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Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape

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eBay's business is based on enabling someone to do business with another person, and to do that, they first have to develop some measure of trust, either in the other person or the system.

- Pierre Omidyar, founder of eBay, in Business Week Online (June 20, 2005)

Men are able to trust one another, knowing the exact degree of dishonesty they are entitled to expect.

- Attributed to Stephen Leacock, writer and economist (b. 1869, d. 1944)

A dishonest man you can always trust to be dishonest. Honestly. It's the honest ones you want to watch out for, because you can never predict when they're going to do something incredibly stupid.

- Captain Jack Sparrow, "Pirates of the Caribbean: The Curse of the Black Pearl"(2003)

INTRODUCTION:

As explorers once opened up new trade passages, thus attracting hordes of both honest traders and dishonest pirates, so too has the Internet opened new lanes of commerce and attracted the modern versions of the same. One of the widest of these lanes undoubtedly runs through eBay, located at <http://www.ebay.com> . From its humble beginnings as a little-known auction site hawking PEZ candy dispensers, broken laser pointers and other garage-sale pickings, eBay

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has transformed itself into a reputable public sales powerhouse where a Gulfstream II jet, million-dollar sports artifacts, and Madonna's wedding tiara might easily change hands.⁴

Today eBay is a household name, a widely imitated⁵ electronic "supermarket"⁶ offering a vast range of goods both used and new, in all price ranges, via both computerized auctions and fixed-price ("Buy it Now") direct sales,⁷ to huge segments of the buying public. At the end of 2005, eBay had over 181 million total user accounts worldwide; during that year, users traded over \$44 billion in total value of goods sold.⁸ True to its origins, the current version of eBay still features many low-priced items of the sort that one might clean out of a cluttered attic. However, large volumes of new and expensive goods also change hands, including costly collectibles⁹ and high-end consumer goods such as designer clothing, home electronics,

⁴ See http://www.thebidfloor.com/eBay_facts.htm (listing top five most expensive auctions ever on eBay); *Madonna Selling Wedding Tiara for Charity*, UNITED PRESS INT'L, Sept. 2, 2006.

⁵ Auction sites similar to eBay currently range from large general sites such as Yahoo Auctions (which retired its United States site in June 2007, but continues to operate in some foreign countries) and uBid.com to smaller specialty sites such as The Teddy Patch, which features auctions for teddy bears, dolls and similar toys. Yahoo Auctions, <http://auctions.yahoo.com> (last visited Nov. 18, 2007); uBid.com, <http://www.ubid.com> (last visited Nov. 18, 2007); The Teddy Patch, <http://www.theteddypatch.com/index.php> (last visited Nov. 18, 2007). These sites tend to follow the basic eBay model with slight variations. For example, uBid differs from eBay in that uBid requires all sellers to go through a "certification" process and does not charge sellers a fee to list items. See Ubid.com, *The uBid.com Difference and The Marketplace You Can Trust*, http://www.ubid.com/sell_online/#difference (last visited Sept. 10, 2007).

⁶ During oral argument in the recent case of *eBay Inc. v. MercExchange, L.L.C.*, U.S. Supreme Court Justice Stephen Breyer likened eBay's "Buy-It-Now" feature to A&P's "process for a supermarket." Transcript of Oral Argument at 42, *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-130.pdf.

⁷ The "Buy it Now" fixed-price sales feature, which was introduced on eBay after its original auction format had gained popularity. Buy it Now, <http://pages.ebay.com/help/buy/buyer-bin.html> (last visited Sept. 10, 2007). Many other online retailers also have some direct-sale feature that appears similar to the end user. For example, Amazon.com offers "1-click" ordering whereby a purchaser clicks a button on the display screen to instantly purchase a product. See *Ordering Via 1-click*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=468480> (last visited Sept. 10, 2007).

⁸ eBay, Inc., Annual Report (Form 10-K), available at <http://investor.ebay.com/annual.cfm> at (i), 2 (Feb. 24, 2006).

⁹ As a typical example, on September 7, 2006, the eBay category "Dolls" contained over 113,000 items, the highest priced of which were antique Bru and Steiner dolls offered at starting bids of approximately \$25,000 and \$9,000 respectively, and the lowest priced of which started at a penny bid plus a few dollars shipping fee. Similarly, the category "Stamps" contained over 41,000 items with the two most expensive, a worldwide stamp lot and pre-1939 stamp albums, listed at approximately \$18,000 and \$17,000 starting bids respectively, and the lowest offered

automobiles, and real estate.¹⁰ The maxim “if you build it, they will come,” where “they” are the buyers and sellers who transact, has obviously come true 180 million times over in eBay’s case.

Unfortunately, as the pool of potential rewards grew, the modern pirates – fraudulent traders and scam artists – also came to troll these lanes of commerce. Since the late 1990s, reports of Internet fraud made to organizations such as Internet Fraud Watch, the FBI’s Internet Fraud and Complaint Center, the National Consumers League, and the Federal Trade Commission have risen steadily; Internet auction fraud has comprised the majority of the complaints.¹¹ The Federal Trade Commission now offers a 30-page booklet of tips to help Internet auction users avoid fraud.¹² While eBay is certainly not the only auction site or web site where fraud can occur, its sheer size, longevity, and influence make it a highly visible arena, both for those who commit fraud and those interested in preventing it. Actions taken or not taken by eBay tend to have far-reaching effects due to the multitude of users affected, as well as eBay’s influence on Internet business models.

for a starting bid of one penny plus a small shipping fee. See <http://www.ebay.com> (last visited Sept. 7, 2006) (survey of categories “Dolls” and “Stamps”) (on file with author).

¹⁰ According to TheBidFloor.com, an eBay marketing research website, the most popular category on eBay continues to be collectibles with 17% of total items listed, while the second most popular category is clothing/shoes/accessories with 11% of the total items listed, followed by entertainment (11%), sports (9%), home (8%), jewelry and watches (8%) and computers and electronics (7%). The Bid Floor, “eBay Statistics,” available online at http://www.thebidfloor.com/eBay_statistics.htm (Sept. 7, 2006). eBay Motors, the separate vehicle sales arm of eBay, has been active since the late 1990s for trading of cars, trucks, boats, motorcycles and related items. And, although real estate only makes up 0.01% of eBay listings according to thebidfloor.com, this is a significant number of transactions given the total volume. The New York Times recently noted that eBay “may have more than 1,800 residential properties listed on any given day – from multimillion-dollar vacation houses in Florida to thousand-dollar fixer-uppers in the rural Midwest.” Katie Hafner, *On the Internet, Some Home Buyers Find a House of Cards*, N.Y. TIMES, Mar. 11, 2006, at C1.

¹¹ Kyo M. Dolan, *Internet Auction Fraud: The Silent Victims*, J. OF ECON. CRIME MGMT, Winter 2004, at 1-3, <http://www.utica.edu/academic/institutes/ecii/jecm/articles.cfm> (follow “Winter 2004 Volume 2, Issue 1” hyperlink; then follow “Internet Auction Fraud: The Silent Victims” hyperlink). The number of complaints relating to Internet auction fraud made to the FTC alone increased from approximately 4,400 in 1998 to over 25,000 in 2001. *Id.* at 2-3.

¹² FEDERAL TRADE COMM’N, INTERNET AUCTIONS: A GUIDE FOR BUYERS AND SELLERS, <http://www.ftc.gov/bcp/online/pubs/online/auctions.pdf> (last visited Sept. 10, 2007).

