

# ANTIQUITY MEETS THE MODERN AGE: EBAY'S POTENTIAL CRIMINAL LIABILITY FOR COUNTERFEIT AND STOLEN INTERNATIONAL ANTIQUITY SALES

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## INTRODUCTION

Antiquities and cultural property—authentic, fake, legitimate, and stolen—have been sold internationally for centuries.<sup>1</sup> The number of these sales has drastically increased with the advent of Internet sales platforms.<sup>2</sup> The proliferation of illicit sales has led the international community to combat them, but as illustrated in Part I, *infra*, a quick perusal of eBay, Inc. (“eBay”) on any given day will still show thousands of questionable antiquities listed for sale.<sup>3</sup> 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 potentially be criminally liable under current U.S. statutes. Part I will provide an overview of the

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1. Laney Salisbury and Aly Sujo, Provenance: How a Con Man and a Forger Rewrote the History of Modern Art 234 (2009).
2. Karen Olsen Bruhns, Networks, 18 SAA Bulletin (Mar. 2000), <http://www.saa.org/Portals/0/SAA/Publications/SAABulletin/18-2/saa11.html> (noting that the antiquities market has moved online in an increasing manner).
3. See Conclusions: 7th International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiquities, Interpol (2008) [hereinafter INTERPOL Conclusions]; Art Collector Warning: Print Signature Forgery Problems, ArtBusiness, <http://www.artbusiness.com/sigwarn.html> (“Large numbers of prints and lithographs, originally published unsigned in art books, periodicals, and portfolios, are offered for sale with fake or questionable signatures, particularly at online auction sites like eBay.”) (emphasis in original).

international eBay marketplace, the United Nations Educational, Scientific and Cultural Organization 1970 Convention on the Means of Prohibiting and Preventing the 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’ laws concerning stolen antiquities. Part II will also endeavor to explain why the U.S. website seemingly lags behind in reducing illicit online 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 treatments of Internet auction website liability when counterfeit goods are sold and how U.S. eBay’s platform could draw from its policies preventing sales of counterfeit trademarked goods. Finally, Part V will explore possible solutions for the shortfalls in the U.S. eBay’s monitoring procedures and conclude that eBay has exposure to criminal liability because of the shortcomings of its U.S. policies when taken in the context of its international platform policies and international trademark policies. Nonetheless, although it is clearly possible for the 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 is negligible given the current state of the United States’ legal framework.

#### 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.<sup>4</sup> A fourth emerging 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 sales, controlling 95% of all online auctions.<sup>5</sup> Currently, eBay has more than 116 million active users<sup>6</sup> and in 2008 had around half a million online stores.<sup>7</sup> A search on August 10, 2013 revealed that there were 22

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4. Christopher Chippindale & David Gill, *On-line Auctions: A New Venue for the Antiquities Market*, CULTURE WITHOUT CONTEXT (2001), <http://www2.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue9/chippindale-gill.htm> (arguing that the antiquities market has been subject to three venues: public auctions, sales from dealers whose stock may be publicly announced or displayed, and private transactions).
  5. Ried Goldsborough, *Distinguishing Bargains from Counterfeit Scams on eBay*, (Dec. 15, 2008), <http://www.infoday.com/linkup/lud121508-goldsborough.shtml> (noting that eBay controls 95% of online auction listings).
  6. *eBay Inc. Corporate Fact Sheet: Q3 2013*, EBAY INC., [http://legacy.ebayinc.com/assets/pdf/fact\\_sheet/eBay\\_Marketplaces\\_Fast\\_Facts\\_Q12013.pdf](http://legacy.ebayinc.com/assets/pdf/fact_sheet/eBay_Marketplaces_Fast_Facts_Q12013.pdf). (noting that there are currently 123.6 million active users of eBay).
  7. Goldsborough, *supra* note 5 (noting that eBay has about half a million online stores).

categories listed under “Antiques,” under which the sub-category of “Antiquities” contained an additional 16 categories consisting of some 31,579 items.<sup>8</sup>

Two main questions arise when determining the legality of eBay antiquities transactions. First, are the items authentic or forged? 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.<sup>9</sup> In his article *Forging Ahead*, he estimated that around 30% are obvious fakes or tourist art, while only 5% are real objects.<sup>10</sup> The third type, which he labels “ambiguous objects,” accounts for the largest percentage.<sup>11</sup> These objects would need to be viewed before an informed decision could be made concerning their authenticity.<sup>12</sup>

According to Professor Stanish, the 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.<sup>13</sup> The problem came to the attention of The International Criminal Police Organization (“INTERPOL”) Expert Group on Stolen Cultural Property, which met in March 2006 to discuss cultural property Internet sales.<sup>14</sup> 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.<sup>15</sup> The Group then decided that guidelines were needed to address who should verify authenticity, at what point in the auction such verification should be made, and who should be held responsible when illicit items are auctioned.<sup>16</sup>

Following the meeting, INTERPOL, The United Nations Educational, Scientific and Cultural Organization (“UNESCO”), and The

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8. *Antiquities*, [http://antiques.shop.ebay.com/Antiquities-/37903/i.html?\\_catref=1&\\_trksid=p3910.c0.m449](http://antiques.shop.ebay.com/Antiquities-/37903/i.html?_catref=1&_trksid=p3910.c0.m449) (last visited Dec. 22, 2013).
  9. Charles Stanish, *Forging Ahead*, *ARCHAEOLOGY* (May/June 2009), available at <http://www.archaeology.org/0905/etc/insider.html> (stating that there are three types of antiquities available on eBay).
  10. *Id.*
  11. *Id.*
  12. *Id.*
  13. *Id.*
  14. *Basic Actions Concerning Cultural Objects Being Offered for Sale over the Internet*, UNESCO, 1, 1, <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf> (last visited Dec. 22, 2013) [hereinafter UNESCO, *Basic Actions*].
  15. *Id.* (noting that it has been “internationally recognized that the illicit trade of cultural objects via the Internet is a very serious and growing problem. . .”).
  16. *Id.*

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International Council of Museums (“ICOM”) issued a list of *Basic Actions to Counter the Increasing Illicit Sale of Cultural Objects through the Internet*.<sup>17</sup> The objective was to create guidelines for member states and Internet platforms, but the document is not legally binding.<sup>18</sup> 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.”<sup>19</sup>

The resulting list states that Internet sales platforms are strongly encouraged to place a disclaimer on their sites and disclose all pertinent information regarding suspicious sales.<sup>20</sup> 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 Internet.”<sup>21</sup> This authority would run checks on the authenticity of items and keep record of the results of these checks along with all register information.<sup>22</sup> Each nation would be responsible for creating its own legal measures for tracking and seizing illicit objects and returning those objects to their rightful owners.<sup>23</sup>

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.<sup>24</sup> The concluding memorandum further 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.<sup>25</sup>

While UNESCO recommendations do not create legal obligations and rights between state parties, they do have legal implications amongst member states.<sup>26</sup> This concept was provided for in a UNESCO document (UNESCO/CUA/68, 9 August 1955, 3-4),<sup>27</sup> which provides:

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 2.

