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EBAY SELLERS AND ARTICLE 2: SELLING A BROADER MERCHANT CONCEPT

I. BACKGROUND/INTRODUCTION

Right now, there is a man in Thailand who is auctioning on Ebay a foot-long insect mounted on a glass frame. No one in Thailand is interested in purchasing the insect; in fact, the *Sipyloidea sipyilus*, as it is taxonomically referred to, is pretty much everywhere. The market for this insect is farther away; he will probably sell his etymological knickknack to someone in the United States for around \$15.00.¹

At the same time, much closer to home, a Texas woman auctions around twenty pairs of used sunglasses a day. She ships the glasses to people all over the United States. She started listing the glasses on Ebay as a hobby, but she now sells so many that her sales provide her with almost as much income as her full-time job.

Transactions like these now account for around forty-eight billion dollars a year on Ebay alone.² The Web site now boasts more than one-hundred million registered users.³ And people spend more time on Ebay than any other Web site on the internet.⁴ The users are all over the world and many operate significant online businesses.⁵ The company bills itself as “the world’s online marketplace.”⁶ And it truly is.

As Ebay has become an increasingly robust market, the number of sophisticated sellers has grown in lockstep. There are now almost a

¹ One such walking stick is on file with the author. His wife considers the mounted curio gross and weird.

² Press Release, Ebay Inc., Ebay Inc. Announces Fourth Quarter and Full Year 2005 Financial Results (Jan. 18, 2006), available at <http://investor.ebay.com/releases.cfm> (noting that the gross market value of all items successfully sold on Ebay during its fourth quarter in 2004 was twelve billion dollars). Ebay is not the only successful internet auction Web site, despite what the company would like us to believe.

³ Ebay Company Overview, <http://pages.ebay.com/aboutebay/thecompany/company-overview.html> (last visited Apr. 28, 2006).

⁴ *Id.*

⁵ Press Release, *supra* note 2, at 2 (reporting net revenues from the international marketplaces to be comparable to the domestic revenues and increasing at a staggering rate).

⁶ Ebay Company Overview, *supra* note 3.

million people who rely on Ebay as their primary or secondary source of income.⁷ An additional 1.5 million people claim that they do not rely on Ebay sales as a source of income, but do use it to supplement their income.⁸ These Ebay auctioneers are in many ways more analogous to professional sellers than to people who hold a single garage sale each spring, not only because of the volume of goods they sell, but also because of how they present themselves. Under Article 2 of the Uniform Commercial Code (U.C.C. or Code), professionals are held to slightly higher performance standards than everyone else. People who regularly sell goods through online auctions are well equipped to comply with these standards. Many of these sellers would be merchants by extrapolation from existing law; others, who should be, are not.

This Comment argues that this new class of not-so-casual sellers should have merchant status for all of the Code's provisions and that doing so would make online auctions a "better" marketplace. After providing a brief overview of the context in which the question arises, this Comment evaluates the practical effects of the merchant dichotomy on an Ebay transaction and concludes that the implied warranty of merchantability included in section 2-314 is the only merchant provision that would have a direct, material impact on online sales. Applying the implied warranty of merchantability to sales by Ebay auctioneers not only makes sense, but is supported by the text of the U.C.C. and the drafting history. Finally, this Comment examines some of the potential ramifications of this classification.

II. WHEN AND WHERE THE U.C.C. APPLIES: THE GOODS TO THE DOWNRIGHT WEIRDS . . .

The U.C.C. was promulgated in 1951.⁹ It replaced a number of uniform laws that had been enacted across the country, which in turn replaced the Danielic chaos of pre-statutory commercial law.¹⁰ The Code reorganized the law of commerce using the sale of goods as the foundation, based on the logic that "every phase of commerce . . . is but a part of one transaction, namely, the sale and payment for

⁷ Press Release, Ebay Inc., *New Study Reveals 724,000 Americans Rely on Ebay Sales for Income* (Jul. 21, 2005), available at <http://investor.ebay.com/releases.cfm>.

⁸ *Id.*

⁹ General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute to the Uniform Commercial Code (2000), reprinted in *SELECTED COMMERCIAL STATUTES 16-17* (Carol L. Chomsky et al. eds., 2005) [hereinafter *General Comment*]. Unless otherwise indicated, all references to the Uniform Commercial Code (U.C.C. or Code) are to the 2000 Official Text and Comments.

¹⁰ Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 FLA. L. REV. 367, 367-68 (1957).

goods.”¹¹ The Code aggregated a body of law that was “extremely scattered” and was expensive to “the business man . . . because of [its] uncertainty.”¹² And it did so with the hope of making the law more clear and reasonable while allowing for reasonable adjustment and growth.¹³

Every state in the union has adopted the U.C.C., so it now governs virtually all of the transactions on Ebay and other internet auction sites.¹⁴ Generally, there are only two limited circumstances in which Article 2 would not apply to sales facilitated by online auctioneers. First, the seller could include a provision in the posting, which is the basis for the auction, specifying that another body of law will govern the transaction. By bidding, the buyer might be agreeing to this term.¹⁵ In most situations, the Code grants to the counterparties the freedom to contract.¹⁶ And this might include agreeing that the laws of a foreign jurisdiction should govern the transaction.¹⁷ Second, and perhaps more importantly, Article 2 applies only to transactions in “goods”; while that term is broadly defined in Article 2, section 105(1), it would not include services and other intangibles. Thus, while online auctions purporting to sell a “ghost” or an e-mail containing “the secrets of the pirates of the Caribbean” would not be covered, virtually everything else sold on Ebay would be.¹⁸

¹¹ General Comment, *supra* note 9, at 17; *see also* Llewellyn, *supra* note 10.