Since its inception, eBay has attempted to distance itself from the actual transactions taking place on its website, which it contends are between the individual buyers and sellers, with eBay's role strictly limited to providing a trading environment. However, over the years eBay has stepped up its involvement in fraud prevention in order to protect its own interests and respond to legal or economic pressure from strong third parties, including government entities and its own customer base.¹³ Indeed, eBay acknowledges in its own annual report that fraud poses significant risks to its business, both by eroding consumer confidence and directly affecting payments made to the company.¹⁴ While still maintaining that it is "not involved in the actual transaction[s],"¹⁵ eBay now performs a number of fraud protection activities, including cooperating with law enforcement to remove illegal items and assist investigations, working with intellectual property rights owners to remove allegedly infringing items, investigating some user complaints, and providing users some limited forms of financial coverage against fraud loss. Part of eBay's impetus to become more involved also stems from its operation of the online payments business, Paypal (<http://www.paypal.com>). Paypal is essentially a financial services

¹³ See Peter P. Swire, *Trustwrap: The Importance of Legal Rules to Electronic Commerce and Internet Privacy*, 54 HASTINGS L.J. 847, 855-56 (2003) (discussing the evolution of eBay's risk-reducing and enforcement procedures on the basis that they add value to the transaction); Daniel Wolfe, *As Web Fraud Evolves, So Do eBay's Tactics*, AM. BANKER (Apr. 28, 2004) (discussing how eBay has become more proactive about fraud over time).

¹⁴ See eBay, Inc., *supra* note 8, at 14, 20 (noting that fraud losses pose a risk to eBay's Paypal financial segment as well as to the main auction site).

¹⁵ eBay User Agreement, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Sept. 9, 2007) "describes the terms on which eBay offers you access to our services" and states in a section entitled "Liability":

You will not hold eBay responsible for other users' actions or inactions, including things they post. You acknowledge that we are not a traditional auctioneer. Instead, the Sites are a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats and venues, such as stores, fixed price formats and auction-style formats. We are not involved in the actual transaction between buyers and sellers. We have no control over and do not guarantee the quality, safety or legality of items advertised, the truth or accuracy of listings, the ability of sellers to sell items, the ability of buyers to pay for items, or that a buyer or seller will actually complete a transaction.

entity and thus may fall within a more traditional regulatory context than eBay's groundbreaking auction model.¹⁶

This article surveys the current auction fraud landscape using eBay as a model, examining a number of the "mine shafts" down which unwary users, particularly buyers, can fall, and eBay's perceived response, if any, to these issues. It is important to note that most, if not all, of these forms of fraud are not unique to eBay or even to e-commerce generally. Indeed, before the Internet, when goods were sold over a distance by mail order, there were fraudulent buyers who paid with bad checks, and fraudulent sellers who took payments and failed to ship the promised items. Even within the Internet context, many Internet frauds target large entities including but not limited to eBay. For example, "phishing" scams – a form of identity theft that operates by convincing a user to provide personal data to a phony e-mail or website – regularly target websites of major banks and even the U.S. government.¹⁷ Within the Internet auction and sales context specifically, eBay's pioneering success has spawned a host of Internet auction and direct sales websites using similar sales models that are vulnerable to many of the same frauds. eBay, because of its size, high visibility, and standardized transaction model, simply provides a consistent framework to discuss these frauds and one company's perceived response to them.¹⁸

Part I of this article provides a background description of eBay's basic transaction model, including the basic remedies available for problematic transactions. Part II discusses areas in

¹⁶ See eBay, Inc., *supra* note 8, at 23-24, 34 (noting that Paypal "is providing a financial service and operating in a more regulated environment" than the main eBay site).

¹⁷ See FED. TRADE COMM'N, *supra* note 12, at 4; Jennifer Lynch, Note, *Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 BERKELEY TECH. L.J. 259, 267-70 (2005); FED. TRADE COMM'N, FTC CONSUMER ALERT: HOW NOT TO GET HOOKED BY A 'PHISHING' SCAM (2006). Phishing is clearly not an eBay-specific fraud but is discussed in this article primarily as it relates to eBay.

¹⁸ It should also be noted that, as discussed later in this paper, the analysis is based on the publicly *perceived* response of eBay, both as observed by its outside users and publicized through official company statements to users, shareholders and media. The exact parameters of eBay's fraud response are kept largely confidential and unknown, partly to keep fraudsters in the dark as to eBay's investigative methods. See discussion *infra* at note 57.

which eBay and/or outside groups have been actively working to prevent fraud. Finally, part III describes areas where eBay and/or outside groups have not effectively taken action, and suggests some solutions.

I. A Map of the Known World: eBay's Basic Transaction Model

Now . . . bring me that horizon.

- Captain Jack Sparrow, "Pirates of the Caribbean: The Curse of the Black Pearl"

eBay uses the same basic transaction model for both auction sales and fixed-price "Buy it Now" sales. In this model, sellers of goods are eBay's primary customers and sources of revenue. These sellers in turn derive revenue from buyers, who are primary customers of the sellers and secondary customers of eBay. This section describes the mechanics of typical eBay transactions and the available protections against fraud.

A. Seller Registration and Activities

In order to sell on eBay, a seller must first register with eBay under a unique "seller ID" and verify his identity, usually by registering a credit or debit card account and bank information with eBay.¹⁹ The seller is then permitted to list items for sale on eBay using various sales models, including an auction of fixed duration or a fixed-price sale using the "Buy it Now" feature, with the item available for purchase during a set time period. Sellers can also use a combination of these two methods, offering buyers a choice of either purchasing the item outright at a fixed price through "Buy it Now," or placing an auction bid in hopes of winning the

¹⁹ eBay offers an alternative process called "ID Verify" to verify those users who do not have credit cards or do not wish to place a credit card number on file. Users who have been ID Verified have a special icon next to their user IDs. ID Verify requires that a user live in the United States, provide a home (not business) address, verify various information on installment and credit accounts for cross-checking, pay a five-dollar fee, and then not change his contact information after verification is complete. If contact information changes, the user must pay another fee and repeat the process. eBay, About ID Verify, <http://pages.ebay.com/help/confidence/identity-idverify.html> (last visited Sept. 9, 2007). The relative ease of providing credit and bank account numbers on file suggests that many, if not most, sellers will prefer that option, as evidenced by the large number of sellers on eBay lacking an "ID Verify" icon.

item at a lower price than the Buy it Now price.²⁰ A typical listing format using the “Buy it Now” feature is shown in Figure 1.²¹

The seller generally pays one fee to eBay at the time of listing and a second fee if the item sells. Sellers also have the option of paying eBay additional fees to use various promotional features and selling tools.²²

An item listing typically contains the seller’s ID, geographic location, a description and photograph of the item, the ending date and time of the auction or direct sale period, and whatever additional information the seller wishes to provide regarding acceptable forms of payment, shipping and handling fees, returns policies, and other sale-related policies. For an auction item, the listing will further include the starting or current auction bid, while for a direct sale listing, the “Buy It Now” price will be included. Regarding forms of payment, sellers typically state that they accept Paypal, an Internet payment service that became popular on eBay

²⁰ Further complicating the scenario for inexperienced users are the many variations on this model, such as Immediate Payment listings in which the item is still available for sale until a buyer sends payment; Best Offer listings, allowing the buyer to make a fixed-price offer to the seller; Dutch auction format, where a group of items is divided among a group of high bidders in the order of magnitude of their bids; and Store Inventory listings, which may carry different seller fees and be presented differently to buyers in search listings. *See, e.g.*, eBay, Immediate Payments, <http://pages.ebay.com/help/pay/immediatepayment-buyer.html> (last visited Sept. 9, 2007); eBay, Selling with Best Offer, <http://pages.ebay.com/help/sell/best-offer.html> (last visited Sept. 9, 2007); eBay, Selling Multiple Items in a Listing (Dutch Auction), <http://pages.ebay.com/help/sell/multiple.html> (last visited Sept. 9, 2007); eBay, eBay Stores Fees, <http://pages.ebay.com/help/sell/storefees.html> (last visited Sept. 9, 2007) (discussing fees and search results presentation for eBay Stores items). However, many listings still conform to the basic model of auction and/or Buy-it-Now.

