to change the landscape of illicit online cultural property sales. To reach compliance without congressional action, at a minimum, would require the U.S. government to put in place a team of experts dedicated to working with eBay to review items for authenticity and assist internet platforms in the search for illicit items. One way to achieve this would be to put in place a cooperative agreement with the valuable (yet woefully underfunded and shrinking) FBI Art Crime Team.

¹⁸⁸ <http://www.rovinginsight.org/library/?id=458&/arts.auction/>, *see also*: <http://www.tribalmania.com/INTERVIEW.HEINRICH.PAGE2.htm>, <http://art-crime.blogspot.com/2011/03/museums-and-nazi-looted-art-provenance.html>

This would put an end to the failure of complete self-regulation in the internet auction industry.

If the United States intends to combat illicit sales of antiquities and cultural heritage on internet platforms, it will need to follow the successful examples of proactive countries, such as Germany and France, despite domestic differences effectuating the UNESCO Convention.

DRAFT