21. *Id.*

22. *Id.*

23. *Id.* at 3.

24. INTERPOL Conclusions, *supra* note 3, at 2 (stating that member states should “[c]irculate as widely as possible the INTERPOL-UNESCO-ICOM joint letter on Basic Actions concerning cultural objects being offered for sale over the Internet so that these actions can be implemented, and conclude agreements with auction platforms in order to reduce illegal sales and to monitor this type of trade as effectively as possible.”).

25. *Id.*

26. UNESCO, *Basic Actions*, *supra* note 14, at 3 (noting legal measures to be taken).

27. *Id.*

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.<sup>28</sup>

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 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.”<sup>29</sup> A presumed advantage of recommendations is that they create a “best practice” for industry experts across the numerous jurisdictions.<sup>30</sup>

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 lutte contre le trafic des Biens Culturels (“OCBC”), which encouraged eBay to create an interface that the OCBC could use to conduct searches for stolen property.<sup>31</sup> eBay transfers data for verification, and the OCBC uses the interface to check for legitimacy of sale items.<sup>32</sup>

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.<sup>33</sup> The British Museum (on behalf of the MLA) also manages the central authority called the Portable Antiquities Scheme (“PAS”).<sup>34</sup> The PAS works with eBay to

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28. *Id.*

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

30. *Id.* at 206.

31. Edouard Planche, *Fighting Against Illicit Trafficking of Cultural Goods on the Internet: UNESCO and its Partners’ Response*, CITIES WORLD (Feb. 2010), <http://www.cites.org/eng/news/world/19/5.shtml>.

32. *Id.* (noting that “eBay regularly transfers data to the OCBC for deeper verifications”).

33. eBay partners with British Museum and Museums, Libraries and Archives Council to protect British Treasures (August, 2006), [http://www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2006/eBay\\_partnership.aspx](http://www.britishmuseum.org/about_us/news_and_press/press_releases/2006/eBay_partnership.aspx).

34. *Id.*

stop the sale of illicit items; PAS created a detailed, easily understandable informational guide on buying and selling antiquities that eBay exhibits to buyers and sellers.<sup>35</sup> 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.<sup>36</sup>

Austria, Switzerland, and Germany also started pilot projects whereby the sale of cultural property on eBay was allowed only if the seller could prove authenticity and provide provenance.<sup>37</sup> To prove the authenticity of an item, the seller had to provide a legible document demonstrating authenticity; otherwise, the object would be removed from the website.<sup>38</sup> 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.<sup>39</sup>

Germany has also been a notable frontrunner in its efforts to stop the illicit sale of cultural property and antiquities on Internet platforms, as discussed in the next Part, while the United States is notably absent 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.<sup>40</sup> This leeway has given member states the ability to accept only certain provisions of UNESCO as well as create new administrative oversight entities.<sup>41</sup> This Part will compare the legal framework in the

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35. *Antiquities Buying Guide*, <http://pages.ebay.co.uk/buy/guides/antiquities/> (last visited Dec. 22, 2013) (stating that in “England, Wales, and Northern Ireland there is a legal obligation to report treasure finds” if found under the Treasure Act).
  36. *Scheme and eBay*, PORTABLE ANTIQUITIES SCHEME, <http://finds.org.uk/treasure/advice/schemeandebay> (last visited Dec. 22, 2013) (discussing comments made about the Portable Antiquities Scheme's partnership with eBay).
  37. Planche, *supra* note 31 (discussing concrete measures countries have taken against illegal sales of cultural property by partnering with eBay).
  38. *Id.* (discussing specific measures to ensure the authenticity of artifacts sold on eBay).
  39. *Id.* (discussing further collaboration between Switzerland and eBay based on the success of an initial partnership).
  40. 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) (discussing the UNESCO Convention and the vast deference it gives countries to implement it).
  41. *See id.* at 846 (discussing significance of UNESCO's policy of deferring to member countries).

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 websites have posted policies regarding cultural property; however, these policies differ significantly. The most significant difference between the two policies is that the German eBay website allows cultural property sales only if an individual can provide legitimate proof of provenance, whereas the U.S. website broadly restricts the description of items or categories they can be placed for sale in, but only bans the sale of some Native American items. The latter 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”).<sup>42</sup> Germany passed the Act on the Return of Cultural Property (Kulturgüterrückgabegesetz – KultGüRückG).<sup>43</sup> The remainder of this Part contrasts these two very different laws from each other.

Where the former law is concerned, the United States took an import restriction approach. The CCPIA is not a criminal statute, but rather a customs law found under Title 19 of the U.S. Code (“Customs Duties”).<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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42. 19 U.S.C. §§ 2601-2613 (2007) (codifying the 1970 UNESCO Convention).

43. Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern [hereinafter *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/](http://www.gesetze-im-internet.de/englisch_kultg_r_ckg/) (codifying the 1970 UNESCO Convention into German law).

44. See *United States v. Schultz*, 333 F.3d 393, 409 (2d Cir. 2003) (discussing the differences between customs laws and criminal laws).

45. Weiss, *supra* note 40, at 853 (comparing U.S. and Swiss implementation of the UNESCO Convention). See also Patrick J. O’Keefe, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 106 (2000) (comparing U.S. and Australian implementation of the UNESCO Convention).

46. O’Keefe, *supra* note 45, at 66 (comparing U.S. and Swiss implementation of the UNESCO Convention).

By contrast, the German Act focuses on exports. Under the Chapter 5 provisions, individuals can be punished criminally for illegal exports.<sup>47</sup> Also, the German Act in Chapter 4 Section 18 imposes obligations on auction houses or antique dealerships to keep record of sales,<sup>48</sup> 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. In contrast, the U.S. statute concerns itself with imports and does not focus on in-state or interstate sales. U.S. eBay’s international buying policy is strict; domestic sales are not addressed. Perhaps the statutory differences help explain the drastically different policies guiding 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.<sup>49</sup> 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: (1) The Indian Arts and Crafts Act; (2) The Native American Graves and Repatriation Act (“NAGPRA”); and (3) The Federal Cave Protection Act.<sup>50</sup> 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 the following:

Misrepresentation of Indian produced goods and products.  
(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

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47. Act on the Return of Cultural Property, *supra* note 43, at 2547 (“Provisions governing criminal penalties and regulatory fines.”).

48. *Id.* (“recording obligations in the art and antiques trade and in the auction trade”).

49. *Artifacts, Grave-related Items, and Native American Arts and Crafts Policy* <http://pages.ebay.com/help/policies/artifacts.html> (last visited Dec. 22, 2013) [hereinafter *Artifacts Policy*]. (discussing eBay’s policy on such artifacts and referring viewers to specific laws from government websites for the full text of laws that eBay bases its policies on).

50. *Id.* (discussing policy overview of sellers’ responsibilities when posting an artifact for sale).

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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.<sup>51</sup>

The U.S. eBay policy on “Native American arts, crafts, or jewelry” provides, “[A]ny 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” and directs eBay users’ questions to the Indian

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51. 18 U.S.C. § 1159 (2010) (codifying penalty for misrepresentation of Indian produced goods and products).