²¹ The listing in Figure 1, including the fictitious user ID’s “buyer*xxx” and “seller*yyy”, was created solely as an illustration for this article and did not actually appear on eBay. Where this article references actual eBay user ID’s or e-mail addresses, such identifying information has been truncated to protect privacy.

²² Sellers initially pay eBay an “insertion fee” to list the item. If the item does not sell, the seller can sometimes obtain a credit towards the fee by relisting the item on eBay. eBay, How Does the Free Relist Policy Work?, <http://pages.ebay.com/help/sell/questions/free-relist.html> (last visited Sept. 9, 2007) (discussing insertion fee credits). If the item sells, sellers then pay eBay a “final value fee” that is calculated based on the sales price. The seller also has the option of paying additional fees to use other auction features and selling tools. eBay, ebay.com Fees, <http://pages.ebay.com/help/sell/fees.html> (last visited Sept. 9, 2007). Sellers can sometimes list items for free during special promotional periods. *See, e.g.*, eBay, U.S. Free Listing Day, <http://pages.ebay.com/promo/f621q230d/> (last visited Sept. 9, 2007) (advertising December 26, 2003 promotion when insertion fees for items listed on that day were waived).

and was eventually purchased by eBay in 2002.²³ Paypal allows buyers to instantly pay for goods online using a bank account balance or credit card, without having to give their bank or credit card information directly to the seller. Sellers thus receive their payment in a cash equivalent without having to process buyers' bank or credit card information themselves. In addition to Paypal, many sellers also accept traditional forms of payment such as money orders and checks.

As shown in Figure 1, the seller's listing displays graphics designed to engender trust in buyers. A "feedback number" appears next to the seller's ID. Feedback is a rating of positive, neutral or negative, accompanied by a one-line comment that can usually be publicly read, given by one's transaction partner after a transaction is complete.²⁴ A positive feedback increases the feedback score by one point, a neutral feedback does not affect the score, and a negative feedback decreases the score by one point. Under the current eBay model, one feedback rating per transaction can be left within a set time window after that transaction, and each rating shows whether the recipient was the buyer or seller in the transaction. Feedback can only be left by a transaction partner, and the overall feedback score can only be increased by unique partners. In other words, a single buyer purchasing ten items from ten different listings by the same seller may leave ten individual comments, but can only increase the seller's numeric score by one

²³ eBay bought Paypal after its attempts to start and promote its own online payments site, Billpoint, failed. See ERIC M. JACKSON, *THE PAYPAL WARS: BATTLES WITH EBAY, THE MEDIA, THE MAFIA, AND THE REST OF PLANET EARTH* (2005).

²⁴ See eBay, Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited Sept. 9, 2007). Although it is possible to make one's feedback comments private, few users do so. Users with private feedback may buy items on eBay but are not permitted to sell items. Furthermore, as noted by eBay, private feedback can reduce the willingness of potential transaction partners to deal with a user because of suspicion that the private feedback may be negative. See eBay, Making Your Feedback Profile Public or Private, <http://pages.ebay.com/help/feedback/reputation-public-feedback.html> (last visited Sept. 9, 2007) (discussing private feedback).

point. A high feedback number for a seller is generally interpreted as denoting a trustworthy seller who advertises truthfully, communicates well, and ships quickly.²⁵

A “Power Seller” graphic appears next to a seller’s ID when that seller has a consistently high volume of monthly sales with a 98% or better feedback rating.²⁶ Interestingly, because Power Sellers have a high volume of sales, they can also have a proportionately high number of negative feedbacks without losing their 98% rating, a fact that is revealed only if one bothers to click past the feedback score to read the actual feedback comments.

A “SquareTrade” seal appears on the auctions of sellers who have committed to the SquareTrade online dispute resolution program, available via the SquareTrade website at <http://www.squaretrade.com>. eBay was instrumental in developing the SquareTrade program and continues to support it through endorsements, advertising, and referrals. The SquareTrade seal means that a seller has had her identity verified by SquareTrade, has committed to SquareTrade’s policies for online selling, and has agreed to resolve any problems through SquareTrade’s dispute resolution. SquareTrade also safeguards all auctions displaying the seal by insuring the parties up to \$250.00 for losses sustained due to fraud.²⁷ Some other companies

²⁵ While the feedback system appears to have been a success in denoting successful “repeat players” experienced in honest transactions, its imperfections and the need for a backup legal system in the event of its failure has also been noted. *See, e.g., Swire, supra* note 13, at 856-57.

²⁶ eBay, Power Sellers: Criteria, [http://pages.ebay.com/services/buyandsell/Power Seller/criteria.html](http://pages.ebay.com/services/buyandsell/Power%20Seller/criteria.html) (last visited Sept. 9, 2007). In addition to averaging a minimum of \$1,000 in sales per month for three consecutive months on eBay or certain affiliated sales sites such as eBay Motors, Power Sellers must also meet other requirements such as 90 days of active membership, compliance with eBay listing policies, and good financial standing with eBay. eBay automatically invites qualified sellers to become Power Sellers by e-mail and periodically reviews their status. *Id.*

²⁷ eBay, Square Trade Seal, <http://pages.ebay.com/help/confidence/programs-square-seal.html> (last visited Sept. 9, 2007) (explaining Square Trade Seal program).

independent of eBay, such as buySAFE (<http://www.buysafe.com>), offer similar trust programs with displayable seals for sellers who choose to participate.²⁸

B. Buyer Registration and Activities

Buyers must also register on eBay, using a process similar to seller registration, in order to bid on or buy items.²⁹ The major difference between buyers and sellers is that buyers do not have to pay fees directly to eBay. The eBay model is thus similar to a shopping mall or flea market, where sellers rent space to display their wares to buyers who browse for free.³⁰

When a buyer wins an auction or purchases an item directly with “Buy it Now,” eBay sends automated notices to both the seller and buyer informing them of the pending transaction. eBay then expects the seller and buyer to make contact via e-mail within a time window of three days (eBay provides special messaging services on its site that facilitate fast and accurate e-mail contact³¹) and to complete the transaction within a reasonable time, generally one or two weeks.

If a buyer fails to make payment within seven days, the seller can report the buyer to eBay for nonpayment. eBay will then credit back part of the seller’s fees and issue an “unpaid item

²⁸ See Reid Goldsborough, *Online Buyers Beware: Technology Today*, CMTY. COLL. WEEK, Nov. 8, 2004, at 19 (describing buySAFE as “the first true buyer protection plan” for eBay users); See also Bob Tedeschi, *Nervous About Bidding on eBay? Hartford Insurance and a Start-Up Are Offering a Policy to Allay Buyers’ Fears*, N.Y. TIMES, Nov. 17, 2003, at C7 (describing Hartford Insurance and buySAFE program to sell insurance to eBay buyers covering sellers’ failures to deliver advertised goods, and noting similarities to SquareTrade program).

