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STUDENT ARTICLE

Schemes and Scams: Auction Fraud and the Culpability of Host Auction Web Sites

By: Dara Chevlin*

Introduction

It was a typical Sunday morning. Carla the Consumer opened her front door, picked up her Sunday newspaper, and began flipping through the Sunday ads. In addition to the usual grocery coupons, department store ads, and the funnies, a bold new flier caught her eye. The banner across the top proclaimed:

**“eBay: 10 Years! 10% OFF! 10 Days Only!
Check out eBay’s Top 10 Hottest Deals!”**

The page was filled with eBay’s top suggested searches with a coupon code good for ten percent off each winning bid—for ten days only. Remembering that she needed a new handbag, Carla opened her Internet browser and visited <http://www.ebay.com>. She entered eBay’s first search suggestion: “designer handbags.” As the results appeared, she clicked through the items of interest. Some auctions were posted by “powersellers,” vendors with established selling histories, usually vendors with more than one thousand sales. Then Carla came across a designer handbag for a “Buy It Now” price of \$250. The handbag was being sold by Seller X. However, Seller X had no feedback on his account—a key indicator of a seller’s credibility on eBay. Uncomfortable with the lack of information about the seller, Carla moved on to the next item in her search results.

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But what if Carla had decided to bid on that handbag? Perhaps, she would have asked Seller X a question or two about the merchandise. After placing her bid, she would have waited impatiently for the auction to end. If successful, she would have received an email from eBay stating, "Congratulations, you have the highest bid on this designer handbag, Item #XXXX! Please follow the instructions for remitting payment to Seller X." After sending payment, Carla would then have waited patiently for her item to arrive in the mail. But what if Carla's item never arrived? What could she do then?

Serious questions arise from what have now become common transactions on online auction web sites. With whom did Carla conduct the transaction? Would she have visited the web site without the prompting of eBay's newspaper advertisement? What would eBay's responsibility have been if Carla never received her merchandise and if Seller X took off with her money? What would have been her remedies? Against whom? What courts have authority to settle such disputes? What authorities, if any, are able to assist? Finally, and perhaps most important to the average consumer, what is the likelihood of recovery?

These questions pose problems for consumers who want to pursue their legal rights. A key problem relates to jurisdiction. The issue of personal jurisdiction over the Internet remains problematic for courts. There are no hard line rules or well-settled case law for online transactions, let alone on an auction web site. When dealing with an auction site, such as eBay, where the web site you are visiting is not technically the entity with which you are transacting, figuring out where to file—or even if you *can* file an action for recovery is fuzzy at best.

The discussion below will examine the nuances of auction web sites; the types of fraud that occur on these sites; what remedies are currently available to consumers; and how personal jurisdiction applies to online auction web sites so consumers can seek recovery. Finally, the article will examine if host sites, such as eBay, should be held accountable to consumers and will consider additional protections for consumers who conduct business on auction web sites.

I. Auction Web Sites: Bargain-Hunter's Dream or Thieve's Den?

A. The Use of Auction Web Sites: Roles of Buyers, Sellers, and Host Web Sites

Auctions have been used for thousands of years to determine value for items.¹ Online auctions are an increasingly popular Internet destination and source of goods for consumers. At least thirty-one percent of Americans who access the Internet regularly (about 35 million people) participate in online auctions.² Always looking for the best bargain, consumers today are using the Internet to find new ways to save money. As this new market grows, even more individuals will become more comfortable conducting these auctions and exchanges online.³ Auctions provide bargain-hunters with a venue to find rare items at below retail prices. There are two main Internet auction formats.⁴ An English auction is an ascending bid auction, where bidding is open for all to see, and at the end, the winner pays the bid price.⁵ Conversely, a Dutch auction is the opposite of an English auction, where the price of an item starts high and is lowered until someone bids.⁶ The first bidder is the winner.⁷ There are also a variety of hybrid auctions as well.⁸ Yahoo introduced a new option called "Buy Now," which eBay adopted in 2000 under the name "Buy It Now," which as these names suggest, gives bidders

¹ Auctions have been used to determine the value of almost anything. Alex Tajirian, *Auctions, Haggling, and Fixed Prices: A Survey of Recent Literature*, DOMAINMART, (2004), http://www.domainmart.com/Marketplace/Mechanism_Survey.pdf. Around 500 B.C., auctions were used to sell wives in ancient Babylon and in 193 A.D. an auction was used to sell the emperor's crown. *Id.*

² Brian J. Caveney, *Going, Going, Gone . . . The Opportunities and Legal Pitfalls of Online Surgical Auctions*, 103 W. VA. L. REV. 591, 593 (2001).

³ Steven L. Telleen, *Electronic Commerce: Interaction Does Make a Difference*, IORG.COM, (1999), <http://www.iorg.com/ec2.html>.

⁴ Tajirian, *supra* note 1, at 3-4.

⁵ *Id.* In 1998, 121 out of 142 web sites surveyed used this type of auction format. *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 3.

⁸ *Id.* at 4.

the option to end the auction immediately if he or she is willing to pay the seller's posted price.⁹

Online auctions are consistently increasing in popularity, particularly since eBay was founded in 1995.¹⁰ The estimated total number of auction sites has increased to 2,594.¹¹ There are larger, more recognized sites such as eBay and Yahoo! Auctions and a number of smaller sites are also available where a consumer can place a few bids.¹² eBay and Yahoo!, however, clearly dominate the market, with eBay owning 60% of the market share and Yahoo! owning 28%.¹³ These auction web sites provide an infrastructure to let anyone become a buyer or a seller instantaneously.¹⁴

When a consumer makes the decision to conduct a transaction on an auction web site, he or she wants assurance that the transaction is safe and secure. But the most important concerns of buyers are the lack of ability to inspect their merchandise and the actual delivery of the merchandise.¹⁵ Having a national reputation helps alleviate some consumer concerns. As a result of a successful marketing program, ranging from commercials to newspaper ads, eBay has become a household name, thereby, creating greater consumer trust.¹⁶ Research shows that consumers feel a sense of security transacting on eBay.¹⁷

However, upon closer examination, consumers may not be as safe as they think. There is little to no screening when signing up for an eBay user name; in fact, eBay users are not even required to

⁹ Tajirian, *supra* note 1, at 4. eBay introduced this auction format in 2000. *Id.* It was used by 45% of eBay's auctions in its first year and, in 2003, accounted for 29% of gross merchandise sales. *Id.*

¹⁰ eBay, The World's Online Marketplace, <http://pages.ebay.com/aboutebay.html> (select "company overview" hyperlink) (last visited Oct. 25, 2005).

¹¹ See The Internet Auction List, <http://www.Internetauctionlist.com> (last visited Oct. 25, 2005) (listing various online auction sites).

¹² Examples of smaller auction web sites include: www.ubid.com, www.auction.com, and www.bid2save.com.

¹³ Tajirian, *supra* note 1, at 7. As of 2001, eBay owned 60% of the market share, Yahoo! owned 28%, Amazon trailed with 6%, and the other 6% was shared by smaller web sites. *Id.* On any given day, there are, on average, more than 12 million items listed on eBay across 18,000 categories. *Id.*

¹⁴ Telleen, *supra* note 3.

¹⁵ Tajirian, *supra* note 1, at 10.

¹⁶ Robyn Greenspan, *Consumers Trust eBay*, ClickZ Stats, June 16, 2004, http://www.ecommerce-guide.com/resources/market_research/article.php/3369451.

¹⁷ *Id.*

divulge their true identities, since the information provided on the registration form is not verified. Once one becomes an eBay user, he or she can post items for sale. Establishing a seller account merely requires a credit card or checking account number.¹⁸ Sellers also have the *option* of using “ID Verify,” where a seller answers a few questions and becomes a verified member for a fee of five dollars.¹⁹ An optional service, however, does not afford any real protection as the users who opt into this program are less likely to be the sellers who take advantage of consumers. Additionally, there is no identity verification or inspection of the merchandise up for sale.²⁰ This is convenient for a mom from Iowa who is trying to clean out her attic and get top dollar for those antiques she found, but it is also opportune for those in the business of stealing from unsuspecting Internet consumers. Virtually anyone with Internet access can sign up for a user name, or three, or ten as long as he or she obtains different email addresses (which can also be created for free on any number of web sites).²¹ In short, both buyers and sellers have fears, habits, and blind spots to overcome before any marketplace can operate efficiently and safely for consumers.²²

B. Internet Fraud: Crimes That Occur on Auction Web Sites and Trends

The popularity of the Internet and specifically auction web sites has created the ability for anyone with a computer to make a quick buck—honestly or not. Today, anything and everything is being sold on online auction web sites. For example, a West Virginia man placed an airplane for auction on eBay and succeeded in finding

¹⁸ eBay, Creating a Seller’s Account, http://pages.ebay.com/help/sell/seller_account.html (last visited November 29, 2005).

¹⁹ eBay, ID Verify, <http://pages.ebay.com/services/buyandsell/idverify-login.html> (last visited November 27, 2005).