¹² Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 779 (1953).

¹³ Llewellyn, *supra* note 10, at 370, 80.

¹⁴ Caveat: while Louisiana adopted much of the Code, it never adopted Article 2 or Article 2A. Ebay’s User Agreement specifically states that it does not “modify the governing provisions of California Commercial Code § 2401(2) and Uniform Commercial Code § 2-401(2), [which] will govern” the transaction. Ebay User Agreement, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited May 24, 2006). Moreover, while many international sales of goods are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), the treaty does not apply to goods sold at auction. United Nations Convention on Contracts for the International Sale of Goods, art. 2(b), Apr. 11, 1980, 1489 U.N.T.S. 3, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, 19 I.L.M. 668 (1980).

¹⁵ Unlike traditional transactions in which the counterparties typically negotiate the terms of the transaction, choosing the governing law in an online transaction might be possible if the seller clearly specified that the buyer would be ratifying or agreeing to have the transaction governed by his choice. However, whether this would be effective to bind the counterparties presents an interesting question, because there is an argument that “*the parties*” are not truly agreeing to these not-dickered-for terms.

¹⁶ U.C.C. § 1-105 (2000).

¹⁷ Section 1-105 allows choosing another jurisdiction’s laws provided it bears a reasonable relation to the jurisdiction of the transaction. *Id.* § 1-105. While the 2005 revision eliminates the reasonable relation requirement, no state has adopted it yet. U.C.C. § 1-301 (2005).

¹⁸ The wide variety of things for sale on Ebay is truly shocking. For example, there are apparently people who buy and sell murderabilia and votes. Marcia Stepanak, *Making a Killing Online*, BUS. WEEK, Nov. 20, 2000, at EB84 (reporting that an inmate on death row has sold parts of his body through an auction and that votes have been sold). There are also a number of Web sites that track the unusual items for sale. *E.g.*, WhatTheHeck.com, Ain’t Capitalism

III. ALL BUT ONE OF THE MERCHANT PROVISIONS HAVE NEGLIGIBLE IMPACT IN THIS CONTEXT

Article 2 applies to all “sellers” and “buyers” of goods, whether they are merchants or not. It makes no difference whether the counterparties think of themselves as merchants, consumers, or pitiable schlubs: when goods are being sold, Article 2 governs. However, the Code has a handful of special rules for parties it classifies as “merchants.” When a party satisfies a provision’s merchant criteria, a heightened standard applies in addition to the rules that apply to everyone else.

Section 2-104(1) defines “merchant” as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” Interpreting the explicit language of the definition and the comments thereunder, the courts have provided many different definitions of the term “merchant.”¹⁹ In order to determine whether a party has merchant status under section 2-104, it is necessary to examine the relevant code section.²⁰ For the purposes of internet auctions, the nuances of the various definitions have only limited relevance, because there is only one merchant provision of any significant impact: the implied warranty of merchantability. The other provisions are either not implicated or largely irrelevant.

Three provisions applicable to merchants are not implicated in this context. One is the statute of frauds, which requires merchants to respond to confirmations of contracts or be barred from claiming that the contract is not enforceable for lack of a writing.²¹ Because the internet posting that serves as the basis for internet auctions satisfies that section’s requirements,²² the statute of frauds is not implicated. Another inapplicable provision is section 2-209(2), which provides a heightened obligation for merchants who wish to contractually proscribe oral modifications to their agreements.²³ In the context of internet auctions, the agreement is consolidated in the posting and

Grand?, <http://www.whattheheck.com/ebay/index.html> (last visited Apr. 28, 2006) (compiling a number of odd auctions, including a nerdy seventeen-year-old boy trying to sell his virginity).

¹⁹ Ingrid Michelsen Hillinger, *The Merchant of Section 2-314: Who Needs Him?*, 34 HASTINGS L.J. 747, 779 (1983).

²⁰ *Id.*

²¹ U.C.C. § 2-201(2) (2000).

²² The Code’s definition of “written” would include the postings as well as any e-mail correspondence that might be used to contact a seller in an effort to consummate the transaction in some other way. *Id.* § 1-201(46).

²³ *Id.* § 2-209(2).

separate agreements and signings are largely impossible. While it may be possible to acquire a separate signing from a potential bidder, the bidder has no motivation for agreeing to, or signing, such a term after a potentially binding offer has been posted online. Finally, the merchant distinction incorporated into section 2-207(2) makes little practical difference, because the rule applies only to communications between merchants that do not materially alter the contract. Many courts have liberally interpreted the merchant concept for purposes of section 2-207(2); to the extent that a distinction still exists, however, it is eliminated in the most recent, though not yet adopted, version of the Code.²⁴ In these three provisions, the merchant distinction is inapplicable to online auction sales; two provisions, however, are implicated but have negligible impact: risk of loss and good faith.