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Arts and Crafts Board via the Board's number and website.<sup>52</sup> The policy is 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 members.<sup>53</sup> The policy bans items described as "Alaska Native style, American Indian style, Native American style and other descriptions that may suggest the item was made by a Native American."<sup>54</sup> 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."<sup>55</sup> When attempting to list an item for sale, if one uses 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, § 1170(b) of NAGPRA provides, in relevant part, the following:

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.<sup>56</sup>

The Act defines the types of cultural items that subject one to liability if sold,<sup>57</sup> 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

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52. *Artifacts Policy*, *supra* note 49 (discussing overview for listing items of Native American arts, crafts, or jewelry).

53. *Id.*

54. *Id.* (listing items that are totally banned from being listed for sale under the category of Native American arts, crafts, or jewelry).

55. *Id.*

56. 18 U.S.C. § 1170 (2011).

57. 25 U.S.C. § 3001 (2010) (codifying definitions of items that a seller may be liable for illegally trafficking under NAGPRA).

remains, and sacred items used by Native American religious leaders in ceremonial practices such as: ceremonial masks, and prayer sticks,” all of which is covered by the Act.<sup>58</sup> 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, the following:

(2) Any person who possesses, consumes, sells, barter or exchange, 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.<sup>59</sup>

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.<sup>60</sup>

This language in eBay’s policy shows it uses the same terms provided for in the definition section of the Act<sup>61</sup> and also refers sellers to follow the law under the act before listing these types of items.<sup>62</sup>

The restrictions U.S. eBay has placed on antiquities, however, are far more limited and the website 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).”<sup>63</sup>

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58. *Artifacts Policy*, *supra* note 49.

59. 16 U.S.C. § 4306 (2007) (codifying actions for which a person may be liable for under federal law).

60. *Artifacts Policy*, *supra* note 49 (listing items that are restricted or not allowed to be listed under cave formations).

61. 16 U.S.C § 4302 (2007) (codifying definitions of terms used in Federal Cave Protection Act).

62. *Artifacts Policy*, *supra* note 49 (instructing sellers on how to list cave formation items).

63. *Id.* (discussing restrictions on listing antiquities).

U.S. eBay does not generate pop-ups for antiquities not covered by the Indian Arts and Crafts Act, NAGPRA, or the 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 the following:

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.<sup>64</sup>

The eBay policy neither directly mentions nor reflects the Cultural Property Implementation Act nor the National Stolen Property Act (NSPA), nor key statutory schemes that federal policies use to deter the international trade in black market antiquities in the United States. Also, there is no pop-up disclaimer with rules to follow 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 website, thus shrugging off responsibility for the sale of 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 he or 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 aggregated for valuation purposes).<sup>65</sup> 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 website 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 or her own.

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64. *Policy on Stolen Property*, <http://pages.ebay.com/help/policies/stolen.html> (last visited Dec. 23, 2013).

65. *See* ;United States v. Medford, 194 F.3d 419, 425 (3d Cir. 1999) (aggregating cultural object values for sentencing purposes under the Theft of Major Artwork statute).

The U.S. eBay website's international policy page, for example, redirects the user to other countries' eBay website policies, such as eBay Germany. In contrast to the German policy described below,<sup>66</sup> the U.S. eBay website does not require showing legitimate provenance or ownership.<sup>67</sup> If an American user is redirected to a foreign eBay site, he or she would likely still not be aware of these differing policies, like the foreign ownership documentation requirement, unless he or she were either familiar with eBay Germany or thought to translate the webpage. Although 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,"<sup>68</sup> it is not until one clicks through to the "Additional Information" section of the page that the user is invited to familiarize themselves with the laws and special issues involving the importation of cultural items by exploring the website of the U.S. Department of State's Cultural Heritage Center.<sup>69</sup> While the CHC's website does provide more in depth details on these issues, the website is difficult to navigate and is not particularly beneficial to the average individual seller.<sup>70</sup> eBay leaves the ultimate discretion 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 those items.

The Office of Investigations, part of U.S Immigration and Customs Enforcement, sometimes assists with the authentication of artifacts and collected information from eBay and PayPal, but lacks a specialized unit of experts dedicated solely to cultural property investigations.<sup>71</sup> During the 2006 annual meeting of the INTERPOL Expert Group on Stolen Cultural Property, INTERPOL, UNESCO, and ICOM noted the benefit of nations 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

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66. *See infra* Section II(B) (detailing eBay Germany and comparing it with eBay U.S.).

67. *International Trading Policy*, <http://pages.ebay.com/help/policies/international-trading.html> (last visited Dec. 22, 2013).

68. *Id.*

69. *Id.* (stating "each country has different laws that limit the types of goods that can be imported into their country.").

70. *See Cultural Heritage Ctr.*, U.S. DEP'T OF STATE, <http://eca.state.gov/cultural-heritage-center> (last visited Dec. 22, 2013).

71. Press Release, ICE, ICE, European Law Enforcement Agencies and Europol Seize 132 Domain Names Selling Counterfeit Merchandise in 'Project Cyber Monday 3' and 'Project Transatlantic' Operations, <http://www.ice.gov/news/releases/1211/121126washingtondc.htm> (Nov. 26, 2012).

short bidding periods during a sale.”<sup>72</sup> Without a specialized unit of experts, the United States has little chance of keeping up with the monitoring or prohibition of illicit sales. The ineffectiveness of eBay’s policies in combating the use of its platform for sales of stolen and fake antiquities 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, *infra*.

### B. German eBay’s Policy on Cultural Property

From a property protection standpoint, the German eBay Policy on Archaeological Finds is far more restrictive and comprehensive than the U.S. eBay policies.<sup>73</sup> The two main differences between the U.S. and German eBay websites are a provenance requirement, and an expert check monitoring items prior to posting for sale.<sup>74</sup>

With regards to the provenance requirement, the German eBay’s “Our principle” section provides: “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.”<sup>75</sup> The website also prohibits “especially endangered cultural assets . . . which are listed in the red list of the International Council of Museums (ICOM).”<sup>76</sup> The website stipulates that “antiquities may only be offered with documentation of proof of origin, a Pedigree or Provenance (discussed below) . . . and acquired in accordance with National Monument Protection laws and international cultural protection agreements.”<sup>77</sup>

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72. Press Release, UNESCO, Basic Actions Concerning Cultural Objects Being Offered for Sale Over the Internet, <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf> (outlining conclusions drawn by the INTERPOL Expert Group on Stolen Cultural Property on March 7-8, 2006).

73. See *Policies of Archeological Finds*, EBAY GERMANY, <http://pages.ebay.de/help/policies/artifacts.html> (last visited Oct. 13, 2013) (providing additional information and documents for sellers that American eBay does not provide).

74. See *id.* (laying out policies for importation and exportation of cultural items, requiring some to have proof of origin); *International Trading Policy*, *supra* note 67 (does not contain any requirements for import/export of objects besides complying “with applicable laws”).

75. *Policies of Archeological Finds*, *supra* note 73 (enumerating documents needed to sell cultural objects on eBay Germany).