²⁰ While members are required to enter their personal information such as name, address, and telephone number in order to register for eBay, eBay “cannot and does not confirm each user’s purported identity.” eBay User Agreement § 3.3, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Nov. 20, 2005).

²¹ Free email services are provided by many providers including Hotmail, Yahoo!, and Google.

²² Telleen, *supra* note 3.

a buyer willing to purchase the plane for \$16,200.²³ The prospective buyer sent a \$2,000 deposit, but never heard from the seller.²⁴ When the seller finally responded to the buyer's emails, the seller accused the buyer of harassment and said he was going to keep the deposit and refused to deliver the plane.²⁵ He then re-listed the airplane on eBay and sold it to a different buyer.²⁶ Outrageous? Several web sites have even tried to auction off medical procedures and organs.²⁷ These cases are extreme examples, but they clearly illustrate the severity of this growing problem—fraud on auction web sites and the lack of regulation on or by these online auction web sites.

As consumers become savvier, so do the scam artists. With the ever-increasing popularity of auction web sites, online auction fraud is also on the rise.²⁸ Fraud involving the use of online auctions is by far the most frequently reported type of Internet fraud.²⁹ Evidence of the increasing problem can be seen below—a yearly comparison of the number of complaints received by the Internet Crime Complaint Center from 2000, the year the organization was formed, to the end of 2004:³⁰

²³ Iris Taylor, *Consumer Watch: Internet Auctions Top Fraud List*, RICHMOND TIMES-DISPATCH, Jan. 30, 2005, at D1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ The West Virginia man who sold the plane on eBay led the police on a 100mph motorcycle chase, was arrested and charged with fraud. *Id.* Last June, he pled guilty to a lesser charge of obtaining money under false pretenses. *Id.* He was sentenced to six months in jail, fined \$250 plus court costs and ordered to pay restitution to his victim within ten months of his release. *Id.* The man's sentence was then suspended pending payment of restitution to his victim. *Id.*

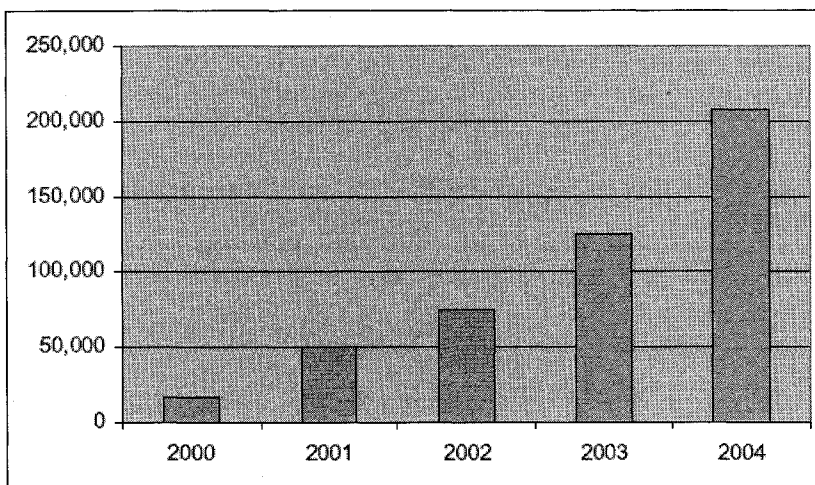
²⁷ Caveney, *supra* note 2, at 595-96. A large private hospital group in South Africa auctioned off surgeries including breast reductions and liposuction, where the winner received a recovery at an upscale Johannesburg hotel. *Id.* at 595. Medical professionals are worried about the fraud that will follow. *Id.* at 598-99. One psychiatrist (who posed as a plastic surgeon and claimed to perform breast augmentations) has already been caught. *Id.* at 599.

²⁸ Jonathan Rusch, *U.S. Attorney's Bulletin: The Rising Tide of Internet Fraud*, http://www.usdoj.gov/criminal/cybercrime/usamay2001_1.htm (last visited Oct. 25, 2005).

²⁹ *Id.*

³⁰ Nat'l White Collar Crime Ctr. & the FBI, Internet Crime Complaint Center 2004 Internet Fraud Crime Report at 5 (2005), available at http://www.ifccfbi.gov/strategy/2004_IC3Report.pdf.

Chart 1
Yearly Comparison of Complaints Received Via IC3 Website



Auction fraud may assume various forms.³¹ The most common scam involves a situation like the airplane scheme discussed earlier.³² A seller posts a high-priced item, like an airplane, on a well-known web site, such as eBay. The winning bidder will send his or her money to the seller, but the promised merchandise will never be sent.³³ A variation of this scam involves the payment for a winning item, but instead of never receiving the items, the seller sends counterfeit merchandise.³⁴ Most consumer fraud victims lose small

³¹ See generally *id.*

³² *Id.* at 6.

³³ See *U.S. v. Hartman*, 74 Fed. App'x. 159 (3d Cir. 2003) (unpublished), where the defendant was found guilty of mail fraud, wire fraud, obstruction of justice, and making false statements. *Id.* at 160. The defendant was offering various goods (including automobile parts, electronic equipment, and Palm Pilots) for sale on an auction web site. *Id.* He would instruct buyers to mail payments to him. *Id.* at 161. When he received the payments, he would cash them, and never send the merchandise, as he was offering goods that he did not possess. *Id.* He was sentenced to eight months in prison and ordered to pay restitution to his victims. *Id.* at 160. See also *U.S. v. Jackson*, 61 Fed. App'x. 851 (4th Cir. 2003) (unpublished), where the defendant defrauded 100 victims out of approximately \$105,965.07 after the non-delivery of computers and other items posted on Internet auction sites. *Id.* at 852.

³⁴ See *Gentry v. eBay*, 99 Cal. App. 4th 816 (2002). A class of plaintiffs filed suit against eBay upon learning that the sports memorabilia that they purchased off

amounts of money and are unable to get the attention of their local authorities. These consumers are left with no other option, but to protect themselves.

The Internet Crime Complaint Center³⁵ suggests that consumers “do their homework on the individual or company to ensure that they are legitimate.”³⁶ Unfortunately, it may not be enough to “do your homework” because it is impossible for consumers to know if what they are learning is fact or fiction. In response to increasing buyer demand for information about potential sellers, web sites such as eBay and Yahoo! Auctions have established a system for feedback: after a transaction, a buyer can report comments about his or her experiences with that particular seller and vice versa.³⁷ However, this feedback system is hardly a foolproof check on a seller’s reliability and credibility. Even feedback systems have become vulnerable to scams that are unique to online auctions including “shill bidding” and “shill feedback.”³⁸ “Shills” are bidders who have no genuine interest in the merchandise on which they are bidding, but have been hired to place bids in order to create the appearance of interest and prompt genuine bidders to bid higher than they might have otherwise.³⁹ Scam artists also use false email addresses to provide “shill feedback”—information that is favorable

the auction web site was fake. *Id.* at 821. Plaintiffs alleged that eBay failed to supply certificates of authenticity and permitted false representations to be placed on its web site, thereby, making its own false and misleading representations. *Id.* at 822. *See also* U.S. v. Gajdik, 292 F.3d 555 (7th Cir. 2002), where the defendant began to sell designer sunglasses on eBay that were described as new and under manufacturer’s warranty. *Id.* at 556. In fact, the sunglasses were broken—the defendant has retrieved them from a dumpster outside the manufacturer’s warehouse. *Id.* The defendant also began to auction off higher end merchandise including Rolex watches, diamonds, and collectible coins, none of which he possessed or had the intention to deliver. *Id.* In all, he conned consumers out nearly \$700,000. *Id.* He was charged with mail fraud, wire fraud, money laundering, and interstate transportation of stolen currency. *Id.*

³⁵ The Internet Fraud Complaint Center (IFCC) is a partnership between the Federal Bureau of Investigations (FBI) and the National White Collar Crime Center (NW3C), <http://www.ifccfbi.gov/index.asp> (last visited Nov. 20, 2005).

³⁶ IFCC, Internet Fraud Preventative Measures, <http://www.ifccfbi.gov/strategy/fraudtips.asp> (last visited Oct. 25, 2005).

³⁷ *See* eBay, Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited Oct. 25, 2005).

³⁸ Rusch, *supra* note 28.

³⁹ *Id.*

about them, but is certainly false.⁴⁰ Sellers do this to create the appearance that they have satisfied customers with the intention of deceiving and misleading future customers.⁴¹

Consumers are not the only ones frustrated with the fraud occurring on auction web sites. Last year, Tiffany & Co. brought suit against eBay, accusing eBay of trademark infringement by facilitating and promoting the sale of tens of thousands of pieces of counterfeit Tiffany's jewelry.⁴² In an attempt to place greater responsibility on the shoulders of the monster web site, Tiffany & Co. maintains that fraud is not just the consumer's problem or Tiffany's problem; it is becoming eBay's problem as well.⁴³ Though eBay has been cooperative with companies in the past by providing a link directly on the web site to report issues, the results are still unsatisfactory.⁴⁴ Counterfeit merchandise is still being sold, branding of legitimate manufacturers is being damaged, and consumers are still being defrauded.⁴⁵

In 2002, the average reported loss incurred by a victim of Internet fraud was \$484.⁴⁶ Auction fraud accounts for approximately eighty-seven percent of all documented Internet fraud complaints.⁴⁷ In 2004, the Internet Crime Complaint Center discovered that consumers who reported Internet fraud were conned out of about \$68 million.⁴⁸ One individual lost \$560,000, but most victims lost less

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Michael Bobelian, *Tiffany and eBay Clash Over Sales of Fake Goods*, 231 N.Y. L. J. 1 (2004).