Risk of Loss

The merchant distinction included in the risk of loss rules has little, if any, practical effect on Ebay sellers. The risk of loss rules address which party will bear the loss when goods are stolen, damaged, or destroyed between the time when the auction is finalized and the time when the purchaser actually receives the merchandise. The drafters of the U.C.C. radically changed the law in this area. The primary drafter, Karl Llewellyn, chose not to focus on hypertechnical notions of when title transfers from seller to purchaser; instead, he argued that sales are “complex structures of certain part-way stages occurring . . . frequently between” the time property leaves the hands of one person and enters the hands of another.²⁵ As such, the Code “adopted a system that allocates the risk of loss based on which party has control of the goods, which party is more likely to insure the goods, and whether a party has breached the contract.”²⁶

On the most general level, the Code distinguishes between contracts that require delivery of the goods and those that do not. In the case where the goods do not have to be delivered, e.g., when the purchaser will collect them from a showroom, the Code has a separate rule for merchants.²⁷ With a merchant seller, the risk of loss passes from the seller to the buyer when the buyer actually receives the goods.²⁸ For example, if someone stole a television from a Best Buy

²⁴ U.C.C. § 2-207 (2005).

²⁵ K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 730-31 (1939).

²⁶ Seth Gardenswartz, *The Risk of Loss in Electronic Transactions: Vintage Law for 21st Century Consumers*, 6 VA. J.L. & TECH. 15, 15 (2001).

²⁷ U.C.C. § 2-509 (2000). This distinction is eliminated in the newest draft of the Code. U.C.C. § 2-509 (2005).

²⁸ U.C.C. § 2-509(3) (2000).

loading dock, before it could be loaded into the purchaser's car, Best Buy, as a merchant seller, would incur the loss and not the consumer. For a non-merchant seller, on the other hand, the risk of loss passes "on tender of delivery," i.e., when the goods have been made reasonably available to be picked up.²⁹

An Ebay transaction generally calls for delivery of the goods and is thus governed by section 2-504, which makes no merchant/non-merchant distinction.³⁰ Transactions that occur through Ebay almost invariably include an agreement that the goods will be sent via a service like United Parcel Service (UPS) or traditional mail; the Code calls this type of agreement to deliver the goods a "shipping contract."³¹ The provision that handles shipping contracts does not include a merchant distinction. In a shipping contract, the risk of loss passes when the seller delivers the goods to the carrier.³² This risk of loss rule is not well suited to internet auctions. The seller, who can easily prove the existence and quality of the goods, is in a better position to insure the goods than the buyer; in fact, modern shipping services generally allow *only* the sender to insure the goods. Despite this practical problem, there is little difference between an Ebay transaction and other long distance sales, such as mail order purchases: the criticisms of the rule would be the same.³³ Regardless, the merchant distinction contained in the risk of loss provision is virtually irrelevant to Ebay transactions.

Good Faith Standard

The heightened standard of "good faith" imposed on merchants also has little practical effect on Ebay transactions. Merchants and non-merchants alike have a standard of "honesty in fact,"³⁴ which is

²⁹ *Id.*

³⁰ *Id.* § 2-504.

³¹ In the unusual circumstance in which this is not the case, it is probably because the seller does not regularly sell goods via the internet, i.e., would not be considered a merchant, and is unable or unwilling to ship a large item through the mail.

³² U.C.C. § 2-509 (2000). In the event that a buyer is picking the goods up from the seller's place of business rather than having them shipped, risk of loss does not transfer until the buyer actually receives the goods. Note that this implicates the merchant definitions, too—tender vs. delivery difference.

³³ There is a significant amount of scholarship criticizing the risk of loss rules when non-commercial goods are shipped. *E.g.*, Gardenswartz, *supra* note 26, at *3-4; R.S.G., Note, *Risk of Loss in Commercial Transactions: Efficiency Thrown Into the Breach*, 65 VA. L. REV. 557 (1979).

³⁴ U.C.C. § 1-201(19) (2000). While merchants have always been held to an objective test, which asks whether a reasonably prudent person would have acted the same way, non-merchants' conduct has generally been tested under a subjective test. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 521 (5th ed. 1995).

imposed on all contracts through section 1-203.³⁵ However, in addition to requiring “honesty in fact” from merchants, the Code also requires them to observe “reasonable commercial standards of fair dealing in the trade.”³⁶

From a conceptual or academic standpoint, the different standards of good faith are relatively easy to understand. “Honesty in fact” is a subjective standard. It is an examination of what someone actually believed and whether they intended to disfavor someone else. On the other hand, “reasonable commercial standards of fair dealing” is a phrase that encompasses both an objective and a subjective standard. It is an inquiry into whether the seller conformed to the standards of whatever trade they are engaged in.³⁷ From a practical perspective, these differences are difficult to implement and analyze; juries struggle with the distinction.³⁸ Further, courts have interpreted the subjective standard of “honesty in fact” to include some objective component.³⁹ The practical difficulties of determining what these standards mean has blurred the distinction between the subjective and objective tests, effectively making them both applicable to merchants and non-merchants alike. Perhaps partially for this reason, the newest draft of the Code makes the heightened standard universally applicable.

IV. THE IMPLIED WARRANTY OF MERCHANTABILITY SHOULD APPLY TO THIS NEW BREED OF ENTREPRENEURS

“There is no more puzzling a question than what this word [merchantable] means.”⁴⁰

There is one merchant provision that remains unchanged by the most recent revision of the Code and is significant to Ebay auctioneers: the implied warranty of merchantability.⁴¹ While the other merchant provisions would have little impact, applying the implied warranty of merchantability to Ebay auctioneers would have a significant positive effect on the online auction market as a whole.

³⁵ U.C.C. § 1-203 (2000).

³⁶ *Id.* § 2-103(1)(b) & cmt. 2.