76. *Id.* (forbidding sellers on eBay Germany from selling particular, sensitive cultural objects).

77. *Id.* (establishing that no antiquities may be sold on eBay Germany without proper paperwork establishing its authenticity and eligibility to be sold).

The documentation (Pedigree) requirement for archaeological finds came into effect on July 1, 2008.<sup>78</sup> A Pedigree is verifiable proof that the offered object complies with the special legal provisions that apply to archaeological finds.<sup>79</sup> If the seller cannot submit a Pedigree, or if it is incorrect, incomprehensible, un-traceable, or incomplete, then proof of the lawful adherence to the laws is not satisfied, and the sale is prohibited.<sup>80</sup>

The other main difference between the two sites' policies pertains to 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 corresponding Pedigree.<sup>81</sup> This authority is the Association of National Archaeologists, Verband der Landesarchäologen (in German, "VLA"), which works in close co-operation with the German website to prevent illicit online sales of archaeological objects.<sup>82</sup> A team of experts from the VLA verifies items for legitimacy.<sup>83</sup> If an item is legitimate, but the seller lacks a Pedigree, the VLA will assist the seller in the purchase of a Pedigree.<sup>84</sup> However, if the authenticity of an item or its Pedigree cannot be verified, then the VLA, through eBay Germany, has the authority to halt the auction.<sup>85</sup> German eBay policies are clearly written and easily understandable to sellers and buyers. The German website also places discretion in the hands of experts (the VLA) to make the final determination to either allow or disallow the auction, not the individual.

The German eBay policy seems as though it would effectively prevent the sale of stolen or fake antiquities. Although not without its flaws, the VLA authentication and title control mechanism look to be the best practice in the industry so far and has been praised for its success,

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78. Nathan Elkins, *Ebay.de (Germany): New Rules on the Selling of Archaeological Materials*, NUMISMATICS AND ARCHAEOLOGY (July 14, 2008), <http://coinarchaeology.blogspot.com/2008/07/ebayde-germany-new-rules-on-selling-of.html>.

79. *Id.*

80. *Policies of Archeological Finds*, *supra* note 73 (stating it is "forbidden" to sell "archaeological findings without offering documents demonstrating compliance with the legal provisions relating to archaeological finds and the rightful property (proof of origin or provenance or pedigree).").

81. *Kommission "Illegal Archaeology,"* VERBAND DER LANDESARCHÄOLOGEN, <http://www.landesarchaeologen.de/verband/kommissionen/illegale-archaeologie/> (last visited Oct. 13, 2013) (stating one of its missions is to work closely with eBay Germany).

82. *Id.* (stating "[one] focus of the Commission is working in close cooperation with eBay Germany in monitoring of the marketplace with archaeological objects in order to stop the illegal Internet auction finds").

83. *See id.* (noting that the Commission monitors eBay Germany).

84. *Id.*

85. *Id.*

inspiring Austria and Switzerland to use similar practices.<sup>86</sup> The Swiss policies have also been lauded as effective.<sup>87</sup> One suggestion was made during the 7<sup>th</sup> 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.<sup>88</sup>

When comparing the two websites' policies and putting them in context with a typical eBay transaction, one can easily deduce why the German policy would be much more effective in policing illicit sales. Requiring documentation before a seller can post an item essentially stops the seller from ever putting the illicit item on the marketplace (so long as investigators are schooled in false documentation). Although the U.S. website seems to comply with the necessary laws, it falls short of the level of detail and preventative measures the German eBay website has implemented. Although it is apparent from its German operation that such restrictions would be possible, U.S. eBay lacks a team of experts like the German VLA and does not require documentation of provenance; however, the scale of U.S. operations is considerably larger.<sup>89</sup>

### III. POTENTIAL CRIMINAL LIABILITY

If a U.S. prosecutor were interested in pursuing the issue, current U.S. statutes could be applied to hold eBay criminally liable for its part as a third party providing the platform for illegal sales.<sup>90</sup> 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,<sup>91</sup> this Part and the next

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86. 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>; Anita Gach, *Illicit Trade and Interpol*, FORUM ARCHAEOLOGIAE (2010) available at <http://homepage.univie.ac.at/elisabeth.trinkl/forum/forum0610/55gach.htm>.
87. Ursula Kampmann, *A Pilot scheme between eBay and the Swiss Federal office for Cultural Affairs*, COINSWEEKLY, (Oct. 14, 2009), <http://coinsweekly.com/index.php?pid=4&id=12>; *eBay and the Federal Office of Culture Concluded A Memorandum of Understanding*, FEDERAL OFFICE OF CULTURE (Oct. 20, 2009), <http://www.news.admin.ch/message/index.html?lang=fr&msg-id=29602>.
88. Interpol Minutes at 2.
89. *100 Best Companies to Work For: 2008*, CNN MONEY, <http://money.cnn.com/magazines/fortune/bestcompanies/2008/snapshots/68.html> (last visited Oct. 13, 2013) (stating the number of eBay's U.S. employees was 7,769 and all international affiliates were 6,287 combined).
90. *See infra* Part III.B.
91. David Rubenstein, *eBay: The Cyber Swap Meet*, 13 U. MIAMI BUS. L. REV. 1, 1-2 (2004).

demonstrates that the risk of eBay being held criminally liable for the illegal sale of goods by third parties is currently low.

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

The National Stolen Property Act, § 2314 provides the following:

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.<sup>92</sup>

eBay's Policy Overview for Artifacts, Grave-Related Items, and Native American Arts and Crafts Policy, states that "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."<sup>93</sup> There is no mention of the NSPA<sup>94</sup> or other customs statutes. To obtain a conviction under § 2314, the United States only needs to prove the following: "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 have been stolen, converted or taken by fraud.'"<sup>95</sup> For criminal prosecution under customs regulations, a similar *mens rea* or knowledge requirement would apply in a typical antiquities case.<sup>96</sup>

92. National Stolen Property Act, 18 U.S.C.A. § 2314 (West 2012). *But see* 18 U.S.C.A. § 2315 (West 2012) ("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; § 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 Section 2314. This Article's analysis will focus on § 2314.

93. *Artifacts Policy*, *supra* note 49.

94. *See* 18 U.S.C.A §§ 2314-2315 (West 2012).

95. *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting 18 U.S.C. § 2314 and establishing a three prong test for transportation of stolen goods).

96. *See also* Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 158 (2010) ("Following a conviction premised on the McClain Doctrine's definition of stolen, continued possession of such works would constitute a crime under the NSPA: post-acquisition knowledge satisfies the NSPA's scienter requirement.").