⁴³ *Id.*

⁴⁴ *Id.* Tiffany monitors eBay regularly. *Id.* "In one five-month period it notified eBay of 19,000 efforts to sell suspected fake Tiffany goods, it said in its court complaint, about 125 a day. All were removed by eBay." *Id.*

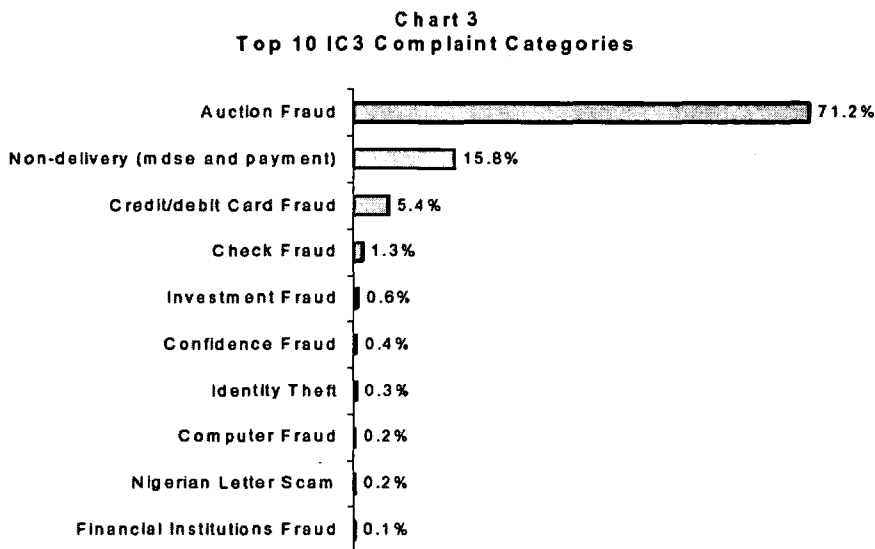
⁴⁵ *Id.* Tiffany's complaint alleges that the company bought "186 pieces of jewelry described as original Tiffany goods a few months ago and found that only 5 percent of the items were genuine[.]" *Id.* The Tiffany & Co. case is still ongoing in the Southern District of New York.

⁴⁶ Nat'l Fraud Info. Ctr., 2002 Internet Fraud Statistics, <http://www.fraud.org/02intstats.htm> (last visited Nov. 20, 2005).

⁴⁷ Of the Internet crimes reported, 71.2% was reported as "Auction Fraud" and 15.8% was reported as "Non-delivery." Nat'l White Collar Crime Ctr. & the FBI, *supra* note 30, at 3.

⁴⁸ Taylor, *supra* note 23.

than \$1,000.⁴⁹ Auction fraud victims lost the least amount of money, but accounted for the largest number of complaints.⁵⁰ The Internet Crime Complaint Center reported that the average auction fraud victim lost around \$200.⁵¹ However, these statistics are not representative of the entire problem. Authorities say that the number of people who complain is “probably just the tip of an iceberg.”⁵² The following chart summarizes the categories of complaints received by the Internet Crime Complaint Center in 2004:⁵³



C. The Level of Responsibility Host Web Sites Take Upon Themselves: *Caveat Emptor*

Host web sites use a number of difference devices to attempt to insulate themselves from liability for fraud. For example, according to eBay’s user agreement, a member of eBay must be at least eighteen-years-old and able to enter into legally binding

⁴⁹ *Id.*

⁵⁰ Nat’l White Collar Crime Ctr. & the FBI, *supra* note 30, at 6-7.

⁵¹ *Id.* at 7.

⁵² Taylor, *supra* note 23.

⁵³ Nat’l White Collar Crime Ctr. & the FBI, *supra* note 30, at 6.

contracts under applicable law.⁵⁴ The user agreement also makes explicitly clear that eBay is a venue, not an auctioneer.⁵⁵ Instead of acting as a traditional auctioneer, eBay claims that the web site “acts as a venue to allow anyone to offer, sell, and buy just about anything, at any time, anywhere, in a variety of pricing formats . . . we are not involved in the actual transaction between buyers and sellers.”⁵⁶ The agreement also states that the site uses many techniques to verify the accuracy of the information that users provide when they sign up for membership, yet they never elaborate on exactly what those techniques entail.⁵⁷ They disclaim this statement; however, by then stating that because verifying information over the Internet is very difficult, eBay “cannot and does not confirm each user’s purported identity.”⁵⁸ However, in 1999, eBay initiated a voluntary program called “Verified eBay User” for users who wish to participate.⁵⁹ This program encourages users to provide personal information including

⁵⁴ eBay User Agreement, *supra* note 20, at § 1.

⁵⁵ *Id.* at § 3.1.

⁵⁶ *Id.* eBay User Agreement § 3.1 states:

We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to pay for items. We cannot ensure that a buyer or seller will actually complete a transaction. Consequently, we do not transfer legal ownership of items from the seller to the buyer, and nothing in this agreement shall modify the governing provisions of Ca. Com. Code § 2401(2) and Uniform Com. Code § 2-401(2), under which legal ownership of an item is transferred upon physical delivery of the item to the buyer by the seller.

⁵⁷ *Id.* at § 3.3.

⁵⁸ *Id.* eBay User Agreement §3.3 states:

Identity Verification. We use many techniques to verify the accuracy of the information our users provide us when they register on the Site. However, because user verification on the Internet is difficult, **eBay cannot and does not confirm each user’s purported identity.** Thus, we have established a user-initiated feedback system to help you evaluate with whom you are dealing. We also encourage you to communicate directly with potential trading partners through the tools available on the Site. You may also wish to consider using a third party escrow service or services that provide additional user verification.

Id.(emphasis added).

⁵⁹ Verified eBay User FAQ, <http://pages.ebay.ie/help/policies/identity-idverify.html> (last visited Nov. 20, 2005).

social security numbers, driver's license numbers, and date of birth.⁶⁰ Though it appeared to be a step in the right direction, the level of security offered by a voluntary program is questionable. Logically, those who use eBay as a mechanism for defrauding consumers will most likely be unwilling to provide personal information—and any information that is provided may not even belong to them. eBay was also wary of the cost of the program and has contemplated charging users to use it.⁶¹

Yahoo! Auctions posts similar legal disclaimers.⁶² The site's guidelines remind users that Yahoo! does not participate in, nor is it a party to, auction transactions.⁶³ The site does not screen or control users who may sell or bid nor does the site review or authenticate auction listings.⁶⁴ But it does remind users that they are responsible for working out any disputes and complying with any applicable laws that may pertain to the transactions in which they participate.⁶⁵ Most importantly, Yahoo! Terms of Service state that users of their service participate at the user's own risk.⁶⁶ While sellers usually do have to give credit card information to link to their account for the purpose of collecting fees (which is preferred to requiring no credit card information), it is unclear whether the credit card has to be registered to the reported user. As long as the number is valid, an account can

⁶⁰ eBay does not keep copies of this information; the information is given to Equifax Secure Inc. for identity verification and only Equifax retains a record of that information. *U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace Comments*, Federal Trade Commission, available at <http://www.ftc.gov/bcp/icpw/comments/ebay.htm> (comments of eBay, Inc.) (last visited Nov. 20, 2005).

⁶¹ Verified eBay User FAQ, *supra* note 59.

⁶² Yahoo! Terms of Service, <http://docs.yahoo.com/info/terms/> (last visited Oct. 25, 2005); Yahoo! Auction Additional Terms, <http://auctions.yahoo.com/phtml/auc/us/legal/additionaltos.html> (last visited Oct. 25, 2005).

⁶³ Yahoo! Auction Additional Terms, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Yahoo! Terms of Service, *supra* note 62, at § 17(a). The section states:

Your use of the service is at your sole risk. The service is provided on an "as is" and "as available" basis. Yahoo and its subsidiaries, affiliates, officers, employees, agents, partners, and licensors expressly disclaim all warranties of any kind, whether express or implied, including, but not limited to the implied warranties of merchantability, fitness for a particular purpose, and non-infringement.

be opened. Moreover, scam artists have been able to trick existing users into divulging information about their accounts and credit card information.⁶⁷

Overall, auction web sites have, in essence, taken no responsibility upon themselves and appear to have taken a caveat emptor⁶⁸ philosophy.⁶⁹ Courts have yet to come down on these web sites, but the rulings on cases, including the Tiffany & Co. case,⁷⁰ are being watched closely. Notwithstanding the purported disclaimers, the question remains: are the disclaimers valid? Are these statements, in and of themselves, sufficient to exculpate the auction sites from liability?