²⁹ Buyers do not have to provide checking account information, and may not have to provide credit card information if their identity can be verified based on their e-mail account. However, if a buyer’s identity cannot be verified based on e-mail – for example, if the buyer uses a free web-based e-mail service such as Yahoo or Hotmail, as opposed to an e-mail linked to an employer or a paid Internet service provider – the buyer will need to place a credit card on file or go through the ID Verify process. See eBay, *Providing Identification for Registration*, <http://pages.ebay.com/help/newtoeBay/RegisterVerifyOrEmail.html> (last visited Sept. 9, 2007). Other activities such as frequent high bidding or browsing auctions for adult products may also require the buyer to verify his identity. See eBay, *Buyer Activity Limits*, <http://pages.ebay.com/help/tp/activity-limits.html> (last visited Sept. 9, 2007); See also eBay, *Searching Mature Audiences Items*, <http://pages.ebay.com/help/find/adult.html> (last visited Sept. 9, 2007).

³⁰ For example, eBay has been likened to a swap meet and it has been suggested that problems could be avoided by states regulating it in the same manner as actual swap meets. See generally, David Rubenstein, Comment, *eBay: The Cyber Swap Meet*, 13 U. MIAMI BUS. L. REV. 1, *2-4 (2004).

³¹ See eBay, *Contacting eBay Members*, <http://pages.ebay.com/help/tp/contacting-members.html> (last visited Sept. 9, 2007).

strike” against the buyer. Buyers who get “too many strikes in too short a time period” (according to eBay, which does not define “too many” or “too short” numerically) may have their accounts limited or suspended by eBay.³² The seller has some control over the time frame. For instance, a seller can require in her listing that contact or payment be made within a shorter time frame, or can choose to forgive rather than report a late payer.

Buyers, like sellers, can receive one feedback rating from their transaction partner (the seller) following each transaction. A buyer’s feedback score is indicated next to her user ID when she bids or purchases items. A high buyer feedback score is generally taken as indicating an experienced eBay user and timely payer. Sellers frequently reserve the right to cancel bids of potential buyers who have no feedback or negative feedback.

C. Completing the Transaction

After the buyer pays, the seller is expected to ship the item within the time frame agreed upon by the buyer. Often, all goes well and the satisfied buyer and seller may leave each other positive feedback and move on to the next transaction. However, the transaction can also go badly if the seller fails to receive payment or the buyer fails to receive the item as promised. When this happens, the buyer and seller also have the option of leaving each other negative eBay feedback, although they may choose not to do so for various reasons, one being that leaving a

³² eBay’s “too many strikes in too short a time period” language on its website at <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited Sept. 9, 2007) is vague regarding the exact number of strikes required for limiting or suspension, making the decision to suspend appear discretionary on eBay’s part. eBay indicates elsewhere that it uses profiling, based on its research into characteristics of non-paying bidders, to determine whether to limit account activity. For example, a buyer’s activity may be limited if the buyer account is new and makes a large number of bids having a high total value over a short time window. eBay, “Buyer Activity Limits,” *supra* note 29. As eBay does not derive its revenue directly from the buyers, these tactics are largely attempts to address the frustration of sellers (eBay’s customers) with buyers who do not pay.

negative feedback generally results in receiving a negative feedback in return. The failure to leave deserved negatives can make feedback unreliable as a trust indicator.³³

Even assuming that feedback is generally reliable, it is important to note that it is essentially a forward-looking solution. The main penalty imposed by negative feedback is to discourage other users from engaging in future transactions with the feedback holder, and in some cases may result in the feedback holder being suspended from eBay.³⁴ While feedback might thus prevent future bad transactions, it does nothing to make whole the parties who have already suffered a loss. For actual remedies, the parties' options depend on the details of the transaction at issue.

D. Seller and Buyer Fraud Protection Models

1. Seller Protection Options

Because sellers set the terms of the eBay auctions or sales, they can generally protect themselves well in the transaction. The seller controls the method of shipping and has the option of either paying for insurance or requiring that the buyer pay for it. The seller also can control how disputes will be resolved, for example, by stating a returns/refund policy or by participating in a "trust" service such as SquareTrade (<http://www.squaretrade.com>) that offers dispute

³³ See, e.g., Mary M. Calkins, Comment, *My Reputation Always Had More Fun Than Me: The Failure of eBay's Feedback Model to Effectively Prevent Online Auction Fraud*, 7 RICH. J.L. & TECH. 33, ¶ 99 (Spring 2001), <http://law.richmond.edu/jolt/v7i4/note1.html> (last visited Sept. 9, 2007); eBay, Feedback Board FAQ, <http://forums.ebay.com/db2/thread.jspa?threadID=410219594&tstart=0&mod=1090647722903> (last visited Sept. 9, 2007) (stating in response to the question, "I did not get feedback for every transaction. Why?" that "[t]he feedback program is voluntary, and not everyone participates.").

³⁴ Negative feedback alone, without some other evidence of problems such as formal complaints made directly to eBay, does not result in a user's suspension unless the overall feedback rating reaches (-4). See eBay, Feedback Board FAQ, *supra* note 33. Because a positive feedback cancels a negative feedback, it would be very possible for a user to have a significant amount of negative feedback, yet not be suspended based on feedback alone because they have sufficient positive feedback, perhaps from an earlier time period, to prevent their overall rating from reaching (-4). For example, a user with 20 positive feedbacks and 10 negative feedbacks has one-third negative feedback, yet would still have an overall positive feedback rating of (+10), well above the automatic suspension level. Overall, suspensions appear more likely to be based on a seller's failure to pay eBay, a buyer's failure to pay sellers, or some violation of eBay policy.

resolution. Although trust services are generally advertised as protecting buyers from bad sellers, the seller is actually the one who decides whether to purchase these services, which can add value and draw customers by increasing buyers' trust that they are protected against fraud.³⁵ Because the buyer alone cannot invoke trust services, the buyer's options are limited to choosing to buy from a participating seller. In addition to encouraging sales, these services also protect and insure sellers to some degree against buyer complaints.

The only issue beyond a seller's control is a buyer's failure to pay, which has been addressed by eBay through the "unpaid item strike" process discussed in the previous section. Sellers manage this risk partly by requiring payment to be made and cleared before the item is shipped, thus limiting the seller's potential loss to administrative costs such as relisting fees.³⁶ Sellers also may manage this risk by refusing some forms of payment, such as personal checks, that carry higher risks of buyer fraud. eBay also prohibits certain risky forms of payment such as mailed cash and non-bank instant cash transfers such as Western Union.³⁷

However, even with these protections in place, some risk remains that the buyer's payment will be rescinded after shipping, particularly if payment is made by credit card (including a Paypal payment funded by credit card, otherwise known as "credit card via Paypal"). In general, purchasers who transact using credit cards have a broad statutory right to

³⁵ Swire, *supra* note 13, at 858. The buySAFE "buyer protection program" was marketed primarily to eBay Power Sellers, rather than to eBay buyers. Tedeschi, *supra* note 28.

³⁶ Although the administrative costs incurred by the seller are generally well below the value of the item, such costs can be non-refundable and can add up if the seller routinely lists many items. For example, while the seller might get a credit for the insertion fee of an item that did not sell, no credit is issued for the use of seller tools and other features promoting the initial auction. See *ebay.com Fees*, *supra* note 22. eBay's stance against non-paying bidders may be viewed as a reaction to seller complaints about these costs.