³⁷ James J. White, *Revised Article 1 and the Warranty Provisions of Amended Article 2*, 3 DEPAUL BUS. & COMM. L.J. 519, 525 (2005).

³⁸ *Id.*; *Int'l Harvester Co. v. Glendenning*, 505 S.W.2d 320 (Tex. App. 1974) (overturning a jury's decision that a defendant who admitted to lying and falsifying documents in connection with the purchase of tractors had acted in good faith).

³⁹ *E.g.*, WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 227-28 (5th ed. 2004).

⁴⁰ Karl N. Llewellyn, *CASES AND MATERIALS ON THE LAW OF SALES* 324 (1930).

⁴¹ U.C.C. § 2-314 (2000).

Whether they know it or not, many regular Ebay sellers are already subject to this provision; those who are not, should be.

The warranty of merchantability applies to a subset of merchants, often referred to as “dealer-merchants.” Section 2-314(1) states that the warranty is implied when “the seller is a merchant with respect to goods of that kind.”⁴² But this language needs considerable interpretation. Section 2-104 defines a “merchant” as any “person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved.”⁴³ Construing the two provisions together, courts often interpret that the warranty attaches only when the seller “deals in goods of the kind.”⁴⁴ And even courts that construe the second clause more broadly never use it as a basis for affording a litigant merchant status. However, becoming a “merchant with respect to the goods” should be possible both legally and practically when “you hold yourself out” as a dealer.

By any construction of the Code’s language, conventional stores and vendors, i.e., merchants of common parlance, are included; thus, the warranty is implied in almost everything people purchase from a traditional store. For example, the proprietor of your local hardware store is a merchant as to all of the screwdrivers, fertilizer, etc. she sells.⁴⁵ Your local hot dog vender would also be a merchant as to the epicurean delights she hocks from her cart. On the other hand, a “dealer merchant” would not include a person making an isolated sale.⁴⁶ For example, a farmer who is selling a *single* litter of dogs would not be a merchant despite selling the dogs to a number of different people.⁴⁷ And a person who sold and installed parts for a lobster holding system might not be a merchant as to the assembled product.⁴⁸ By making this distinction, the Code is attempting to dif-

⁴² *Id.* § 2-314(1).

⁴³ *Id.* § 2-104(1).

⁴⁴ *E.g.*, *Allen v. Nicole, Inc.*, 412 A.2d 824, 825-26 (N.J. Super. Ct. Law Div. 1980) (holding that the sales aspect of a business needs to rise to a business itself in order to be considered a merchant under section 2-314 and noting that “such specialized knowledge or skill” only applies when professionals, like plumbers, sell goods in the course of performing a service); *Import Traders, Inc. v. Frederick Mfg.*, 1971 WL 17892 (Md. Super. Ct. 1971) (holding that the seller-importer was not a merchant because it did not deal in goods of that kind).

⁴⁵ Of course, the behemoth specialty stores would be merchants to the goods they sell as well.

⁴⁶ U.C.C. § 2-314 cmt. 3 (2000).

⁴⁷ *Nuijens v. Novy*, 543 N.Y.S.2d 887 (Just. Ct. 1989).

⁴⁸ *Desmarais v. Sciola*, No. CV-97-279, 1998 Me. Super. LEXIS 153 (Super. Ct. June 17, 1998) (holding that whether the seller of the components was a dealer merchant as to the entire holding system presented a genuine issue of material fact).

ferentiate between a “professional” and a “casual or inexperienced seller or buyer.”⁴⁹

Historically, the courts have not had to address the possibility of a seller holding himself out as a merchant without that actually being true. Sellers with a physical storefront quickly become dealers as to the goods they sell, or they go out of business.⁵⁰ But the possibility of a “hollow storefront,” i.e., a store that is not a dealer in goods, is much greater online, where opening and operating a virtual business involves negligible cost: it is now possible to maintain a “store” without consummating even a single sale. The scant guidance provided by existing court decisions indicates that how the seller presents himself is of little importance.

At least one court has intimated that an implied warranty of merchantability might attach from the opening day sale, no matter how little the proprietor understands about the good or how many goods have been sold.⁵¹ Other courts have reached the opposite conclusion, if they choose to address the question at all.⁵² The primary authority for not attaching an implied warranty of merchantability, even if seller “holds herself out” as a professional, appears to be Official Comment 2 to section 2-314, which reiterates that a person who makes “an isolated sale” is not a merchant.⁵³ But that fleeting and circular statement hardly addresses the question head on.

Section 2-314’s language should not only afford merchant status to anyone “who deals in goods of the kind,” but also to anyone who “by his occupation *holds himself out* as having knowledge or skill peculiar to the practices or goods.”⁵⁴ Under the latter clause, Ebay auctioneers could be afforded dealer-merchant status based on how the Web site classifies them and how they market themselves. Two ways in which Ebay categorizes sellers on their Web site signals that merchant-

⁴⁹ U.C.C. § 2-104 cmt. 1 (2000).

⁵⁰ Hillinger, *supra* note 19, at 782 (noting that this category of sellers might not even exist).

⁵¹ Golden Needles Knitting & Glove Co. v. Dynamic Mktg. Enters, 766 F. Supp. 421, 428 n.6 (W.D.N.C. 1991) (noting in a footnote that the defendant’s argument that it was not a merchant was undermined by the way it presented itself in its correspondence); Musil v. Hendrich, 627 P.2d 367, 372 (Kan. Ct. App. 1981) (assuming that the implied warranty of merchantability would attach if the defendant held himself out as a hog farmer, but affirming the trial court’s decision that any such warranty had not been breached).