During 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, many of whom are located in other jurisdictions. No one employed by eBay seems to usually look at the auction page.<sup>97</sup> For purposes of this analysis, discussion shall focus first on the seller's potential criminal liability. Assume the seller has knowledge that the antiquity being sold was stolen or is a fake, but, at the time of purchase, the buyer is ignorant of that fact. Assume that the object in question has a market value exceeding \$5,000 if offered for sale at an auction in a traditional brick-and-mortar auction house within the United States, but that the actual price for which the item sold was below \$5,000. This encompasses the majority of items listed on eBay under the antiquity category.<sup>98</sup>

So is the seller in the typical stolen antiquity eBay transaction criminally liable under § 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 global and individuals can sell items to any country or state, therefore these goods typically are traveling in interstate or foreign commerce. The analysis under the second element depends on the facts of individual cases, but so long as the item for sale is valued at "\$5,000 or more," this prong would be satisfied as well.<sup>99</sup> The third element, "knowing the same to have been stolen," can be satisfied even by circumstantial evidence either by showing how the individual obtained the goods or his or her expertise in the field could presume his or her 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,<sup>100</sup> which, perhaps must be effectively enforced by the source nation.<sup>101</sup>

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97. Alan Bamberger, *What's Wrong With eBay*, ARTBUSINESS.COM (1999), available at <http://www.artbusiness.com/eBay.html> ("Sale postings are essentially automatic—eBay staffers attend to technical operational details and rarely monitor the site's content as it goes public.").
98. *Antiquities*, [http://antiques.shop.ebay.com/Antiquities-37903/i.html?\\_catref=1&\\_trksid=p3910.c0.m449](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.
99. National Stolen Property Act, 18 U.S.C.A. § 2314 (West 2012). *See also* United States v. Medford, 194 F.3d 419, 425 (3d Cir. 1999) (concluding that the monetary loss from stolen items, as measured by the market price of the stolen items, "is insufficient to fully capture the harmfulness of the defendant's conduct").
100. United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) [hereinafter McClain I] ("The question is whether this country's own statute, the NSPA, covers property of a very special kind—purportedly government owned, yet potentially capable of being privately possessed when acquired by purchase or discovery. Our examination of Mexican law leads us to reject the appellants' argument that

B. *The Requisite Level of “Knowledge”*

Now we turn to the core question of this Article: Could a court hold eBay criminally liable? 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. This determination hinges upon the definition of “knowledge” under § 2314. In *U.S. v. Jacobs*, the U.S. Court of Appeals for the Second Circuit 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.’”<sup>102</sup> The court elaborated that the requisite “knowledge” could be present by “deliberate closing of the eyes to what would otherwise be obvious and ‘reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth.’”<sup>103</sup>

In *Jacobs*, the appellants sought to overturn their conviction of illegally conspiring<sup>104</sup> to violate 18 U.S.C. §§ 2314 and 2315 by trafficking stolen U.S. Treasury Bills while “knowing that they had been stolen.”<sup>105</sup> 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.<sup>106</sup> Ten of these bills were found to be in the possession of one co-defendant, Lavelle, in mid-September 1970.<sup>107</sup> Subsequently, Lavelle approached Jacobs, a friend and business associate, to find a way to sell them.<sup>108</sup> After several rejections from attempts to sell at banks, Jacobs went

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the NSPA cannot apply to illegal exportation of artifacts declared by Mexican law to be property of that nation.”); *U.S. v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974). *See* Urice, *supra* note 96, at 161 (“Federal prosecutors have repeatedly asserted that unprovenanced antiquities removed without a valid export license from a foreign nation in violation of that country’s patrimony statutes are ‘stolen’ within the meaning of the NPSA.”).

101. *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff’d*, 333 F.3d 393 (2d Cir. 2003); Urice, *supra* note 96, at 130.

102. *United States v. Jacobs*, 475 F.2d 270, 288 (2d Cir. 1973).

103. *Id.*

104. *See* 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.”).

105. *Jacobs*, 475 F.2d at 273.

106. *Id.* at 274.

107. *Id.*

108. *Id.*

to his attorney David Altschul, who agreed to find a buyer.<sup>109</sup> Altschul discussed this meeting and the sale of the bills to the other co-defendant, Thaler, a lawyer and New York State Senator who shared an office with him.<sup>110</sup> The next day, Jacobs, Altschul, and Thaler met, and Jacobs stated that Lavelle had \$800,000 worth of bills which he was willing to sell for 40-50% of maturity value with a 10% fee for the middlemen.<sup>111</sup> The meeting ended with an understanding that Thaler would find a buyer and the three would share the 10% fee. According to Jacobs' and Altschul's testimony, the three met again where they signed a written agreement to equally share the 10% with each party receiving a signed original copy.<sup>112</sup> After his first attempt failed, Thaler ultimately found a buyer who took the bills to his bank to put them in for collection and within a week they were paid.<sup>113</sup> The profits were then distributed to the co-defendants. During the summer of 1971 the three treasury bills collected were determined to be stolen and the investigation traced the chain of possession to the defendants.<sup>114</sup> The defendants claimed insufficiency of evidence to prove guilty knowledge.<sup>115</sup> The court stated "so far as concerns Thaler, the record not only was sufficient for a finding of guilty knowledge but fairly shrieked of it."<sup>116</sup> The court's reasoning was based on the fact that Thaler was an attorney, a member of the New York State Senate's Committee on Banking, and therefore he could not have reasonably believed that the lawful holder of treasury bills would sell them at such a significant discount.<sup>117</sup> The court then stated he knew others questioned the suspicious transaction, "yet he closed his eyes to all the storm signals so apparent to them."<sup>118</sup> The appellants also attacked the trial courts' definition of guilty knowledge.<sup>119</sup> The court quashed their arguments and reasoned the trial judge clearly emphasized that "the elements of deliberate closing of the eyes to what would otherwise have been obvious and "reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth."<sup>120</sup> The court affirmed the convictions and denied the motions.

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109. *Id.* at 275.

110. *Id.*

111. *Id.*

112. *Id.* at 277.

113. *Id.*

114. *Id.*

115. *Id.* at 280.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 287.

120. *Id.* at 287-88.

The Circuit Court of Appeals for the District of Columbia, in two subsequent decisions, reaffirmed the principle of conscious avoidance; 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 they were stolen.<sup>121</sup> 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 coins.<sup>122</sup> 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.<sup>123</sup> The defendant purchased the stamps two months prior to purchasing the coins.<sup>124</sup> The thieves' testimony provided that one thief 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.<sup>125</sup> Also, following the break-in, the thief called the defendant to tell him he had the coin collection and the defendant told him to come to his store the following morning.<sup>126</sup>

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

[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, unless you find that the defendant actually believed that the antiquities were not the property of the Egyptian government.<sup>127</sup>

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

122. *Id.* at 363.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Schultz*, 333 F.3d at 413.

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.”<sup>128</sup> This approach could be applied to U.S. eBay in that its avoidance of inspecting items, by choice, is an attempt to consciously avoid the fact that illicit cultural property is being sold on its website. The previously stated fact that eBay has admitted it is aware of the existence of illicit items sold on its website certainly could be argued to satisfy the knowledge requirement.