D. The Pros and Cons of Remedies Currently Available to Consumers

Though recovery may seem bleak, victims of auction fraud do have options. The first step a victim of auction fraud normally takes is to report the problem to the host web site.⁷¹ Web sites often have arenas for dispute resolution.⁷² For example, eBay's "Item Not Received or Significantly Not as Described Policy" allows a buyer who has not received his or her merchandise to file a form where eBay tries to communicate with the seller.⁷³ Sellers have a number of

⁶⁷ Paula Festa, *Identity Thieves Strike eBay*, CNET NEWS.COM, Nov. 22, 2002, <http://news.com.com/2100-1017-966835.html>.

"the fact remains that con artists are using stolen numbers to set up a growing number of increasingly convincing scams intended to part eBay buyers and sellers from their usernames and passwords. Once a con artist has commandeered an account, the process of defrauding buyers out of potentially tens of thousands of dollars while evading detection becomes that much easier. One expert in the area of identity theft said that the eBay scams fit a classic mold of identity theft schemes." *Id.*

⁶⁸ A Latin phrase meaning "Let the buyer beware."

⁶⁹ See eBay User Agreement, *supra* note 20, at § 3.4; Yahoo! Auction Additional Terms, *supra* note 62.

⁷⁰ See *supra* Part I.B for a discussion of *Tiffany v. eBay*.

⁷¹ See eBay Security & Resolution Center, <http://pages.ebay.com/securitycenter/> (last visited Oct. 25, 2005).

⁷² *Id.*; Yahoo! Auction Abuse form, http://add.yahoo.com/fast/help/us/auct/cgi_abuse (last visited Oct. 25, 2005).

⁷³ eBay's Item Not Received or Significantly Not as Described Policy, <http://pages.ebay.com/help/policies/inr-snad-policy.html> (last visited Oct. 25,

options in terms of how they would like to respond including trying to settle the dispute or not. Sanctions range from account suspension to no action at all.⁷⁴ While eBay has, in the past, cooperated with legal authority, since there is no real sanction for failure to respond, many sellers may not respond at all.⁷⁵ Buyers who are unable to resolve their concerns through the “Item Not Received or Significantly Not as Described” dispute process may then be eligible for reimbursement through eBay’s “Standard Purchase Protection Program.”⁷⁶ This protection plan, however, has a processing fee of \$25 and the maximum any buyer can recover is \$175.⁷⁷ The protection plan also contains strict limitations such as payment by credit card and user ratings.⁷⁸ Both the buyer and seller must have feedback ratings of greater than zero when your auction closes.⁷⁹

For example, consider a scenario where a seller has ten listings, no feedback, and a buyer bids when the auction has five days left. The listing of interest to the buyer ended five days later than the other auctions. By the time the listing the buyer bid on ends, the seller may have received nine negative feedbacks each saying “Item Never Received” and have a feedback rating of -9. Under this scenario, the seller did not have this rating when you bid, but rather at the close of your listing. Consequently, your item would no longer be covered under eBay’s buyer protection policy, although it would have been covered at the time you placed your bid.⁸⁰ Furthermore, as a part

2005).

⁷⁴ *Id.*

⁷⁵ From the description of the policy, it seems that, in most cases, all eBay will do is potentially close your account. eBay explains that “[s]ellers who fail to deliver items to buyers, or who deliver items which are “significantly not as described”, may face possible account restriction and suspension. And in some cases, eBay will also contact and cooperate with law enforcement to penalize fraudulent sellers.” *Id.* However, as discussed *supra* in Part I.B though, a scam artist can have a new user name and a new account with a new email address in a matter of minutes.

⁷⁶ eBay’s Standard Purchase Protection Program may reimburse buyers ineligible transactions where an item was purchased on eBay and was either not received or was received but was significantly different than described. eBay’s Standard Purchase Protection Program, <http://pages.ebay.com/help/tp/esppp-coverage-eligibility.html> (last visited Nov. 20, 2005).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

of your user agreement, you are now obligated to pay for your item.⁸¹ This format is clearly deficient and leaves the buyer with no option but to cross his fingers and hope his item is actually delivered.⁸²

Auction web sites also encourage defrauded consumers to seek reimbursement through their credit card companies.⁸³ Many credit card companies will try to resolve disputes for you and temporarily reimburse a consumer while they investigate the situation.⁸⁴ The fact of the matter is that if all consumers used credit cards on auction web sites, much of the fraud that occurs on web sites could be more easily avoided because consumers would have a remedy. Credit card companies appear to have taken some responsibility for fraud and have instituted venues for consumers to pursue remedies.⁸⁵ Unfortunately, auction fraud also occurs when consumers send checks or wire funds to sellers. One eBay customer bid and won a 2000 Porsche 911 for \$50,000, and he wired the money to an escrow company.⁸⁶ It turned out that the seller had “hijacked” an existing member’s account and set up a fake escrow service.⁸⁷ When the man reported the situation to eBay, he said there was no help and that “they’re useless in a bad situation.”⁸⁸ For those consumers who complete transactions using credit cards that offer protection, there is some hope for recovery. But for those who choose other forms of payment, they are right back where they started.

Victims of auction fraud may also report the fraud to a

⁸¹ eBay User Agreement, *supra* note 20, at § 4.

⁸² *Id.*

⁸³ See eBay’s Standard Purchase Protection Program, *supra* note 76.

⁸⁴ For example, American Express has a *Fraud Protection Guarantee* for purchases made with your credit card. The company offers a quick resolution. “If any fraudulent charge appears on your statement, simply notify us at the 800 number on the back of your Card, or access your account at americanexpress.com/myca and notify us by e-mail. In most cases, a temporary credit is given *immediately*.” Am. Express Fraud Protection Guarantee, <https://www124.americanexpress.com/cards/loyalty.do?page=fraudprotection.guarantee> (last visited Oct. 31, 2005).

⁸⁵ *Id.*

⁸⁶ Troy Wolverton, *Fraud Lingers Despite eBay Efforts*, CNET NEWS.COM, http://news.com.com/2102-1017_3-940427.html (last visited Nov. 20, 2005).

⁸⁷ *Id.*

⁸⁸ *Id.*

number of government agencies.⁸⁹ The Internet Fraud Complaint Center began its operations in May, 2000,⁹⁰ and recently changed its name to the Internet Crime Complaint Center. On its web site, consumers can find tips to protect themselves against fraud, learn about common Internet schemes, and file complaints online.⁹¹ Its primary goal is to address fraud committed over the Internet by facilitating the flow of information between law enforcement agencies and victims.⁹² For consumers, this is a venue where they can file a complaint and hopefully, the complaint will be routed to proper local authorities.⁹³

Consumers can also turn to the Federal Trade Commission (FTC).⁹⁴ The FTC has been mildly successful at prosecuting auction scam artists, but still has a long way to go in combating online fraud.⁹⁵ Currently, the FTC has an online form⁹⁶ as well as an 800 number that consumers can call to file a complaint. Specifically, the FTC realized the need for new methods of collecting and analyzing information about the online marketplace, as well as properly training agencies to deal with this new era of fraud.⁹⁷ To do so, they have

⁸⁹ Fraud may be reported to the Internet Crime Complaint Center, Federal Trade Commission, U.S. Postal Service (to report mail fraud), your banking institution, Attorney General's office of your home state as well as the seller's home state, and local police.

⁹⁰ Internet Fraud Complaint Center (IFCC), <http://www.ifccfbi.gov/index.asp> (last visited Oct. 25, 2005).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The Federal Trade Commission (FTC) is the federal government's primary consumer protection agency. The FTC's jurisdiction extends over the entire economy, including business and consumer transactions over the Internet. *Internet Fraud: Hearing Before the Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 107th Cong. (2001) (statement of the Federal Trade Commission).

⁹⁵ Since 1994, the FTC has brought 182 cases against over 593 defendants. *Id.*

⁹⁶ FTC Consumer Complaint Form, <http://www.ftc.gov/> (select "Consumer" hyperlink; then select "File a Complaint").

⁹⁷ The FTC has developed *Project Safebid* which consists of training, law enforcement, and education. FTC, *Going, Going, Gone . . . Law Enforcement Efforts to Combat Internet Auction Fraud*, Feb. 2000, at 3, available at <http://www.ftc.gov/bcp/reports/int-auction.pdf>. The project was designed to foster cooperation between local, state, and federal law enforcement. *Id.*

instituted electronic complaint forms, similar to those found on the Internet Crime Complaint Center, as well as maintaining the Consumer Sentinel, the largest North American consumer fraud database, which is integral to tracking complaints and coordinating law enforcement agencies.⁹⁸ Other than these federal agencies, consumers can send complaints to their own local authorities (police or the Attorney General's Office) or the authorities in the state of the fraudulent seller, hoping that something somewhere sticks.⁹⁹

II. The Jurisdictional Problems of Auction Web Sites

A. Personal Jurisdiction in General

Under current law, if a consumer who has been defrauded in an online auction wants to seek a legal remedy, he or she must decide against whom an action could be filed and where that action should be filed. Today, a consumer using an auction site like eBay has no legal recourse against the web site.¹⁰⁰ If a consumer chooses to bring an action against the seller who posted his or her item for sale, the consumer is left with an intimidating task. Not only did the transaction occur online, which makes it difficult to figure out where to sue and which laws apply, but often times, it may be difficult, if not impossible, to locate the seller, who enjoys the anonymity that the Internet and his user name provide him.