⁵² Fred J. Moore, Inc. v. Schinmann, 700 P.2d 754 (Wash. Ct. App. 1985) (holding that a seller of mint root was not a merchant when it sold mint oil for purposes of the implied warranty of merchantability); Musil, 627 P.2d at 372 (noting that the trial court incorrectly decided that the defendant was not a merchant-dealer despite selling a considerable number of hogs over the years, but affirming the trial court’s decision on other grounds).

⁵³ U.C.C. § 2-314 cmt. 2 (2000).

⁵⁴ *Id.* § 2-314 (emphasis added).

dealer status would be appropriate. These designations include: Power Seller and Ebay Store.

Ebay invites its members to become "Power Sellers" after they have been an active member for ninety days, average a minimum of \$1,000 in sales per month for three consecutive months, and have a high feedback rating from their customers.⁵⁵ This designation is used as a marketing tool to entice other customers. Similarly, the "Ebay Store," one of the newer innovations to the Ebay Web site, is essentially a virtual storefront that allows potential buyers to more efficiently browse a seller's wares. Operating an Ebay store is as simple as having a valid e-mail and bank account and paying the low monthly subscription fee.⁵⁶ Ebay now hosts more than 383,000 Ebay Stores,⁵⁷ which listed almost 73 million items for sale last year alone.⁵⁸

These labels are important because sellers use them to attract business based on their purported expertise as to the goods, the Web site itself, and the online auction selling practices in general. They broadcast to potential consumers that the seller sells significant amounts of goods without qualifying exactly what those goods are. The labels also separate Ebay auctioneers from someone who is using the Web site casually. Anyone claiming to operate an "Ebay Store" or marketing themselves as a "Power Seller" is sufficiently "holding themselves out" as a merchant, so that merchant-dealer status should be attributed to them.

The Effects of This Change

Assuming the merchant-seller has not effectively disclaimed the implied warranty of merchantability, it attaches to all of the merchant's sales; it is created whether the seller intended to make it or not. When the implied warranty attaches under state law, sales of consumer goods are also subject to reinforcing federal legislation.⁵⁹ The Code enumerates certain attributes that set the threshold quality level for merchantability. For one, the list specifies that, in order to be merchantable, the goods must at least "pass without objection in the trade

⁵⁵ Ebay, What Is a Power Seller?, <http://pages.ebay.com/services/buyandsell/welcome.html> (last visited Apr. 28, 2006).

⁵⁶ Ebay, Open an Ebay Store, <http://pages.ebay.com/storefronts/start.html> (last visited Apr. 28, 2006).

⁵⁷ Ebay Press Release, *supra* note 2, at 3.

⁵⁸ EBAY INC., 2004 ANNUAL REPORT 22 (2005).

⁵⁹ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (2006).

under the contract description.”⁶⁰ The Code also states that they must be at least “fit for the ordinary purposes for which such goods are used.”⁶¹ Many of the goods sold on Ebay would not satisfy these basic requirements. For example, I purchased a laptop power adapter that stopped working three hours after it arrived in the mail.⁶² Almost certainly, the adapter would not satisfy the criteria.

My legal recourse in regards to the power adapter, like any purchaser, hinged almost entirely on whether the seller was a dealer-merchant.⁶³ If she was, she would assume the loss; if she was not, I would be stuck with a useless power adapter and be out the purchase price. But the merchant/non-merchant distinction is slightly more complicated to apply to online sellers than to traditional sellers. Further, the distinction makes little sense here, as discussed above.

Conventional Test Is Too Difficult To Apply

Applying the conventional test presents a slightly more complicated problem in the Ebay context than in a more conventional sales context. However, these problems and others would be lessened, if not eliminated, if the merchant status could be gained by how the seller presents themselves. One difficulty of applying the current rule relates to determining which type of goods a merchant “deals” in, and thus which goods carry an implied warranty of merchantability. On one level, courts have been grappling with these hard decisions for some time, and the problem is anything but novel. However, this new medium exacerbates the already difficult problem of framing or delimiting the type of goods.⁶⁴

For a long time, courts have struggled to define what someone “deals in” when faced with the sale of similar, but not identical, goods.⁶⁵ For example, should a part-owner in an antique business, who often buys and sells prints, secondhand furniture, and china, be a

⁶⁰ U.C.C. § 2-314(2)(a) (2000).

⁶¹ *Id.* § 2-314(2)(c).

⁶² I purchased the power adapter for the laptop I am currently writing this Comment on. Also on file with author.

⁶³ Arguably, unconscionability might provide some recourse in the most extreme cases. U.C.C. § 2-302 (2000).

⁶⁴ *Compare* *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972) (holding that defendant cattle farmers were not merchants because the sale to non-meat packers was a different type of business than the sale of cattle to meat packers), *with* *Loeb & Co. v. Schreiner*, 321 So.2d 199 (Ala. 1975) (holding that while a cotton farmer might make an annual sale, he was not a merchant for any of the Code’s provisions).

⁶⁵ *E.g.*, *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971) (holding a beer manufacturer not to be a merchant with respect to an isolated sale of carbon dioxide to a soft drink manufacturer).

merchant as to fine art or antiques?⁶⁶ Should a dairy farmer's sale of cattle include the implied warranty of merchantability only when the purchaser will use the cattle in the same way as the farmer's typical purchasers?⁶⁷ The answer is anything but clear and must depend on the rationale for the distinction. Further, online auctions allow for an unprecedented level of specialization, which compounds the difficulty of answering these conundrums.