³⁷ See eBay, Accepted Payments Policy, <http://pages.ebay.com/help/policies/accepted-payments-policy.html> (last visited Sept. 9, 2007).

withhold payment based on all claims arising from the transaction.³⁸ Rescindment of a credit card payment is known as a “chargeback,” and can occur weeks or even months after the item has shipped. Chargebacks can occur where the initial payment was fraudulent, e.g., made with a stolen credit card, or where the buyer claims, perhaps falsely, that the item was not received or was not as described.³⁹ When a chargeback occurs, the seller loses the price paid and also may be subject to additional penalties from financial institutions.⁴⁰ Thus, the seller must bear and manage the risks of fraudulent payments and false claims of nonreceipt.

Fraudulent credit card “chargebacks” present the most difficult risk for online sellers. Not only are credit card payments popular and efficient, allowing payment to be made swiftly even across international borders, but Paypal forbids eBay sellers from refusing to accept credit cards via Paypal.⁴¹ Charging an extra fee for payment by credit card is also forbidden on

³⁸ See Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEX. L. REV. 681, 696 (2004) (showing that buyer has broader statutory rights for a credit-card-funded Paypal payment for an eBay auction, than for the same auction payment funded from the buyer’s Paypal money account, due to different regulatory schemes governing the two forms of payment).

³⁹ See, e.g., Paypal, Understanding Chargebacks, <http://www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/securitycenter/sell/ChargebackGuide1-outside> (last visited Sept. 9, 2007); eBay, Chargeback FAQ, <http://www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/securitycenter/sell/ChargebackFAQ-outside> (last visited Sept. 9, 2007). Although chargebacks are designed to operate as buyer protection, (see, e.g., FTC, *Internet Auctions*, *supra* note 12, at 7) it is easy to see how they might result from buyer fraud. The eBay site classifies “chargebacks” with “fraud” and “theft of financial data” as an undesirable effect that eBay works to eliminate. eBay, Accepted Payments Policy, *supra* note 37, (encouraging use of Paypal, the payment service owned by eBay, because it “offers buyers and sellers industry leading protection against fraud, chargebacks and theft of financial data.”). Another form of buyer fraud can occur when the buyer overpays for an item, using a payment form such as a check or money order, and asks that the excess be sent back in another payment form, such as a wire transfer of cash. The original payment instrument (check or money order) is then found to be fraudulent, causing the seller to suffer loss in excess of the item price. FTC, *Internet Auctions*, *supra* note 12, at 12, 25. Because this is a fraud that is not unique to online auctions, and because overpaying for an item is relatively unusual buyer behavior in any trading environment, professional sellers would presumably be on notice of this fraud and refuse to participate.

⁴⁰ For example, Paypal charges sellers a “chargeback fee” for chargebacks that, after investigation, are resolved against the seller, where the seller is not covered by Paypal’s Seller Protection Policy. See Paypal, User Agreement, at ¶ 8, Fees, <http://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/UserAgreement/ua/USUA-outside> (last visited Sept. 9, 2007).

⁴¹ *Id.* at ¶ 4.3 (“Sellers who offer Paypal as a payment method in their eBay listings (either via logos or through text in the item description) must accept Card Funded Payments Sellers may not communicate to buyers that they only accept Balance/Bank Funded Payments, or will not accept Card Funded Payments.”).

eBay.⁴² Thus, credit card payments are likely to continue to be widely used for eBay transactions.

The risk of fraudulent credit card chargebacks is somewhat mitigated by Paypal's "Seller Protection Policy," which provides up to \$5,000 of coverage for transactions Paypal deems fraudulent, as long as the transaction meets a number of requirements.⁴³ Credit card companies also sometimes provide sellers forms of protection against fraudulent chargebacks.⁴⁴ However, these protections appear to have numerous restrictions and loopholes; in particular, the Paypal User Agreement states that its Seller Protection Policy does not cover sellers for buyers' claims that an item was received, but was "Significantly Not as Described."⁴⁵

2. Buyer Protection Options

Despite sellers' exposure to chargebacks, the buyer has less overall protection in an eBay transaction because her options may be limited by the seller's preferences and level of cooperation, as well as by eBay policies. As eBay strongly encourages transaction partners to work disputes out between themselves and provides means to easily contact the other party to a

⁴² eBay, Payment Surcharges, <http://pages.ebay.com/help/policies/listing-surcharges.html> (last visited Sept. 9, 2007).

⁴³ Paypal, Seller Protection Policy Overview, <https://www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/securitycenter/sell/SellerPPOverview-outside> (last visited Sept. 9, 2007) (The requirements for a transaction to be covered include the seller having particular types of Paypal accounts, the item being shipped to an "eligible address," the item being a tangible good, proof of delivery, and shipping within 7 days of receiving payment.).

⁴⁴ See, e.g., Verified by Visa Fact Sheet, <http://www.secpay.com/secpay/index.php/secpay/content/download/982/6992/file/VerifiedByVisa.pdf> (last visited Nov. 28, 2007) (Visa offers the Verified by Visa program that confirms cardholder identity and, according to Visa, "substantially reduces the rate of fraudulent transactions and chargebacks to participating merchants.").

⁴⁵ Paypal Seller Protection Policy, *supra* note 40, at ¶ 11.2. The eBay and Paypal dispute resolution process has also been criticized as too slow and onerous. See, e.g., Richard J. Kinch, *A Small Case of Fraud on eBay and Its Resolution*, TRUETEX, <http://www.truetex.com/eBayfraud.htm> (last visited Sept. 9, 2007) (documenting one detailed experience with recovery from eBay fraud, and observing that eBay's protection program is like small claims court in that "even if you win, you can probably make new money faster than the time it takes to engage a legal process to win back lost money.").

transaction,⁴⁶ a dissatisfied buyer is likely to begin by contacting the seller for a replacement item or refund. Obviously, this method only works if the seller cooperates, which is unlikely where the seller is a fraud.

A second traditional avenue of recovery is shipping insurance, which is generally available for an additional fee through the U.S. Postal Service or other shipper.⁴⁷ Here again, the seller has control over whether to offer insurance, whether to pass the insurance cost on to the buyer (who may refuse to pay the extra cost), whether to actually ship with the agreed-upon insurance, and whether to cooperate with a buyer who wishes to file an insurance claim. Although a buyer who receives a damaged item can generally file a claim on her own, a buyer who never receives an item is dependent upon the seller to provide proof that the insured shipment was actually made. Furthermore, shipping insurance does not cover the situation where the buyer receives an item that was not damaged in shipping, but is otherwise not as described in the seller's listing.

The buyer's other protection options are likely to be heavily contingent upon the form of payment used. Credit cards, including credit cards used via Paypal, generally provide the best protection to buyers because the credit card company provides mechanisms (some required by

⁴⁶ eBay, Resolving Disputes, <http://pages.ebay.com/help/tp/problems-dispute-resolution.html> (last visited Sept. 9, 2007) (stating that “[t]he best and fastest way to resolve problems is to contact your trading partner directly by e-mail or phone” and providing instructions for obtaining a partner’s contact information through eBay as a first step to dispute resolution). eBay also builds a communication step into its formal dispute resolution process. eBay, Item Not Received or Significantly Not as Described Process, <http://pages.ebay.com/help/tp/inr-snad-process.html> (last visited Sept. 9, 2007) (including a “Step 4” where “the buyer and seller communicate” through eBay’s online process and attempt to resolve the dispute).