The Supreme Court has acknowledged that as technology has progressed, "the need for jurisdiction has undergone a similar increase."¹⁰¹ Technology has resulted in the exchange of business transactions through wireless technology as opposed to traditional person-to-person transactions.¹⁰² The standards of personal jurisdiction will continue to change with the development of new

⁹⁸ FTC Consumer Complaint Form, *supra* note 96.

⁹⁹ See *infra* Part II for a discussion of the jurisdictional problems of auction web sites.

¹⁰⁰ Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should be Regulated*, 39 AM. BUS. L.J. 575, 575 (2002).

¹⁰¹ *Hanson v. Denckla*, 357 U.S. 235, 250 (1958).

¹⁰² "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which the business is conducted." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

technology. Traditionally, personal jurisdiction was dependent upon the physical presence of the defendant in the forum state.¹⁰³ The Internet poses obvious challenges to this test because the Internet “diminished the significance of the physical location of the parties involved in the transaction.”¹⁰⁴ Personal jurisdiction gives a court the ability to assert jurisdiction over a defendant in order to fairly adjudicate matters involving people and property.¹⁰⁵ Most states have long-arm statutes governing who is subject to jurisdiction in that particular state, focusing on the behavior and activities of the defendant.¹⁰⁶ Courts have the discretion to look at the defendant’s activities and if within the parameters of the state’s long-arm statute and jurisdiction is proper under the Due Process Clause of the Fourteenth Amendment, the defendant will be subject to the jurisdiction of that particular state.¹⁰⁷

Personal jurisdiction falls into two categories: general jurisdiction and specific jurisdiction.¹⁰⁸ General jurisdiction is when a court can exercise jurisdiction over a defendant “regardless of whether the cause of action arose from the defendant’s activities.”¹⁰⁹ General jurisdiction presumes that the defendant has such “systematic and continuous contacts” with the forum state, that jurisdiction is proper.¹¹⁰ Specific jurisdiction arises when the action is specifically

¹⁰³ *Hanson*, 357 U.S. at 246-47.

¹⁰⁴ Denis T. Rice, *Jurisdiction in Cyberspace: Which Law and Forum Apply to Securities Transactions on the Internet*, 21 U. PA. J. INT’L ECON. L. 585, 585 (2000).

¹⁰⁵ BLACK’S LAW DICTIONARY 384 (2d pocket ed. 2001).

¹⁰⁶ *See, e.g.*, 735 ILL. COMP. STAT. 5/2-208-20.

¹⁰⁷ *Burger King Corp.*, 471 U.S. at 471-73. The Due Process Clause of the Fourteenth Amendment is a limitation on state power to exercise jurisdiction over a non-resident defendant. *Id.*

¹⁰⁸ Louis U. Gasparini, *The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century Under the New York CPLR*, 12 ALB. L.J. SCI. & TECH. 191, 196-97 (2001).

¹⁰⁹ *See Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414 (1984) (holding that general jurisdiction over a defendant occurs when a State exercises jurisdiction over that defendant in a suit that did not arise out of or related to the defendant’s contacts with the forum state).

¹¹⁰ *See Asahi Metal Indus. Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987) (holding that the mere placement of products into the stream of commerce is not enough to constitute purposeful availment).

related to the defendant's contact with the forum state.¹¹¹ Because online auctions deal with particular transactions, specific jurisdiction is most applicable to transactions that occur on auction web sites.

Under specific jurisdiction, courts use a three-part test to determine whether or not jurisdiction is appropriate: (1) does the defendant have sufficient minimum contacts (has the defendant purposefully availed himself in the forum state?)¹¹²; (2) do the defendant's forum-related activities relate to the claim?¹¹³ and (3) is the exercise of jurisdiction reasonable taking into consideration notions of "fair play and substantial justice?"¹¹⁴ The Supreme Court has held that personal jurisdiction is appropriate if the defendant has "certain minimum contacts such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹¹⁵

The examination of minimum contacts occasionally poses challenges for courts. The Supreme Court has offered some clarification, holding that minimum contacts exist if "a defendant reasonably anticipates being haled to court there."¹¹⁶ The Supreme Court has also stated that whether or not a defendant may anticipate being sued in a particular state depends on whether the defendant has "purposefully availed [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."¹¹⁷

Courts have struggled for years, outside the Internet context, to refine the meaning of purposeful availment.¹¹⁸ For example, does a defendant's mere knowledge that his or her actions will have consequences in the forum state satisfy due process or must a defendant actively seek a connection to the forum state?¹¹⁹ This issue is critical in analyzing personal jurisdiction for Internet-based

¹¹¹ *Helicopteros*, 466 U.S. at 414.

¹¹² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

¹¹³ *Int'l. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹¹⁴ *Id.*; see also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

¹¹⁵ *Int'l. Shoe*, 326 U.S. at 316.

¹¹⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

¹¹⁷ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹¹⁸ Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 433 (2004)

¹¹⁹ *Id.*

claims.¹²⁰ Minimum contacts requirements become even more convoluted when trying to apply them to sellers who transact on auction web sites. Since the transaction most likely occurred completely on the Internet, where could a seller anticipate being hauled to court? Predictability is the crux of the minimum contacts requirement, but the lack of predictability is a problem inherent in the context of an online auction web site.¹²¹

Once a court determines that a defendant has minimum contacts with the forum state, a court must still determine whether or not jurisdiction is reasonable.¹²² The court's considerations should include: (1) the state's interest in protecting residents of the forum state; (2) the plaintiff's interest in obtaining relief; (3) the most efficient way to resolve the conflict; and (4) the state's interest in furthering social policy.¹²³ Questions of reasonableness are often a balancing test of these many factors, and defendants are left with the burden of proving that jurisdiction is not reasonable.¹²⁴

B. Personal Jurisdiction as Applied to the Internet: *Zippo* and Beyond...

Courts have struggled to apply personal jurisdiction tests in the context of the Internet. In 1997, a Pennsylvania district court developed a test for exercising personal jurisdiction over those who conduct business on the Internet.¹²⁵ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* gave courts a "sliding scale" that measured personal jurisdiction proportionately to the nature and quality of the activities conducted over the Internet.¹²⁶ The sliding scale that was developed was "consistent with well developed personal jurisdiction principles."¹²⁷ The court described three main categories in which

¹²⁰ *Id.*

¹²¹ Note, *A "Category-Specific" Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law*, 117 HARV. L. REV. 1617, 1619 (2004).

¹²² *Burger King v. Rudzewicz*, 471 U.S. 462, 478-82 (1985).

¹²³ *World-Wide Volkswagen*, 444 U.S. at 292.

¹²⁴ Susan Nauss Exon, *A New Show Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI & TECH.1, 7 (2000).

¹²⁵ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1123.

web sites may be categorized.¹²⁸ The first and most conservative group of web sites is called “passive.”¹²⁹ Passive web sites do little more than offer information to users who happen to come across it while surfing the web.¹³⁰ These web sites, where defendants merely post information, are generally not sufficient to establish personal jurisdiction.¹³¹ The next set of web sites are designated as “interactive.”¹³² On an interactive web site, a user can exchange information over the site itself.¹³³ Proper jurisdiction for “active web sites” is determined by examining the “level of interactivity and commercial nature of the exchange of information.”¹³⁴ The final category are the “active” web sites, web sites that actively conduct business over the Internet, entering into contracts with forum residents and making a profit in a way that constitutes purposeful availment of the forum state’s laws and business.¹³⁵

Recently, however, courts have attempted to move away from *Zippo*¹³⁶ as the results using *Zippo* vary greatly.¹³⁷ In *Malcolm v.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Zippo Mfg. Co.*, 952 F.Supp. at 1123.

¹³¹ *Id.* at 1124.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

¹³⁶ See Note, *supra* note 121, at 1618 (discussing four flaws with the *Zippo* test, identified by Professor Michael Geist: (1) the middle category of “interactive” web sites is problematic and fosters unpredictable results; (2) the test must undergo continual revision to reflect changing technology; (3) the test stunts the growth of e-commerce by discouraging the development of interactive web sites; (4) and the category of “interactive web sites” is overly inclusive because it grants jurisdiction to a given forum only on the basis of whether a site could have affected the forum, not on the basis of whether it actually did so).