The modern internet auctioneer's closest analog might be traditional junkyards or secondhand stores. Unlike these businesses, though, the online auctioneer can be highly specialized in one or more types of goods. Before the online marketplace brought potential counterparties together, niche businesses were extremely confined by geographic limitations. It was both difficult to inform the market about your specialty, and difficult to actually do business with potential customers. For example, a specialty book store generally only drew on customers from its immediate locale. When these specialty businesses tried to sell to someone at a distance, it was typical to send photographs via traditional mail. Now people looking to buy or sell peculiar goods just have to go online. This increased specialization, combined with the seller's ability to fluidly move from one product to another, means that questions about what a seller deals in will more frequently emerge.

Delineating what type of goods a seller deals in is also complicated by the broader span of qualities that have independent markets in online auctions. Modern products have so many component parts and customer returns are so high that retailers recently began reselling the returns with some modifications as "refurbished." Online auctions facilitated the development of a massive market of these quasi-used goods that includes consumer returns, off-lease products, products with shipping damage, and overstocks.⁶⁸ Unlike the traditional junkman or secondhand store, many sellers of goods on Ebay refurbish goods or combine new and used parts to fashion a "new" product. How courts approach these new questions of categorization will determine not only whether the implied warranty attaches, but also the related question of what the relevant measure is for determining a breach.⁶⁹

⁶⁶ *Spainerman Gallery v. Merrit*, No. 00 Civ. 5712 (LTS)(THK), 2003 U.S. Dist. LEXIS 1444 (S.D.N.Y. Jan. 31, 2003) (holding that this issue presented a genuine issue of material fact).

⁶⁷ *Fear Ranches*, 470 F.2d 905.

⁶⁸ See, e.g., James Stock, Thomas Speh & Herbert Shear, *Many Happy (Product) Returns*, HARV. BUS. REV., July 2002, at 16.

⁶⁹ On many levels, these two concepts are interrelated. One interesting decision held that components used in a machine that wrapped concreted pipe with wire could not carry the im-

If the merchant distinction is designed to protect a buyer's reasonable, unarticulated expectations about the quality of the goods, these virtual storefronts should be considered merchants.⁷⁰ The average consumer would not perceive that purchases for an online store are inherently more risky, and the law should not enforce notions that they are. On the other hand, if the rationale of the distinction is to efficiently allocate loss, the answer is less clear. Unfortunately, there is no consensus about why sales by merchants carry the implied warranty and non-merchants are completely absolved.⁷¹

Rationale for the Section 2-314 Merchant Distinction

Nowhere in Article 2, or the rest of the Code, is there an explanation of why the merchant dichotomy exists.⁷² For purposes of section 2-314, there is obviously some essential connection between the allocation of loss and the seller's status.⁷³ But the rationale for the connection is elusive. There appears to be no reason the implied warranty should not apply to those who present themselves as merchant-dealers, save perhaps an unwarranted affinity to outmoded notions of caveat emptor.

Early courts approached the "warranty of merchantable quality" as implied-in-fact but not fully expressed or originating in the agreement.⁷⁴ It was grounded in the concept that when a dealer sold goods the "description obviously must be construed to call for the kinds of goods usually sold by that name by such dealer."⁷⁵ That is to say, "what is sold as 'waste silk' must be something known in the trade and capable of passing in the market as waste silk."⁷⁶ This "inferential" warranty was expressly provided for in the English Sales of

plied warranty of merchantability because the components were of a "new" type in the industry. *Price Bros. Co. v. Phila. Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).

⁷⁰ This argument assumes that expectations about online sales are no different. In the unlikely event that the expectations are different, to the extent that the law forms the normative perspective, it should still apply.

⁷¹ *E.g.*, Hillinger, *supra* note 19.

⁷² Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt To Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1143-45 (1985). There is a broad range of scholarship that discusses the motivations of the drafters as a whole. *E.g.*, Allen R. Kamp, *Legal Development: Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995) (arguing that the drafters, who were part of the legal realist movement, were motivated by the progressivism of the New Deal era).

⁷³ *E.g.*, Hillinger, *supra* note 19, at 747.

⁷⁴ William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 126 (1943).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46).

Goods Act and later carried over into the Uniform Sales Act and to the U.C.C.⁷⁷ When the doctrine was first applied, the distinction that limited the warranty to dealers probably reflected the fact that, before the industrial revolution, goods sold by non-dealers were not fungible.⁷⁸ Modern consumer goods, though, are almost all fungible, as a result of assembly line production. A “brand new” power adapter implies working condition in the same way that “waste silk” once implied the inferior silk from the outside of the moth’s cocoon.⁷⁹ Indeed, the implication of descriptions and categories in the modern consumer market might carry more significance than it ever has, because selling fungible products in the post-mass-production era relies heavily on brand name recognition and huge market volume. Moreover, the robust secondary market for quasi-used goods has created more distinct quality levels.

Perhaps the most obvious, or infamous, modern rationale for the implied warranty of merchantability is that it captures and enforces the reasonable expectations of the contracting parties. Both Dean Prosser’s remarks⁸⁰ and the drafters’ official comments support this rationale.⁸¹ Many recent court decisions have also adopted this rationale when expounding section 2-314.⁸² But if the purpose of the warranty is to protect consumers’ reasonable expectations, and the warranty does not attach to sales by non-merchants, the implication is that purchasers of goods from non-merchants cannot have any reasonable expectation that the goods will be of merchantable quality. This must be true, because the provision precludes courts from examining whether the goods were even of the most basic quality level for non-merchant sales. However, sales by non-dealers are more likely to include these implied warranties than their more experienced and sophisticated merchant counterparts, because non-merchants inherently have less experience crafting sales agreements.