⁴⁷ At least one company affiliated neither with eBay nor with a carrier, Auctionsniper.com, recently began offering buyers the option to purchase insurance for eBay items. Auctionsniper is an automated online bidding service that places a user’s maximum bid by proxy, shortly before the end of the auction, in exchange for a percentage fee on items that are won. Auctionsniper.com FAQ, available online at <http://www.auctionsniper.com/help.aspx> (last visited Sept. 9, 2007). The Auctionsniper insurance is available only through the Auctionsniper website to its customers, and as such does not appear to have been widely used or tested at the time of this writing. See Auctionsniper.com, “U-PIC Payment Information”, available online at <http://www.auctionsniper.com/upic/info.aspx> (last visited Sept. 9, 2007) (describing rates and availability of shipping insurance for items won through Auctionsniper).

law) for unsatisfied buyers to dispute charges. For example, as discussed in the previous section, the chargeback process tends to operate in favor of the buyer, particularly where an item was received but significantly not as described. Where a credit card is used, even via Paypal, the timeframes to dispute charges and the decision to allow a chargeback are determined by the credit card company, not by eBay or Paypal.⁴⁸ The credit card may thus allow the buyer a longer time window than eBay or Paypal to dispute a charge, or may provide other advantages to the buyer. The disputed credit card charge need not be paid while resolution is pending, and is removed permanently if the buyer prevails.⁴⁹ Credit cards may also carry other protections, such as automatically denying a user's attempts to make large or suspicious charges.

In order for the buyer to obtain the enhanced protection of a credit card, the eBay seller must accept credit cards as a form of payment (including via Paypal), and the buyer must both have a credit card and choose to pay with that card (including via Paypal). As previously discussed, many, if not most, eBay sellers now accept credit card payments because they accept Paypal, which forces eBay sellers to accept credit cards via Paypal as a condition of using the Paypal service on eBay.⁵⁰ Therefore, the buyer chooses whether to invoke credit card protections by using the card for a purchase. However, because Paypal also allows, and even encourages (as will be discussed later in this article), buyers to pay by direct bank transfer, it is likely that many buyers will choose the bank transfer option and thus lose the enhanced protections of the credit card.

The buyer may also have protection through a "trust" service such as SquareTrade or buySAFE, as previously discussed. In order for the buyer to have this protection, the *seller* must

⁴⁸ Paypal, Understanding Chargebacks, *supra* note 39; Paypal Chargeback FAQ, *supra* note 39.

⁴⁹ Swire, *supra* note 13, at 852.

⁵⁰ See discussion *supra* note 41.

make the choice to opt in to these services for a fee. The idea is that buyers can then reduce their risk of a bad transaction by choosing to purchase only from participating sellers. However, given that the eBay marketplace is large and contains many hard-to-find or one-of-a-kind items, as well as a variety of price levels for common items, many buyers will probably not limit themselves only to sellers using a trust service.

eBay itself now offers some buyer protection, most notably for vehicles purchased on the eBay Motors site, which offers up to \$20,000 in coverage for a variety of transaction problems, including fraud.⁵¹ However, for most goods purchased on eBay, eBay only offers purchase protection through Paypal, available only when a buyer elects to pay with Paypal.⁵² Paypal currently offers two different buyer protection coverage levels of \$2000 and \$200. In order for a buyer to be covered to the higher level, the seller (not the buyer) of the item must meet a number of criteria, including a threshold level of positive feedback as well as other requirements that may not be apparent to the buyer.⁵³ Therefore, the buyer's best and most controllable way to achieve extended protection is to pay for her purchase with a credit card or line of credit

⁵¹ eBay Motors, Vehicle Purchase Protection Overview, <http://pages.motors.ebay.com/services/purchase-protection.html> (last visited Sept. 9, 2007). This level of coverage might be needed to build consumer confidence, given the relatively high value of the vehicles traded and the Internet publicity given to alleged scams specific to eBay motors. See, e.g., eBaymotorsucks.com, *Collector Car Scams on eBay Motors*, <http://www.eBaymotorsucks.com/scams.htm> (last visited Sept. 9, 2007) (alleged "watchdog" website posting screen caps of purportedly fraudulent eBay Motors auctions). eBay also offers a similar high level of coverage for "eligible capital equipment" purchased on the eBay Business site. eBay, About Buyer Protection Programs, <http://pages.ebay.com/help/tp/isgw-buyer-protection-steps.html> (last visited Sept. 9, 2007).

⁵² eBay's previous Standard Purchase Protection Program, which offered limited and restricted coverage for goods purchased on eBay regardless of the payment method, is no longer available for transactions after January 17, 2007. See eBay, Standard Purchase Protection Program, <http://pages.ebay.com/help/tp/esppp-process.html> (last visited Sept. 9, 2007) (noting that program ended Jan. 17, 2007); eBay, About Paypal Buyer Protection, <http://pages.ebay.com/help/tp/paypal-protection.html> (last visited Sept. 9, 2007).

⁵³ Paypal User Agreement, *supra* note 40, at ¶ 13.9 (For example, the seller must have a Verified Premier or Premier Business account in good standing. A buyer has no way of knowing these details of a seller's account.).

(including credit extended by Paypal itself), which triggers the protection scheme put in place by the credit issuer.⁵⁴

If a buyer seeks a refund under any of these processes, an initial claim must be filed within a designated time frame after the sale closes on eBay. This time frame generally extends between one and three months, depending on the form of protection.⁵⁵ The shipper, credit card company, eBay, Paypal, or other entity providing protection then performs an investigation to determine whether a claim will be paid. Full resolution of a claim can take significant time, and even a clearly wronged buyer may not get relief if she delays too long or takes the wrong procedural steps. The *Washington Post* recently reported the case of an eBay buyer who purchased a \$700 desk that was not as described, failed to contact her debit card company, missed the Paypal claim filing deadlines, and ultimately could not locate the seller or recover her money, despite winning a judgment in small claims court.⁵⁶

3. Preventive Education for Buyers and Sellers

In addition to remedies after the fact, channels exist for eBay buyers and sellers to educate themselves in advance about auction fraud, and thereby lower their risks of becoming a victim. As an initial matter, the eBay site itself contains information warning users against frauds such as unsafe payment methods and phishing scams.⁵⁷ Government organizations

⁵⁴ *Id.* at ¶ 13.14 (stating that claims for purchases funded with Paypal Buyer Credit or the Paypal Plus Credit Card will be fully reimbursed). Similarly, funding a Paypal payment with a credit card issued by an entity other than Paypal would trigger the protections of the credit card issuer. *Id.* at ¶ 13.15 (discussing chargeback rights).

⁵⁵ *Id.* at ¶ 13.3 (Paypal disputes must be filed within 45 days of the relevant payment, and then escalated into claims within 20 days. For purchases funded through credit, longer reporting windows may apply depending on the credit issuer.).

⁵⁶ See Kathleen Day, *Self-Defense for eBay Buyers: Avoiding Unpleasant Surprises on World's Biggest Auction Site*, WASH. POST, July 2, 2006, at F01.