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.”<sup>129</sup> 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.’”<sup>130</sup> The *Alston-Graves* court, referring to the *Gallo* opinion and quoting the holding from *Jacobs*, stated that “knowing the same to have been stolen” element of § 2314 “does not require proof of actual knowledge,” but rather “that circumstantial evidence of the defendant’s knowledge that the property was stolen would suffice.”<sup>131</sup> Furthermore, the court continued, “It may be true in a given case, such as where the notice was clear and was willfully ignored, that evidence of such facts may be considered by the jury as *part* of the proof that an accused possessed the requisite knowledge.”<sup>132</sup> 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.”<sup>133</sup> 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 that the courts provided for the requisite knowledge to the actions, or lack thereof, by the U.S. eBay website, it certainly seems eBay could be held liable under § 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 its website. Evidence of the success of other countries’ websites, along with the control mechanisms they have in place, demonstrates that eBay

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128. *Id.*

129. BLACK’S LAW DICTIONARY 748 (9th ed. 2009).

130. *United States v. Schultz*, 333 F.3d 393, 411 (2d. Cir. NY, 2003).

131. *United States v. Alston-Graves*, 435 F.3d 331, 339 (D.C. Cir. 2006).

132. *United States v. Gallo*, 543 F.2d 361, 367 (D.C. Cir. 1976).

133. *Id.* at 368 n.6.

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 that eBay could be “deliberately closing [its] eyes” to what is obvious to the international community.

Although eBay is not 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. 18 U.S.C. § 371 provides the following:

[I]f 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.<sup>134</sup>

Therefore, if an individual was in violation of one of 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, *infra*, eBay’s general knowledge that its auction platform has been used to buy and sell illicit goods has been insufficient for liability in trademark infringement cases brought against eBay in most jurisdictions.

#### IV. INTERNATIONAL STRUGGLE DEALING WITH COUNTERFEIT SALES ON INTERNET AUCTION WEBSITES

The United States, Germany, and France have taken different approaches when dealing with Internet auction websites 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 the corresponding case law in Germany and France is dominated by a respective 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 Moët Hennessy (LVMH). The main differences between the jurisdictions are the duty to monitor or the scope of monitoring, and potential liability for lack thereof. Thus, we will begin by analyzing the U.S. approach through the *Tiffany* case, and then 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, or that these cases perhaps do apply to counterfeit art sales, which are inapposite to stolen art sales, as concluded in Part IV.D, *infra*.

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134. 18 U.S.C. § 371 (2012).

A. *The United States Approach*

The U.S. approach is best laid out in *Tiffany Inc. v. eBay Inc.*,<sup>135</sup> where the U.S. Court of Appeals for the Second Circuit agreed with the District Court's ruling, which had previously concluded "eBay clearly possessed general knowledge as to counterfeiting on its website,"<sup>136</sup> but stated "a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods and some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary."<sup>137</sup>

The facts provide that Tiffany became aware of counterfeit merchandise being sold on eBay's website 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.<sup>138</sup> 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.<sup>139</sup> 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."<sup>140</sup> 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 believed to be counterfeit.<sup>141</sup> However, the court went on to state that even if eBay had been able to inspect the goods, in many instances it would likely not have the expertise to determine whether the items were counterfeit.<sup>142</sup> Interestingly, the court then described several programs and tools eBay set up to combat counterfeit listings such as: buyer protection programs that reimburse buyers if the items are discovered to be counterfeit, a "fraud engine" that is dedicated to searching out illicit listings, and its "Verified Rights Owner (VeRO) Program" that is a notice and takedown system allowing intellectual property owners to report listings to eBay that are infringing rights so eBay can remove such items.<sup>143</sup>

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135. *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, 113 (2d Cir. 2010).

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

137. *Tiffany*, 600 F.3d at 107.

138. *Id.* at 97.

139. *Id.*

140. *Id.* at 98.

141. *Id.*

142. *Id.*

143. *Id.* at 99.

In late 2006, eBay implemented an additional measure that delayed buyers' 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.<sup>144</sup> 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."<sup>145</sup> Although eBay seemed to be taking preventative measures, it was simultaneously promoting the availability of Tiffany items on its website by purchasing sponsored-link advertisements on various search engines. Tiffany criticized eBay for this and demanded eBay end this advertising practice. eBay assured Tiffany that it ceased this practice, but it was later discovered that eBay continued this practice through a third party.<sup>146</sup> Tiffany then brought suit against eBay; however, the District Court found in favor of eBay on all of its claims. Tiffany subsequently appealed.

On appeal, the main issue Tiffany argued was that of contributory trademark infringement, to which the court noted "for culpably facilitating the infringing conduct of the counterfeiting vendors."<sup>147</sup> The district court applied the test set forth in the U.S. Supreme Court's decision in *Inwood Labs., Inc. v. Ives Labs., Inc.*,<sup>148</sup> 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."<sup>149</sup> Because eBay no longer maintained that it was not subject to *Inwood*, the court applied the *Inwood* test to eBay.

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."<sup>150</sup> While

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144. *Id.* at 100.

145. *Id.* at 100.

146. *Id.* at 103.

147. *Id.*

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

149. *Id.* at 854. See also Deborah J. Peckham, *The Internet Auction House and Secondary Liability—Will eBay Have to Answer to Grokster?*, 95 TRADEMARK REP. 977, 986 (2005) (The [post-*Inwood*] cases clarified and expanded the doctrine of contributory trademark infringement in two crucial ways. First, the post-*Inwood* cases expanded the definition of who might be a "contributor" under the traditional test from one who supplies the goods (allegedly) knowing they will be used to infringe, to defendants who also supply facilities or services used in connection with the infringing activities of others. Secondly, the development of the law post-*Inwood* clarified that one's lack of actual knowledge of infringing activities will not insulate a contributor where there is evidence of 'willful blindness.'").

150. *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, 106 (2d Cir. 2010).

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.”<sup>151</sup> The court also noted the high standard of proof in establishing “knowledge” of contributory infringement.<sup>152</sup> The court concluded that in order to establish liability, “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.”<sup>153</sup>

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.<sup>154</sup> 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.<sup>155</sup> The Second Circuit Court was not persuaded and pointed to *Sony Corp. of America v. Universal Studios, Inc.*<sup>156</sup> In *Sony*, respondent Universal brought an action against Sony alleging the video tape recorders (“VTR’s”) that Sony manufactured were being used by consumers to record some of the respondent’s copyrighted work and Sony shall be held liable for copyright infringement because of its marketing of VTR’s.<sup>157</sup> 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 [Universal’s] copyrights, nor does it supply its products to identified individuals known by it to be engaging in continuing infringement of [Universal’s] copyrights.”<sup>158</sup>

However, the court 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.”<sup>159</sup> The court further

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151. *Id.* at 107.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

157. *Id.* at 419.

158. *Id.* at 439 n.19.

159. *Tiffany Inc. v. eBay Inc.*, 600 F.3d at 109.

reasoned, “a service provider is not, we think, permitted willful blindness.”<sup>160</sup> The trial court 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.”<sup>161</sup>

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: how much should eBay be required to inquire or investigate into 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 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.<sup>162</sup> 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”).<sup>163</sup> The plaintiffs alleged that sales postings constituted notice to eBay and that by failing to intervene, eBay participated in the illegal sale.<sup>164</sup> 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.<sup>165</sup> Section (b) Policy of 47 U.S.C. § 230, provides the following:

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160. *Id.* See also *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992) (analyzing “whether the operator of a flea market is more like the manufacturer of a mislabeled good or more like a temporary help service supplying the purveyor of goods”); Peckham, *supra* note 149, at 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.”).