¹³⁷ Critics of *Zippo* argue that the passive/interactive test represents an “egregious failure of legal imagination.” Stein, *supra* note 118, at 430. Professor Stein argues that courts lack an adequate conceptual account of why purposeful availment matter and courts have reverted back to thinking about jurisdiction in terms of physical presence. *Id.* That is, the interactive web site seems like the defendant is actually operating a store within the forum state. *Id.* And if the defendant is only “conveying information,” he is not really there. *Id.* See also Bunmi Awoyemi, *Zippo is Dying, Should It Be Dead?: The Exercise of Personal Jurisdiction By U.S. Federal Courts Over Non-Domiciliary Defendants in*

Esposito, a Virginia court declined to use the Zippo test in analyzing an eBay transaction, stating that “this Court does not find the Zippo model particularly instructive to the case at bar because the facts in *Zippo* and most cases following it relate to the defendant’s conduct on his own web site. In the instant case, the defendants do not operate eBay; rather, they simply use the web site as a venue for car auctions.”¹³⁸ Instead of using a Zippo analysis, the court used a two-prong test: (1) whether the plaintiff showed that Virginia’s long-arm statute reaches the non-resident defendant; and (2) whether the exercise of personal jurisdiction is consistent with the Due Process clause.¹³⁹ The court ultimately found that they could exercise personal jurisdiction over the defendant, even though it was acknowledged that other courts facing similar challenges with eBay transactions have declined to exercise jurisdiction over non-resident defendants.¹⁴⁰

Contrary to the holding in *Malcolm*, in *Metcalf v. Lawson*, the Supreme Court of New Hampshire analyzing a similar eBay transaction held that the defendant did not have sufficient contacts or engage in sufficient activity to make it fair and reasonable to defend a claim in New Hampshire.¹⁴¹ The court used traditional personal jurisdiction analysis to decide whether exercising jurisdiction was appropriate: (1) whether the contacts relate to the cause of action; (2) whether the defendant has purposefully availed herself of the protections of New Hampshire law; and (3) whether it would be fair and reasonable to require the defendant to defend a suit in New Hampshire.¹⁴² The lower court found that by advertising on eBay, the

Trademark Infringement Lawsuits Arising Out of Cyberspace, 9 MARQ. INTELL. PROP. L. REV. 37, 53 (2005).

¹³⁸ *Malcolm v. Esposito*, 63 Va. Cir. 440, 444 (Va. Cir. 2003). The defendant had placed a BMW for sale on eBay. When the plaintiffs discovered a malfunction in a car they had purchased on an online auction they attempted to rescind the sale, but defendant refused. *Id.* The court concluded that formation of the contract for the sale of the BMW occurred in Virginia because the plaintiffs bid on the car while they were located in Virginia, therefore satisfying Virginia’s long-arm statute. *Id.* The court stated that the fact that the transaction occurred on the Internet does not change Virginia law. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 444. See also *Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002) (declining to exercise personal jurisdiction over a non-resident eBay seller based on the isolated nature of the transaction).

¹⁴¹ *Metcalf*, 802 A.2d at 1226.

¹⁴² *Id.* at 1225.

defendant knew or should have known that the offer would extend to possible buyers in all fifty states and by doing business on the Internet, the defendant has the requisite minimum contact with the state.¹⁴³ The Supreme Court of New Hampshire, however, found that this issue of foreseeability was insufficient to establish personal jurisdiction.¹⁴⁴ This court also declined to use the *Zippo* test, stating that it was not particularly helpful in cases where transactions were conducted through Internet auction sites.¹⁴⁵

Apart from the guidelines set forth in *Zippo*, some courts have chosen to adopt their own rationale for upholding jurisdiction over web sites. In addition to interactive and active web sites, courts have found jurisdiction over web sites based on Internet marketing that ultimately result in sales in the forum state.¹⁴⁶ In *TELCO Communications, Inc. v. An Apple a Day, Inc.*,¹⁴⁷ a Virginia federal court held that online advertising was a “persistent course of conduct” satisfying the state’s long-arm statute for exercising personal jurisdiction.¹⁴⁸ In *TELCO*, the defendant posted press releases on the Internet, advertised regularly in a “consistent and repetitive fashion”, actively solicited business in the forum state, and was ultimately subject to personal jurisdiction.¹⁴⁹ The court also noted that placing press releases on the Internet, which could be accessed by a Virginian at any time, was considered as doing regular business in Virginia for the purposes of Virginia’s long-arm statute.¹⁵⁰

C. How Traditional Notions of Jurisdiction and the *Zippo* Test Can Be Applied to Host Auction Web Sites: How Should Auction Sites Be Classified?

Internet fraud is a difficult crime for authorities to

¹⁴³ *Id.* at 1222.

¹⁴⁴ *Id.* at 1226.

¹⁴⁵ *Id.* at 1222.

¹⁴⁶ Exon, *supra* note 124, at 12-13.

¹⁴⁷ *TELCO Communications, Inc. v. An Apple a Day, Inc.*, 977 F. Supp. 404, 407 (E.D. Va. 1997).

¹⁴⁸ *Id.* at 406; Jamie Spataro, *Personal Jurisdiction Over the Internet: How International is Today’s Shoe*, 3 U. PITT. J. TECH. & POL’Y. 2, 12(2002).

¹⁴⁹ *Telco Commc’ns Group, Inc.*, 977 F. Supp. at 406.

¹⁵⁰ *Id.*

prosecute,¹⁵¹ and arguably, it is even more difficult for a consumer to seek restitution. The first step in examining how to seek a remedy for an Internet transaction gone wrong is to figure out who to sue and where a consumer can bring suit. Because the transaction occurred online, first instincts point to the application of the *Zippo* test and an examination of the web site on which the transaction took place. If, for example, the transaction occurred on eBay, as a whole, how would the site be classified? Under the *Zippo* test, we must look at the nature and quality of the activities conducted.¹⁵² Upon first glance, it seems rather obvious that eBay would be at the highest level of the *Zippo* test—"active." Millions of transactions occur on the site annually.¹⁵³ The site is accessed and used by consumers and vendors all over the globe.¹⁵⁴ Moreover, eBay actively advertises and solicits business around the globe to attract consumers to their site and use its service. Thus, eBay would almost certainly be classified as active. Therefore, under *Zippo*, when a web site is classified as "active," it is more likely for a court to exercise personal jurisdiction when a consumer brings an action.

However, is eBay really the party that the consumer should be examining? After all, eBay is only a venue and "not a party to any transaction."¹⁵⁵ The actual transaction takes place between the buyer and the seller, not the buyer and the auction site. Though courts are split as to when the exercise of personal jurisdiction is appropriate, many courts have concluded that *Zippo* is of little help when it comes to analyzing Internet transactions that occur on auction web sites.¹⁵⁶

¹⁵¹ Thomas Richardson, Deputy Assistant Director of the Criminal Investigative Division of the FBI, stated that "fraud committed via the Internet makes investigation and prosecution difficult because the offender and victim may be located thousands of miles apart. FBI, *Internet Fraud*, <http://www.fbi.gov/majcases/fraud/internetschemes.htm> (last visited Nov. 29, 2005). This borderless phenomena is a unique characteristic of Internet crime, and is not found with many other types of traditional crime." *Id.*

¹⁵² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹⁵³ See Tajirian, *supra* note 1, at 7 ("In 2003, eBay members were involved in \$24 billion in sales, a 60% increase from previous year. There were 94.9 million registered users in 2003, a 54% increase from the previous year. Total listings in 2003 were 292 million, up from 195 million in 2002").

¹⁵⁴ See eBay Company Overview, *supra* note 10.

¹⁵⁵ See eBay User Agreement, *supra* note 20, at § 3.

¹⁵⁶ See *Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002); see also *Malcolm v. Esposito*, 63 Va. Cir. 440, 444 (Va. Cir. 2003).

To examine how personal jurisdiction may be exercised over a seller, these courts note that the seller does not operate the web site, yet the seller still conducted the transaction online.¹⁵⁷ Can traditional notions of personal jurisdiction apply to the seller himself? In *Winfield Collection, Ltd. v. McCauley*, the court held that two sales made to Michigan residents through eBay, standing alone, were insufficient to find that the defendant had purposefully availed herself of the privileges and protections of the state of Michigan because the defendant's sales were the result of "random and attenuated contacts."¹⁵⁸ So, even if the buyer is lucky enough to have a name and address for a particular seller, which often times he or she does not, the buyer is still left with a serious challenge, since courts are still divided on the application of jurisdictional principles to Internet transactions, particularly sellers on auction web sites.