If the rationale was to enforce expectations, the distinction would also be superfluous, because unreasonable quality expectations are not enforced by the Code.⁸³ On the other side of the coin, if the law is

⁷⁷ *Id.*

⁷⁸ SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* 189 (1909) (using the examples of grain and oil to explain the term “fungible good”). Llewellyn conceived the Code as helping to distinguish the horse and haystack from wares in commerce. K.N. Llewellyn, *The First Struggle To Unhorse Sales*, 52 HARV. L. REV. 873, 903-04 (1939).

⁷⁹ See 19 OXFORD ENGLISH DICTIONARY 958 (2d ed. 1989).

⁸⁰ Prosser, *supra* note 74, at 125.

⁸¹ U.C.C. §§ 2-313 cmt. 1, 2-314 cmt. 7 (2000).

⁸² Hillinger, *supra* note 19, at 754-55 nn. 34-40.

⁸³ *Id.* at 757.

creating an expectation of increased risk, it is also creating a negative economic consequence for sellers and society as a whole. Society has an economic incentive to eliminate any reflection of increased legal risk, because even the unwarranted perception creates downward price pressure and this contributes to an inefficient allocation of resources among the different markets. Perhaps more significantly, these growing entrepreneurs would presumably not want to be stigmatized by the notion that their products carry no warranty.⁸⁴

A final rationale for limiting the implied warranty of merchantability to dealers is that a dealer, more than a buyer, is generally a superior loss bearer and endowed with more information and control of the product. This is probably true, but the same could be said for other non-merchant sellers in this context. First, any seller is generally the lower cost producer of information when the counterparties are geographically dispersed. Second, and perhaps more importantly, if an Ebay entrepreneur holds himself out as a merchant, he should be held to the standard of one and face liability for delivering non-merchantable goods.

V. A HISTORICAL PERSPECTIVE AND THE RAMIFICATIONS TODAY

The resilience of the Code is a testament to what Llewellyn modestly described as “a rather amazing piece of legal engineering.”⁸⁵ Imposing merchant status on Ebay auctioneers would not require any change in the language of the Code or the Official Comments; it would only change how the courts interpret them. And this alternative interpretation may be a more correct reading of the current text.

The language originally proposed for the U.C.C. did not include the merchant distinction; rather, it restricted the implied warranty of merchantability to sales of new goods.⁸⁶ However, before the final draft, the used goods distinction was omitted from the comments to section 2-314, and the “deals in goods of the kind or otherwise” language was added to broaden the “merchant” definition in section 2-104.⁸⁷ Based on the current language of the Code, courts routinely

⁸⁴ This begs the question of whether there are different socio-societal considerations when the counterparties are geographically dispersed. To the extent that there is societal pressure not to corkscrew members of your own community, does the relative anonymity and distance of a typical Ebay transaction eliminate it?

⁸⁵ Hillinger, *supra* note 72, at 1164 n.153.

⁸⁶ The comments to the 1949 draft read: “In contrast, a contract for the sale of second-hand goods can involve only such obligation as is appropriate to such goods. A person making an isolated sale of *such* goods would not be a ‘merchant’ within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply.” U.C.C. § 2-314 cmt. 3 (Draft May 1949).

⁸⁷ Hillinger, *supra* note 19, at 785-87.

hold that the implied warranty only attaches when the seller actually deals in goods of the kind and not “by virtue of holding himself out as having knowledge or skill.”⁸⁸ But this might be the wrong interpretation. Those sellers who hold themselves out as dealers should be held to the standards of dealers.

In fact, the drafters might have conceived of including this group as “merchants as to the goods,” but the concept was so academic or confusing that it was overlooked.⁸⁹ It has traditionally been almost impossible to hold yourself out as a dealer in goods for any significant period of time without actually selling anything.⁹⁰ White and Summers interpreted the language to mean that sales by electricians, plumbers, boat builders, etc. would include a warranty of merchantability.⁹¹ But those examples would generally be covered by the dealer language, so perhaps the language should be given a much broader construction. A broader construction would include not only these sundry peri-professionals, but also anyone who “holds themselves out” as a dealer, no matter how many goods they actually sell. For the purposes of Ebay auctioneers, this would include both Power Sellers and Ebay stores.

Reading the text to impose this obligation would be completely possible from a practical perspective. Other legal systems have a similar implied warranty concept that attaches for all sales. For example, both France and Germany prescribe a basic duty to deliver merchantable goods on all sellers through their civil rather than their commercial code.⁹² Many other countries also impose similar standards.⁹³

In the domestic legal regime, this interpretation might have some positive indirect effects. Because the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Warranty Act) only applies to merchants, imposing merchant status on Ebay auctioneers would bring many online transactions within its reach.⁹⁴ The

⁸⁸ *E.g.*, *Siemen v. Alden*, 341 N.E.2d 713, 716 (Ill. App. Ct. 1975) (noting defendant’s argument that plaintiff was a merchant “by virtue of his ‘holding himself out as having knowledge or skill.’”).