161. *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 463, 515 (S.D. N.Y.2008).

162. *Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637, at \*3 (Cal. Super. Ct. Nov. 1, 2000).

163. *Id.*

164. *Id.*

165. *Id.*

It is the policy of the United States –

- (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.<sup>166</sup> 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."<sup>167</sup>

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."<sup>168</sup>

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 websites to avoid liability for goods with counterfeit trademarks. This 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,

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166. *Id.*

167. *Id.*

168. *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, 98 (2d Cir. 2010).

eBay has posted a general statement that its platform should not be used for illegal activity.<sup>169</sup>

### B. *The German Approach*

The German approach has been carved out through a trilogy of cases, commonly known as *Internet Auction I*, *II*, and *III*.<sup>170</sup> This approach differs from the U.S. approach because German courts have issued injunctions against a German auction website.

In *Internet Auction I*, the claimants were the manufacturer and trademark owner of Rolex.<sup>171</sup> The defendant was an Internet auction website similar to eBay. The process to post an item for sale is also similar eBay's process in that the buyer and seller went through a registration process.<sup>172</sup> The auction website contained a page listing general conditions that 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."<sup>173</sup> With respect to the items the claimants complained about, the court 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."<sup>174</sup> 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 original, perfectly cloned!!..., Very Fine heavy imitation ... the layman cannot tell the difference between this and the original..., Rolex Submariner without certificate of authenticity. The claimants sought injunctive relief, disclosure of information, and damages."<sup>175</sup>

The defendant argued that no infringement had taken place because private parties offered the items, the defendant was not involved in the commercial transaction, and the seller posted the items for sale without

169. *Prohibiting Illegal Activity Across Our Platforms*, EBAY INC., <http://www.ebaymainstreet.com/issues/prohibiting-illegal-activity-across-our-platforms> (last visited Dec. 22, 2013).

170. See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 11, 2004 Case No. I ZR 304/01 (Ger.) *translated in* 36 INT'L REV. OF INTELLECTUAL PROP. AND COMPETITION LAW 505, 573 (2005) [hereinafter *Internet Auction I*]; Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 19, 2007, Case No. I ZR 35/04 (Ger.) *translated in* [2007] E.T.M.R. 70, 2007 WL 2817929, at \*1149 [hereinafter *Internet Auction II*]; Bundesgerichtshof [BGH] Apr. 30, 2008, Case No. I ZR 73/05 (Ger.), *available at* <http://www.jurpc.de/rechtspr/20080146.htm> [hereinafter *Internet Auction III*]

171. *Internet Auction I*, at 573.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

the defendant's review.<sup>176</sup> 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."<sup>177</sup> The court turned its focus to what it termed "disturbance liability" and 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."<sup>178</sup>

The court further analyzed 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.<sup>179</sup> On the other hand, the court recognized that Internet platforms benefit monetarily from the sale of infringed goods due to the commission they receive.<sup>180</sup> 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 website has actual knowledge, follow up on such actions as much as possible to ensure they do not recur, and use their technological capability to pinpoint suspicious cases based on relevant search terms.<sup>181</sup> 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."<sup>182</sup>

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.<sup>183</sup> 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.<sup>184</sup> Some of the watches were counterfeit; a fact made apparent either by the items' description, the title, or the extremely low reserve price.<sup>185</sup> The claimant sent the domain owner a letter on September 8, 2000, notifying him of the unlawful use of

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176. *Id.*

177. *Id.* at 578-79.

178. *Id.* at 579.

179. *Id.* (stating that "[s]uch an obligation would jeopardize the entire business model").

180. *Id.* (explaining that such commissions entail "that the defendant participates in the sale of the pirate goods . . .").

181. *Id.*

182. *Id.*

183. *Internet Auction II*, 2007 WL 2817929, at \*1149.

184. *Id.* at \*1150.

185. *Id.*

the trademark and demanded that he cease and desist from such use.<sup>186</sup> The court held that, while eBay was not a direct infringer, it could be nonetheless liable as an intermediary for the acts of trademark infringement committed by its users.<sup>187</sup> The court restated its principle from *Internet Auction I* that eBay cannot be expected to check every offer for infringement; however, it was participating in the sale of counterfeits due to the commission it earned from each sale.<sup>188</sup> 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 entry into a search system” and therefore eBay cannot be responsible for infringements that they are “unable to detect in a preliminary filter process.”<sup>189</sup> This concept strengthens online auction websites’ 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.”<sup>190</sup> as the court stated these were the type of words the filtering software should catch but it ultimately skirts the real problem.

Lastly, *Internet Auction III*, also concerned liability for online auction websites, like eBay, for their role in the sale of counterfeit watches.<sup>191</sup> The court again reaffirmed its holding from the previous two cases and thus seemingly cemented 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.<sup>192</sup> 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.<sup>193</sup>

The German approach focuses on the obligation of Internet auction websites 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. This trilogy of cases suggests that eBay will not be held liable for

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186. *Id.*

187. *Id.* at \*1161.

188. *Id.* at \*1151 (remanding the case for further consideration upon principles outlined in this case).

189. *Id.* at \*1162.

190. *Id.* at \*1155 (indicating that those terms indicate that an offered product does not come from its original manufacturer).

191. *Internet Auction III*, Bundegerichtshof [BGH] Apr. 30, 2008, Case No. I ZR 73/05 (Ger.), available at <http://www.jurpc.de/rechtspr/20080146.htm>.

192. *Id.*

193. *Id.*

listings that are undetectable with reasonable filtering methods; however, it will be liable if it is put on notice and does not take immediate action. While effective on paper, the focus of an injunction focuses on the everyday or multiple item sellers. However, from a U.S. buyer's standpoint, this would be ineffective on a seller who sells an individual item,<sup>194</sup> as courts have continually denied personal jurisdiction for one-time sellers,<sup>195</sup> thereby 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. *The French Approach*

The French approach to dealing with Internet auction websites goes one step further in expanding liability. 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.<sup>196</sup> This Article will focus on the first two lawsuits 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 it did not require sellers to authenticate items or permanently close the account of sellers after the first violation.<sup>197</sup> LVMH

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194. Peckham, *supra* note 149, at 990 (“[I]t 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.”).

195. *See* *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Appellant was the winning bidder of a 1964 Ford Galaxie sold on eBay by Appellee for \$34,106. Appellant arranged for the car to be shipped from Wisconsin to California. Once it arrived, it failed to meet the advertised description. The 9th Circuit held that “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* Elizabeth R. Beardsley, *Poachers with PCs: The United States’ Potential Obligations and Ability to Enforce Endangered Wildlife Trading Prohibitions Against Foreign Traders Who Advertise on eBay*, 25 UCLA J. ENVTL. L. & POL’Y 1, 38 (2006-2007) (“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.”).

196. *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.