The inconsistency of rulings in auction fraud cases involving both seller and auction web sites as discussed earlier, offer little guidance to consumers who are trying to seek remedies for online transactions gone awry. In analyzing the web presence or online activity of the seller, we must look at the "listing" on the auction web site. The seller would be unable to offer an item for sale without utilizing the service and web space of the host auction web site. The listing's web space was, in essence, rented from eBay for the duration of the auction. Arguably, the "listing page" simply occupied eBay's web space and does not have the necessary level of interaction of eBay as a whole if a consumer is trying to hold a seller accountable under a *Zippo* analysis. By placing a listing on the web, is the seller purposefully availing himself? Could the web page that the listing occupies be considered "passive" since it does nothing more than offer information to the buyer regarding that particular item?¹⁵⁹ Or perhaps because the listing page allows for communication between sellers and potential buyers, the page may rise to the level of interactive?¹⁶⁰ It is difficult to know for sure, but poses a perplexing problem. *Zippo* offers little to no guidance with respect to auction web sites or the sellers who use these auction web sites, and application of the test therein to this area yields inconsistent results as

¹⁵⁷ See *Metcalfe*, 802 A.2d at 1227; see also *Malcolm*, 63 Va. Cir. at 444.

¹⁵⁸ *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000).

¹⁵⁹ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹⁶⁰ *Id.*

seem in both the *Malcolm* and *Metcalf* cases. An auction-specific test that yields consistent results is needed, and until one is developed, consumers should be afforded more protection by host auction web sites.

III. Consumer Impact

A. Is the Current System Enough?

Host auction web sites argue that with all of the agencies, rules, and jurisdictional tests that are currently in place, consumers are well-protected from online fraud.¹⁶¹ From the consumers' perspective, however, if one attempts to bring a cause of action, the jurisdictional challenges that the Internet poses to individual consumers seem too daunting to overcome. The great expense involved in litigating a dispute over a few hundred dollars plus attorney's fees may not seem worth it. Consumers may also hesitate to bring suit because under current law, a consumer who has been the victim of fraud in an online transaction has no recourse against the online auction site that facilitated and controlled the auction transaction and claimed a percentage of the transaction price as a fee.¹⁶² These web sites can and do disclaim responsibility for fraud that occurs right under their noses.¹⁶³ Moreover, even locating the seller is problematic due to the lack of verified contact information. All these factors weigh against recovery for the defrauded consumer.

In response, authorities stress that it is the responsibility of the consumer to educate themselves and avoid situations that appear suspicious.¹⁶⁴ It can be conceded that a certain level of responsibility rests on the shoulders of the consumer—he or she should learn as much as possible before deciding to conduct a transaction over the Internet and place a bid on an online auction.¹⁶⁵ As discussed earlier, however, doing your homework does not seem to be enough to afford the level of protection that consumers need to protect themselves

¹⁶¹ eBay's Comments to the FTC, *supra* note 60.

¹⁶² Albert, *supra* note 100, at 576.

¹⁶³ See eBay User Agreement, *supra* note 20 at § 3.4; Yahoo! Auction Additional Terms, *supra* note 62.

¹⁶⁴ FBI Internet Fraud, *supra* note 151.

¹⁶⁵ *Id.*

from online auction fraud.¹⁶⁶ Additionally, it seems logical to use a credit card with fraud protection whenever you conduct business on auction web sites since credit card companies have taken positive steps toward combating auction fraud.¹⁶⁷

While the protection policies of some of the web sites are certainly steps in the right direction, one can take issue with the fact that eBay charges consumers \$25 to be reimbursed for fraudulent sales when the average sale on eBay is just \$50.¹⁶⁸ If the average consumer is defrauded out of \$50, he or she can only recover \$25 (if the transaction meets eBay's other stringent requirements).¹⁶⁹ Yahoo! Auctions has an almost identical "Buyer Protection" program, where the web site limits recovery to \$200, and then subtracts a \$25 processing fee.¹⁷⁰ Yahoo!, however, stipulates that "there is a lifetime limit of two claims per user,"¹⁷¹ which means the third time you are scammed on their web site, you are on your own.

The various agencies and authorities that are currently in place are an important part of the fight against fraud, but it seems as though only large cases grab and maintain the attention of the authorities—where a consumer either loses a few thousand dollars or one seller defrauds a number of sellers.¹⁷² Problems still remain for those victims who only lose a few hundred dollars to scam artists who possibly decided to take advantage of only a handful of buyers. Evidence of the deficiencies in current remedies lie in a new trend that has emerged in online auctions: vigilantism.¹⁷³ Consumers who have been victims of auction scams are banding together and trying

¹⁶⁶ For a fuller discussion of online auction crimes, see *supra* Part I.B.

¹⁶⁷ See *supra* Part I.E.

¹⁶⁸ Jennifer Couzin, *Analysis: eBay Fraud Lawsuit Raises Questions*, CNN.com, Nov. 7, 2000, <http://archives.cnn.com/2000/TECH/computing/11/07/suing.ebay.idg/>.

¹⁶⁹ See *supra* Part I.E.

¹⁷⁰ Yahoo Buyer Protection Program FAQ, <http://help.yahoo.com/help/us/auct/abid/insure/insure-01.html> (last visited Nov. 20, 2005).

¹⁷¹ *Id.*

¹⁷² See Linda Rosencrance, *Maine Man Sentenced to 6 years for eBay Scam*, COMPUTERWORLD, Apr. 7, 2005, <http://www.computerworld.com/securitytopics/security/story/0,10801,100923,00.html> (describing case where defendant was convicting of defrauding at least 321 victims out of nearly \$118,000).

¹⁷³ Ina Steiner, *eBay Auction Fraud Spawns Vigilantism Trend*, AUCTIONBYTES.COM, Oct. 12, 2002, <http://www.auctionbytes.com/cab/abn/y02/m10/i12/s01>.

to coordinate efforts to report fraud and contact law enforcement agencies, though little progress has been made.¹⁷⁴

In short, effective remedies are difficult to achieve in the online marketplace. Complaints of auction fraud increase every year.¹⁷⁵ Globalization increases these challenges for consumer protection law enforcement. And while law enforcement agencies are trying to catch up to the speed of the criminals, more preventative measures also need to be taken to stop the problem before it starts. These agencies urge buyers to take more preventative measures, so it seems fair to require the host web sites to take these measures as well. For example, host web sites should be required to verify information and identification as opposed to making it optional, like eBay's "ID Verify" service.

However, host auction web sites vehemently oppose any type of regulation.¹⁷⁶ They claim that their consumer protection measures are a sufficient protection against fraud and deception.¹⁷⁷ Mostly, it seems as though auction sites worry that if the government gets involved, the growth of the online marketplace will be stifled.¹⁷⁸ In the end, though, it's a simple monetary analysis: affording greater levels of protection to consumers will be costly for a web site to undertake, particularly at the rapid pace that this market is growing. As a result, auction sites want consumers and their credit card companies to bear the risk and claim that consumers are capable of protecting themselves.¹⁷⁹

¹⁷⁴ A group of buyers who were defrauded after trying to buy laptops on eBay rallied and created a web site and mailing list dedicated to publishing information about the seller who defrauded them. *Id.* The list grew to 83 members. *Id.* Refunds were made the two buyers who initiated the web site in an effort to get them to stop their pursuit. *Id.* In the end, however, authorities say that collecting information is "all well and good," but consumers should not take matters into their own hands; they should always contact appropriate authorities. *Id.*

¹⁷⁵ Nat'l White Collar Crime Ctr. & the FBI, *supra* note 30.

¹⁷⁶ eBay's Comments to the FTC, *supra* note 60.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Albert, *supra* note 100, at 619. The existing safeguards that consumer have available to them are insufficient and amount to essentially no protection unless the victims themselves are willing to undertake their own efforts and the costs associated with them. *Id.* And the increasing number of complaints illustrate that consumers feel that the safeguards in place are useless. *Id.* at 619-20.

B. Stricter Regulations on Host Web Sites?

Many value the Internet as an arena for free expression and take pleasure in “e-commerce” and the opportunities of the global marketplace.¹⁸⁰ However, the current freedom enjoyed by consumers is also a fertile ground for scam artists. As we have seen, the Internet and specifically, auction web sites have posed challenges to courts, resulting in varying decisions on whether and how to extend personal jurisdiction.

Some have suggested the creation of a “cybercourt” to handle matters resulting from crimes committed over the Internet since the jurisdictional and other legal issues surrounding the Internet are so daunting.¹⁸¹ However, the creation of an entirely new system of justice like a “cybercourt” may be considered extreme. It is unlikely that such a radical idea will be instituted in the near future, as it is likely to have a great deal of opposition. Moreover, only time will tell what the Supreme Court will do with the issue of personal jurisdiction.

In addition, others recommend that web sites such as eBay should take more responsibility for the business that is conducted on their sites because it sends a message that customers are important to them.¹⁸² Tiffany & Co. argues that eBay should be actively policing their web site for fraudulent listings.¹⁸³ eBay, however, is taking the position that they are not an auctioneer and cannot monitor thousands of auctions.¹⁸⁴ Tiffany claims that eBay should be held responsible

¹⁸⁰ *Id.* at 576.

¹⁸¹ Exon, *supra* note 124, at 51-53. Professor Exon suggests that a cybercourt would require one court in only one geographical location. *Id.* This cybercourt would have its own web site where injured parties could pursue either dispute resolution or more traditional litigation, and the actual dispute resolution would take place via teleconferencing. *Id.* at 52. She argue that a cybercourt is convenient and will save time and money. *Id.* at 53.