⁵⁷ eBay, Accepted Payments Policy, *supra* note 37; eBay, Reporting and Recognizing Spoof (Fake) E-mails, <http://pages.ebay.com/help/confidence/spoof-email.html> (last visited Sept. 9, 2007); eBay, Spoof (Fake) E-mail Tutorial, <http://pages.ebay.com/education/spoofutorial/> (last visited Sept. 9, 2007). eBay uses the term “spoof e-mail” to describe scam e-mails designed to gather user information, such as passwords, for fraudulent use, but notes

outside eBay, such as the FTC and the FBI, also provide information about preventing auction fraud.⁵⁸ A drawback of these outlets is that users must take the initiative to search out information about fraud, and may be more likely to do so only after they have been victimized.

Users can also visit online discussion forums to exchange information about many topics related to auctions, including but not limited to fraud. eBay provides such forums in its “Answer Center,” where users answer the questions of other users regarding eBay generally, and in its “Groups,” where users discuss particular categories of collectibles. An example of a typical question and answer about a problem transaction is shown in Figure 2.

While this information exchange can be helpful, the eBay forums have some limitations. First, eBay has prohibited the exchange of some types of information, such as identification of allegedly fraudulent item listings or user IDs, due to the potential for error and disruption of legitimate activities.⁵⁹ Second, eBay’s various discussion forums are not prominently featured on the eBay website and contain many fairly complex, fact-specific questions geared towards more experienced users. A casual eBay user might thus be unaware of the forums’ existence or be unable to understand the discussion.

Outside eBay, online bulletin boards and mailing lists for collectors facilitate the exchange of user-to-user information without any intervention from eBay. Users of these outlets

that such e-mails are also called “hoax” or “phishing” e-mails. For consistency, the term “phishing” is used throughout this article.

⁵⁸ See FTC, Internet Auctions, *supra* note 12; FBI, Internet Fraud – Avoiding Internet Auction Fraud, <http://www.fbi.gov/majcases/fraud/internetschemes.htm> (last visited Sept. 9, 2007).

⁵⁹ See eBay, Groups Usage Policy – Some Examples, <http://pages.ebay.com/help/policies/everyone-groups.html> (last visited Sept. 9, 2007); eBay, Discussion Boards Usage Policy – Some Examples, <http://pages.ebay.com/help/policies/everyone-boards.html> (last visited Sept. 9, 2007) (prohibiting reporting of suspected listing or member violations or encouraging disruption of particular auctions in eBay discussion forums). See also John Schwartz, *On the Web, Vengeance is Mine (and Mine)*, N.Y. TIMES, Mar. 28, 2004 at § 2, col. 4 (noting that warning fellow eBay users against potential fraud is against eBay’s rules due to the potential for disrupting legitimate activities); Reid Goldsborough, *Fighting Back Against Online Auction Fraud*, CONSUMERS’ RESEARCH, Feb. 1, 2004, at 32.

are not prohibited from warning against specific users or listings. Furthermore, collectors of a particular category of items, operating as a community, often can track fraudsters operating under multiple identities or through multiple sales channels, including but not limited to eBay. For example, several doll and teddy bear collector communities recently posted warnings about an alleged fraudulent trader known as the “Edmonton Scammer,” who had reportedly used many different e-mails and identities and was being sought by police.⁶⁰

These outlets, as well as eBay’s “Groups,” facilitate information exchange primarily between buyers and sellers in collectibles markets. Collectors are likely to buy and sell particular items, such as dolls, on a regular basis and discuss their purchases with other enthusiasts through online forums, as well as through live events such as doll shows. But generic items, such as televisions and laptops, are usually bought and sold more sporadically, and are far less likely to have active communities discussing and tracking purchases. Traders of such generic goods are thus less likely than collectors to obtain fraud prevention information from user-to-user information outlets.

II. Steering Away From Sea Monsters: Areas of Fraud Significantly Addressed by the Actions of eBay or Third Parties

You’re off the edge of the map, mate. Here there be monsters.

- *Captain Barbossa*, “Pirates of the Caribbean: The Curse of the Black Pearl”

Although eBay has always attempted to limit its involvement in transactions between individual users, it has steadily increased its fraud-related activities over the years, apparently in

⁶⁰ See, e.g., “Bad Dolly Deals,” http://community.livejournal.com/bad_dolly_deals/90904.html (last visited Sept. 9, 2007) (Livejournal blogging community posts warnings about “Edmonton Scammer” and includes copies of similar warnings made to “Den of Angels” ball-jointed doll collectors forum and linked to warnings on “Teddy Talk” bear collectors forum).

response to economic incentives and outside pressure. This section examines eBay's role in fraud prevention and discusses some areas where eBay has taken significant action, as well as the efforts of third-party groups to regulate on eBay with or without eBay assistance.

A. eBay's Evolving Role in Policing and Resolving Fraudulent Transactions

Since its inception, eBay has repeatedly stated its role in terms of providing an infrastructure and environment to encourage trading, while at the same time remaining separate from the actual transactions between buyers and sellers. For example, eBay states on its website that it is "unable to take action on a member's behalf. This includes contacting a member directly to ask about the status of an item." eBay further states that "[s]ince eBay is not involved in the actual transaction, eBay cannot force a member to live up to his or her obligation."⁶¹ Remaining largely separate from the transactions probably spares eBay from many administrative costs, jurisdictional complexities, and potential liability.⁶²

However, this supposed separation appears ironic given that eBay, on the same web page where it announces its non-involvement, also lists eBay's numerous fraud-related activities. These activities include investigating complaints, warning and suspending problem users, providing buyer protection through the eBay-owned company Paypal (and, until early 2007, buyer protection through eBay's own non-Paypal program), providing dispute resolution mechanisms to sellers and buyers, and cooperating with law enforcement investigations.⁶³ This

⁶¹ eBay, Understanding eBay's Role, <http://pages.ebay.com/help/tp/isgw-fraud-ebays-role.html> (last visited Sept. 9, 2007).

⁶² See, e.g., Calkins, *supra* note 33, at ¶ 22-24 (suggesting eBay's distancing of the company from the individual transactions is an attempt to behave as a passive Internet service provider for purposes of limiting its own legal liability). eBay's passive stance also allows it to avoid the expense of policing dozens of individual transactions, while exposing it to the potential risk of having to redesign its entire business model should a court ever hold that eBay facilitates fraud. See Katie Hafner, *Seeing Fakes, Angry Traders Confront eBay*, N.Y. TIMES, Jan. 29, 2006, § 4, at 1 (including legal analysis noting "tremendous" costs of business model change in wake of potential unfavorable court decision).

⁶³ eBay, Understanding eBay's Role, *supra* note 61.

long list makes eBay appear quite involved in its users' transactions, despite its statements to the contrary. eBay's involvement is not surprising, as it has numerous motivations to take at least some steps to prevent fraud.

1. eBay's Motivations to Become More Involved in Fraud Prevention

eBay has likely become increasingly involved in fraud prevention in order to encourage transactions and build the trust of its users, to respond to strong outside pressure groups and avoid the specter of outside regulation, and to reduce the possibility that its users might otherwise resort to self-help tactics harmful to eBay's business.

Regarding the encouragement of user trust, Peter Swire has observed that over the years "eBay has wrapped its transactions in more and more layers of reassuring legal and practical protections" as a way to add value for its users.⁶⁴ eBay has stated that it has changed its procedures to be more proactive in response to fraud, rather than always waiting for users to report before policing suspicious transactions.⁶⁵ This change kept pace with the slowly developing framework of e-commerce regulation that has emerged over time to address consumer trust issues and regulatory concerns.⁶⁶

eBay also appears to have provided more protection in response to pressure, not only from its own customer base (primarily sellers), but also from outside enforcement groups with legal or economic clout, such as law enforcement and intellectual property rights owners.⁶⁷

⁶⁴ Swire, *supra* note 13, at 857.