⁸⁹ White and Summers would interpret section 2-104’s second phrase, i.e., “otherwise by his occupation,” to include electricians, plumbers, boat builders, etc. for the purposes of the implied warranty of merchantability. WHITE & SUMMERS, *supra* note 34, § 9-7.

⁹⁰ This scenario could also be possible when parties represented themselves on paper to be dealers, but in fact had no such experience, e.g., in a magazine or newspaper advertisement. There appear to be no cases addressing this situation, but there is no reason to think that it should be handled a different way.

⁹¹ WHITE & SUMMERS, *supra* note 34, § 9-7.

⁹² Hillinger, *supra* note 19, at 748 n.9.

⁹³ *Id.* at 804-06. Perhaps the most notable difference in the regimes is the degree to which they impose consequential damages.

⁹⁴ Many of the consumer protection provisions included in the Warranty Act hinge on

Warranty Act was intended to make warranties in consumer sales more readily understandable and to provide an effective mechanism for the comparatively small amounts of damages involved in such cases.⁹⁵ These are two significant concerns for transactors in the online market.

Many agreements include deceptive warranty provisions. Right now, more than twelve million Ebay offerings use the word “warranty.” Moreover, many offerings contain language like: “no returns”; “buyer must notify the seller of defective goods within three days”; and “goods must be returned directly to manufacturer.” These provisions and other like them are often inapposite to the actual law and would be more closely scrutinized if a seller was a merchant. Applying the Warranty Act would also ensure that a remedy existed for intentionally deceptive trade practices. Finally, making these sellers subject to the Warranty Act would provide the possibility of efficient remedial relief for the small amount of damages often at issue in these cases.⁹⁶

Interpreting the text to afford Ebay auctioneers merchant status might also help stave off the possibility of unnecessary and confusing state regulation. Many states have proposed or passed legislation requiring online auctioneers to become licensed, a process that involves fees and instruction geared to traditional auctioning.⁹⁷ Such legislation raises questions about who is covered. Would stores auctioning goods for others auctioning goods online be covered? Is it necessary for the purchaser to take title to the goods for the implied warranty of merchantability to attach? The existing body of law is sufficient to handle most concerns relating to Ebay transactions; additional legislation only makes resolving such concerns more complicated.

whether state law would include implied warranties. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act 15 U.S.C. § 2301(7) (2006).

⁹⁵ 17 AM. JUR. 2D *Consumer Product Warranty Acts* § 1; Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028 (N.D. Ind. 1981).

⁹⁶ Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321 (11th Cir. 2001) (reconciling the Warranty Act and the Federal Arbitration Act in a dispute over problems with a mobile home).

⁹⁷ S.B. 99, 126th Gen. Assemb. (Ohio 2005); *Ebay Fights Bid To Stop Fencing of Stolen Goods*, BUS. (London), May 29, 2005, at 9; Ted Griggs, *La. Trying To License Ebay Traders Who Sell Property for Other People*, ADVOCATE (Baton Rouge), May 20, 2005, at 1-A; Brad Schrade, *State Licensing Seen as Threat to Businesses that Depend on Ebay*, TENNESSEAN, Apr. 5, 2005, at 1B.

VI. CONCLUSION

While many people perceive the magnitude of internet transactions to be small on a relative or absolute basis, that is not necessarily the case. Many goods sell on Ebay for thousands of dollars: a large volume of expensive jewels, antiques, and computer hardware change hands. A vast majority of these transactions are consummated without incident, and by all accounts the platform is a great success; it is not perfect, however, and problems will inevitably arise. A new sales medium presents new ways to perform old crimes. For example, there is now an enormous amount of fraudulent or “knock-off” goods sold to unsuspecting purchasers.⁹⁸

Some of these problems have entered the case law, but many, perhaps most, remain unreported by the courts and the media, or not pursued by the victim. And with the benefit of a new sales medium, there are inevitably new ways to perform old crimes. However, the problems are generally the same and appear to be adequately addressed in our versatile body of sales law.⁹⁹ Sometimes “[t]he pressure of the times and of newer legal activities,” as Llewellyn once described it, simply requires examining our interpretation of the existing body of law.¹⁰⁰

From a practical perspective, viewing Ebay auctioneers as merchants has little impact. Most of the merchant provisions are not practically implicated. Indeed, even the implied warranty of merchantability’s threshold quality level for goods sold would often be subsumed by express warranties and disclaimers. Nonetheless, how the law works in this area bears investigating, not only because of its increasing importance, but also because it provides insight into how to handle problems with online sales at large. Obviously, there are many other entrepreneurs that hold themselves out as dealers on the internet. Adding clarity and reason to how the law should function

⁹⁸ Katie Hafner, *Seeing Fakes, Angry Traders Confront Ebay*, N.Y. TIMES, Jan. 29, 2006, at A22.

⁹⁹ While a slightly different interpretation of these provisions would address many of the concerns in this area of the law, how the law of personal jurisdiction is being applied merits some attention to these multi-jurisdiction transactions. *See, e.g.*, Fletcher Jones West Shara, LTD. v. Rotta, 2006 Westlaw 231484; 31 Fla. L. Weekly D358 (Fl. App. Feb. 1, 2006) (affirming that defendant’s misrepresentations incident to the sale of an automobile via Ebay afforded the court personal jurisdiction).

¹⁰⁰ Llewellyn, *Why We Need the Commercial Code*, 10 U. FLA. L. REV. 367, 373 (1957).

for Ebay auctioneers provide a framework for dealing with these problems more generally.

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