¹⁸² News Release, Warwick Business School, Should eBay Adopt the Caveat Emptor or the Tylenol Defense? (Nov. 1, 2004), <http://www.pnewsire.co.uk/cgi/news/release?id=133417>.

¹⁸³ Bob Sullivan, *EBay Fights its Toughest Legal Battle: Tiffany Lawsuit puts 'hands off' approach to the test*, MSNBC, Sept. 21, 2004, <http://msnbc.msn.com/id/6030048>.

¹⁸⁴ See eBay User Agreement, *supra* note 20, at § 3. Firms such as GenuOne Inc. have made an entire business out of protecting brand names on eBay—scouring and searching for fraudulent listings on the web site. GenuNET Auctions, <http://www.genuone.com/> (select “GenuNET Auctions V4.0 eBay monitoring and enforcement”).

because the web site both directly and indirectly assists counterfeiters and scam artists as the web site pushes out special advertisements to popular search engines (the same sorts of activities that constitute minimum contacts and purposeful availment).¹⁸⁵ Because users and customers feel as though they have a right to secure transactions with some redress from the entity which provides that service, eBay should act to meet the expectations of their millions of consumers. Otherwise, consumers will become unsatisfied. What may cost eBay money in the short term can prove to be beneficial in the long-term because they will be able to sustain customer satisfaction.

eBay takes great care to call itself a “trading community.”¹⁸⁶ However, this self-titled description may be at odds with the reasonable beliefs of its users. Its millions of users and competitors, may and very likely *do* view eBay as an auctioneer, because the company provides the technology to hold thousands of auctions daily.¹⁸⁷ Though eBay holds no inventory like a traditional auction house, eBay profits from every sale that is completed on its web site.¹⁸⁸

In *Gentry v. eBay*,¹⁸⁹ the court battled with the issue of eBay’s level of responsibility toward their customers—whether or not the web site should guarantee the authenticity of the merchandise sold on the site.¹⁹⁰ In this case, a class of plaintiffs was defrauded by purchasing fake sports memorabilia included baseballs and bats that were supposed to have been signed by sports icons such as Mickey Mantle and Joe DiMaggio.¹⁹¹ The defendants had been peddling these fake items on eBay for nearly four years when the FBI finally caught

¹⁸⁵ Sullivan, *supra* note 183. Tiffany’s lawsuit also claims indirect trademark infringement due to the sheer volume of fake merchandise being sold—which proves that counterfeiting is taking place. *Id.*

¹⁸⁶ eBay, Our Community, <http://pages.ebay.com/aboutebay.html> (select “community” hyperlink) (last visited Oct. 25, 2005).

¹⁸⁷ See eBay Company Overview, *supra* note 10.

¹⁸⁸ See eBay Investor Relations FAQ, <http://investor.ebay.com/faq.cfm> (last visited Oct. 25, 2005) (“eBay primarily makes its money from listing, feature and final value fees collected from registered users who use an eBay site to trade their goods.”).

¹⁸⁹ *Gentry v. eBay*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002).

¹⁹⁰ *Id.* at 706.

¹⁹¹ *Id.* at 707.

them.¹⁹² The California court held that eBay had no responsibility to authenticate the items in question, since eBay was not the party physically selling the items.¹⁹³ The plaintiffs, however, argued that eBay should be considered an auctioneer or dealer, which under California law, would have made them responsible for authenticating merchandise.¹⁹⁴ Ironically, the court never responded directly to plaintiffs' claim that eBay had obligations by virtue of its status as an auctioneer. The court neither determined whether eBay was an auctioneer, or as an auctioneer, whether it had obligations under California law. While the plaintiffs argued that eBay should be considered an auctioneer, one plaintiff stated, "I feel that [eBay] certainly should have been more vigilant in guarding the authenticity of the product that was sold on their site . . . [but] I'm not buying it from eBay, I'm buying it from the vendor . . . eBay's just the bulletin board."¹⁹⁵

Comments such as these illustrate both the frustration and expectations of consumers. In order to recover his \$364, this plaintiff had to be named in a class action suit.¹⁹⁶ Most fraudulent transactions will never get to that point. Unless eBay assists in preventing the fraud from the beginning, consumers seem to be doomed. After being burned one time too many, consumers may simply stop using eBay's service. This hurts eBay and all of the honest sellers trying to conduct business. No one wins.

A new potential solution for the fraud that plagues auction web sites is enactment of stricter regulations on host auction web sites. Stricter regulations on host auction web sites may reduce the likelihood of a scam artist seducing and luring unsuspecting consumers into traps and also offers a greater level of protection for consumers—and may even increase the web site's business with increased consumer confidence. Some argue that Congress should pass legislation establishing uniform standards for Internet personal jurisdiction that would translate policy goals into clear rules dictating when a court could exercise jurisdiction over a dispute involving a transaction over the web.¹⁹⁷ Hopefully, that type of legislation would

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Gentry*, 121 Cal. Rptr. 2d at 707.

¹⁹⁵ *Couzin*, *supra* note 168.

¹⁹⁶ *Id.*

¹⁹⁷ Note, *supra* note 121, at 1621.

also closely examine the role that auction web sites play in the grand scheme of online transacting.

Those who favor stricter regulation of auction web sites argue the high number of complaints about auction fraud highlight the absence of any meaningful consumer protection for auction participants.¹⁹⁸ Advocates of site regulation urge that a comprehensive governmental effort involving the regulation of the auctions, enforcement, and consumer education would be a better option than the current system.¹⁹⁹ Moreover, they argue that unless auction web sites are ultimately held financially responsible for their business that is conducted under their supervision, they have no incentive to clean up the fraud.²⁰⁰ Simply put, auction sites are still collecting their fees from sellers for transactions, whether the consumer is defrauded or not.²⁰¹

Regulation on host auction sites should include mandatory identity authentication standards—the web site should verify the identities of each and every buyer and seller who conduct business on the site.²⁰² Additionally, web sites should limit the number of user names assigned to an email address, which would potentially decrease the number of scam artists who cloak themselves in anonymity. Some argue that even the creditworthiness of both parties should be authenticated.²⁰³ In the end, if a host site failed to enforce those types of requirements, violating the federal statutes, they should incur financial penalties, substantial enough to make fraud prevention a priority. The statutes should also allow a consumer or any legal authority to bring an action alleging violations of the federal statute(s) in his or her appropriate jurisdiction, including state court under that state's long-arm statute. This would not stop authorities

¹⁹⁸ Albert, *supra* note 100, at 576.

¹⁹⁹ *Id.* at 602.

²⁰⁰ *Id.*

²⁰¹ eBay, Basic Fees, <http://pages.ebay.com/help/sell/fees.html> (last visited Oct. 31, 2005). eBay collects a fee from sellers when they list items for sale. *Id.* In addition, eBay collects a Final Value Fee from the seller, a percentage of the final bid that the item receives. *Id.* Therefore, fees are collected as soon as an auction ends, and eBay makes money whether or not a buyer ever receives his or her merchandise.

²⁰² Identification can be verified through any reputable credit agency.

²⁰³ Albert, *supra* note 100, at 606. Perhaps auction sites should require a valid credit card number with sufficient available credit to cover the value of the transaction before allowing parties to engage in a transaction.

from pursuing the instigator behind the scheme, but would afford consumers some relief in the mean time.

Conclusion

Overall, the number of complaints and consumers becoming victims of auction fraud increases annually. Though host auction web sites continue to argue that they should be permitted to govern themselves, claiming that their mechanisms are most effective to prevent fraud, the statistics clearly show that their efforts are ineffective in stemming the growing problem of online auction fraud. The scam artists are becoming smarter and using the anonymity of the Internet to their advantage. The remedies available to consumers appear to be limited. Unless a consumer has lost a great deal of money, it is difficult to get the attention of law enforcement agencies. And those consumers who do try and seek remedies for themselves are posed with a variety of challenges as to where he or she can bring an action and against whom—and if bringing action is worth it at all. Our initial reactions tell us that the seller who was the mastermind of the fraudulent activity should be held responsible. Furthermore, host web sites should not be allowed to turn a blind eye to the seller's deception and the consumer's harm with cleverly worded disclaimers and labels. Finally, whether the seller or the host web site is a party, personal jurisdiction principles must be more clearly outlined to provide better opportunities for consumer recovery.

Several cases have attempted to make eBay accountable for fraudulent activity that occurs on their site because the host auction web site makes money at the close of every auction held on their web site (fraudulent or not), what incentive does eBay have to keep a closer eye on its users? Of course, eBay wants to maintain its reputation. But until host auction sites feel the impact of fraud in their earnings, fraud prevention will not receive the attention and investment of resources that it deserves. One solution is stricter federal regulations on host auction web sites, imposing rules, remedies, and financial penalties for violations of such statutes. Absent some new regulation of auction web sites, consumers seem doomed either to live by caveat emptor or to abandon this growing online market.