197. *SA Louis Vuitton Malletier*, T.C. Paris at 7 A; *Christian Dior Couture*, T.C. Paris at 7 A; Sofia H. Ahmed, *Life, Liberty, and The Pursuit of Luxury: eBay’s*

also argued that the new measures eBay implemented in November 2006 indicate its past negligence.<sup>198</sup> LMVH sought damages, claiming that out of some 300,000 Dior items and 150,000 Louis Vuitton bags offered on eBay during the first six months of 2006, 90% were counterfeit.<sup>199</sup> Like in the German *Internet Auction* trilogy, the court found eBay liable for not taking sufficient measures to prevent infringing items from being sold over its site.<sup>200</sup>

Consistent with its defense in prior cases, eBay argued it escaped liability because it is merely a hosting service, rather than a broker, as LMVH argues, and that it is exempt from liability under Article 6 of the Act on Confidence in the Digital Economy, which protects businesses that provide host services.<sup>201</sup> Unconvinced by eBay's argument, the court ultimately held eBay's website should be deemed a broker rather than a host site.<sup>202</sup> The court reasoned that, due to the fact that eBay provides "tools, specifically designed to ensure the promotion and development of sales on its sites through a 'sales manager' with the creation of on-line stores, the possibility of becoming a 'Power-seller,' therefore eBay is thus a mandatory player in sales taking place on its sites and plays a very active role, particularly through commercial reminders, in order to increase the number of transactions generating commissions for its benefit."<sup>203</sup> *Tiffany* provided the same facts where the court denied eBay's liability for contributory trademark infringement. However, this court found eBay committed grossly negligent violations, even though eBay removes listings it finds infringing marks and had its VeRO program in place that LVMH elected not to participate in.<sup>204</sup> The Tribunal ultimately ordered eBay to pay 38.6 million euros (61 million U.S. dollars) for financial and reputational damages for selling fake luxury goods as a result of the three cases.<sup>205</sup>

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*Liability for Contributory Trademark Infringement in the United States, Germany, and France*, 5 INT'L L. & MGMT. REV. 247, 265 (2008-2009).

198. Ahmed, *supra* note 197, at 266.
199. See Brian W. Brokate, *What's New in Anticounterfeiting*, 947 PLI/PAT 615, 639 (2008).
200. *SA Louis Vuitton Malletier*, T.C. Paris at 7 A; *Christian Dior Couture*, T.C. Paris at 7 A; Ahmed, *supra* note 197 at 266.
201. *SA Louis Vuitton Malletier*, T.C. Paris at 10 A; *Christian Dior Couture*, T.C. Paris at 10 A.
202. *Id.*
203. *SA Louis Vuitton Malletier*, T.C. Paris at 10A-11 A; *Christian Dior Couture*, T.C. Paris at 10A-11 A.
204. *SA Louis Vuitton Malletier*, T.C. Paris at 12 A; *Christian Dior Couture*, T.C. Paris at 12A.
205. *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.

## CONCLUSION

In the United States, it is unlikely that a court will ultimately hold liable for third-party counterfeit sales 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 the illicit sale of cultural property context. Most likely, if one brought an illicit cultural property action against eBay, a court would likely analyze these principles and reach a similar result. Based upon case law and public policy promoting e-commerce, it is likely eBay will avoid 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 websites.

The chance of a court holding eBay liable under the NSPA is slim; however, there is still room for improvement on monitoring if eBay is willing to take on the obligation. It may be that, unless and until Congress considers changing the *status quo*, U.S. eBay will be unwilling 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 given the various crises requiring governmental attention. Even though eBay's monitoring in the U.S. has been held sufficient in the trademark realm, one can argue 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 is not the only category of cultural property sold on eBay, but it represents a significant portion. If eBay required the two-week window for the sale of items as the General Secretariat member suggested, one would find this 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 identify the counterfeit documents.

The U.S. should adopt a simple requirement of provenance or documentation to authenticate the item, as the German eBay website has had implemented, even though the U.S. antiquities community rejected the “blank check” approach to implementing the UNESCO treaty, which would have required the presentation of valid export permits upon importation of virtually all antiquities. Voluntary adoption of this approach seems to have had success in European nations combatting the use of online auction websites trafficking illicit antiquities. This provides an immediate check before allowing a seller to post the items for sale. It would also likely reduce the number of postings, therefore reducing the amount of items to check. Another suggestion is for the government to strike an agreement with eBay (similar to the U.K or Germany) and recruit the FBI Art Crime Team to assist in monitoring and subsequently

prosecuting individuals for illicit items, but such a result is unlikely given the U.S.'s current funding problems.

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 successfully implemented some or all of the aforementioned solutions. Therefore, eBay and the U.S. government should analyze these options. At a minimum, the U.S. government should at least require eBay to search the National Stolen Art File or the Stolen Art Works Database, as these resources are free to the public and thus will be minimally burdensome to implement. Lastly, it could also require sellers, particularly of high value works, to use the Art Loss Register ("ALR"), which touts itself as "the largest database of stolen art."<sup>206</sup> Although the ALR charges a fee,<sup>207</sup> it provides immediate feedback on the item in question. These types of practices are particularly feasible in the high-value auction world, although with mixed results, and could be implemented at an appropriate level in the on-line auction context.<sup>208</sup>

While there is a legitimate argument that a court should hold eBay liable for its role in permitting the sale of illicit cultural property through its 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 has effectively insulated Internet platforms from liability in an effort to promote free trade.<sup>209</sup> It is highly unlikely that

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206. THE ART LOSS REGISTER, <http://www.artloss.com/en> (last visited Mar. 26, 2014).
207. *Services*, THE ART LOSS REGISTER, <http://www.artloss.com/services/searching> (last visited Mar. 26, 2014) (setting out the search fee purchase options via individual transaction or subscription service).
208. *See e.g. Sotheby's Restituted Painting by Jean Baptiste Camille Corot*, ROVING INSIGHT, (Mar. 21, 2010), <http://www.rovinginsight.org/library/?id=458&/arts.auction/> (stating that "Sotheby's was the first international auction house to open a department dedicated to provenance research and restitution. Founded in 1997 the department is comprised of a team of restitution experts in London and New York, supplemented by consultants as necessary."); Interview by Michael Auliso with Heinrich Schweizer, Senior Vice President, Sotheby's, *available at* <http://www.tribalmania.com/INTERVIEW.HEINRICH.PAGE2.htm>, TRIBALMANIA (last visited Dec. 22, 2013) ("Provenance information offers quintessential information . . . and every seller and his or her agent, i.e. auction houses, galleries and private dealers, should do the maximum to make the purchaser feel comfortable and share all information available."); Emily Blyze, *Museums and Nazi-looted Art: Provenance Research Departments and Registries*, ARCA (March 14, 2011) <http://art-crime.blogspot.com/2011/03/museums-and-nazi-looted-art-provenance.html> ("Auction houses, such as Sotheby's, have established Nazi-era provenance research departments.").
209. *See Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637, at \*3 (Nov. 1, 2000) (stating that "A principal objective of the immunity provision is to encourage commerce over the Internet by ensuring that interactive computer service

Congress will pass any new legislation 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. 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.

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providers are not held responsible for how third parties use their services ... It is the policy of the United States ... 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. (47 U.S.C.A. § 230(b)(2))”.