⁶⁵ Wolfe, *supra* note 13 (quoting head of eBay's Trust and Safety Department as saying that eBay was "reactive" in its early days and "didn't do anything to proactively watch the site and monitor it for fraudulent activity," an "inadequate" response to fraud that was changed by the end of 2001).

⁶⁶ See generally Swire, *supra* note 13.

⁶⁷ See, e.g., Day, *supra* note 56 (describing eBay's publicizing of improvements to fraud and dispute resolution processes at its annual gathering of buyers, sellers and company executives); *As eBay Marks 10 Years Online, It Tries to Pacify Unhappy Users*, L.A. TIMES, June 27, 2005, at C2 (describing how eBay's "hands-off approach to fraud" made some users uncomfortable and opened a competitive niche for other auction services such as Ubid); *eBay Unit to Pay Fine Over Bad Transactions*, L.A. TIMES, Mar. 9, 2004, at C2 (describing Paypal

Allowing its business model to evolve based upon a completely hands-off approach to fraud would also expose eBay to the significant economic risk of having to revamp its business model, should courts or regulators choose to intervene on consumers' behalf.⁶⁸

eBay also has a motivation to offer some fraud preventions and remedies to its users in order to effectively discourage them from resorting to vigilante self-help tactics that are potentially destructive to eBay's business. In the mildest form of vigilantism, a user not involved in a transaction might report a suspicious listing or bidding pattern to eBay (which, according to eBay officials, is often already aware of it), allowing eBay to decide whether or not to take action. In the past, eBay's perceived lack of response to reports led some users to interfere more aggressively with allegedly fraudulent auctions by posting or e-mailing warnings to bidders, or by placing the winning bid and then refusing to send payment. As eBay has recognized, because vigilantes have limited information, this type of self-help might easily get out of hand and disrupt legitimate auctions. eBay has termed these aggressive strategies "auction interference" and stated that such tactics will not be tolerated on eBay.⁶⁹

Victims themselves have also sometimes turned vigilante by "scam baiting," in which a victim attempts to turn the tables by scamming or harassing the scammer, often publicizing the results. Two widely publicized recent examples of scam baiting were the "P-P-P-Powerbook!" scam and the incident involving British teenager Amir Tofangsazan. In the "P-P-P-Powerbook!" case, an eBay seller was approached by a buyer using a "hijacked" eBay account (i.e., an account belonging to a legitimate user whose identity and passwords were stolen by the scammer) and

settlement of charges that it failed to provide refunds for bad transactions, following inquiries by New York Attorney General Eliot Spitzer and the FTC).

⁶⁸ Hafner, *Seeing Fakes*, *supra* note 62, and *Going Once Going Twice Gone!*, N.Y. TIMES, June 4, 2006, at § 3, 1 (analyst noting that a decision to impose excessive regulations on sellers would affect eBay "dramatically").

⁶⁹ Katie Hafner, *With Internet Fraud Up Sharply, eBay Attracts Vigilantes*, N.Y. TIMES, Mar. 20, 2004, at A1; *see* discussion *supra* note 59.

offering payment through a fraudulent escrow service. Recognizing the scam, the seller tricked the buyer into paying a \$550 customs charge for a phony laptop. The seller had also reported the escrow fraud to eBay, which initially responded with a form e-mail that did not address the issue.⁷⁰

Tofangsazan's case also involved a laptop which he sold on eBay. Allegedly, the laptop arrived broken and Tofangsazan refused to refund the buyer's money. The disgruntled buyer then created a "revenge website" on the Internet, posting Tofangsazan's photos and other personal information allegedly recovered from the laptop's hard drive, and inviting visitors to join in ridiculing Tofangsazan by posting comments. The site attracted over half a million visitors, the attention of major newspapers, and a Scotland Yard investigation into whether an "improper use of public electronic communications network" had occurred.⁷¹ Obviously, a business such as eBay would not welcome this type of negative publicity and scrutiny.

If a user becomes frustrated enough, he may even go to the dangerous extreme of confronting the accused auction fraudster in person and demanding the return of money or goods. In Figure 2, a frustrated eBay buyer, who claims to have paid for a chair that he did not receive, states on an eBay question-and-answer board that although he can get his money back

⁷⁰ See generally Jeff Harris, *Scamming the Scammer: P-P-P-Powerbook!*, <http://www.newssocket.com/features/article/231/page/1/> (last visited Sept. 9, 2007). Some time after its initial failure to substantively respond to the seller's report, eBay later sent a more complete response informing the seller that the fraudulent buyer was using a hijacked account. *Id.*

⁷¹ The posted information included photographs of Tofangsazan and his family and friends, a copy of his passport, pornography, and photographs of women's legs allegedly taken on the London Underground. Tofangsazan has claimed that not all of the posted information was his own. See "The Broken Laptop I Sold on eBay," <http://www.amirtofangsazan.blogspot.com/> (last visited Sept. 9, 2007) (revenge website) and "Amir Massoud Tofangsazan: The Blog Continues," <http://tofangsazan-the.blogspot.com/> (last visited Sept. 9, 2007) (second revenge website); Frances Gibb, *Tougher Libel Laws May Be Needed to Combat Cyber Vigilantes, Lawyers Warn*, *TIMES ONLINE* (London), May 31, 2006, http://business.timesonline.co.uk/tol/business/law/public_law/article670245.ece (analyzing whether the website could be libelous given that Tofangsazan had sent the data out voluntarily when he shipped the laptop). See also Barry Collins, *Talking Point: For Sale: Second-Hand Computer, With Free Bank and ID Details*, *SUNDAY TIMES* (London), Aug. 13, 2006, Features, at 26; Ed Harris, *Buyer's Revenge Over "Broken" eBay Laptop*, *THE EVENING STANDARD* (London), May 30, 2006, at A18.

from Paypal, and has filed a complaint with eBay regarding the seller, “what I want to do is drive to [the seller’s location] and take my chair.”⁷² Again, eBay probably has an interest in defusing user frustrations and heading such interactions off at the pass, in order to avoid frightening off users and possibly garnering bad publicity from confrontations gone wrong.

In addition to potentially driving away legitimate sellers and/or violating the law, vigilante tactics undermine the public image of eBay as a safe and controlled trading environment, where users are able to resolve their differences. eBay is therefore motivated to try and prevent such tactics by attempting to alleviate user frustration, for example, through organized dispute resolution and buyer/seller protection programs.

2. Problems in Evaluating eBay’s Response to Fraud

While eBay’s publicized actions against fraud probably benefit eBay by inspiring trust in users, reducing outside regulation, and discouraging vigilante self-help, it is unclear exactly to what extent eBay’s actions actually prevent fraud or make victims whole. First, although it has been reported that eBay is an industry leader in online fraud prevention, such statements are difficult to directly support or refute because eBay and other companies working against Internet fraud tend to be close-mouthed about their methods in order to avoid tipping off the targets of their investigations.⁷³

⁷² Another example of this behavior is shown on one of the off-eBay websites warning against the “Edmonton Scammer,” which contains a comment by a user threatening to visit the scammer’s home and recover allegedly stolen property. *See* discussion *supra* at note 60.

⁷³ *See* Wolfe, *supra* note 13 (stating that head of eBay’s Trust and Safety Department “[would] not say how eBay locates illegal and phony auctions [because] ‘if a bad guy knew what we look for, how we did it, they would be able to alter their activity.’”).

Second, Internet fraud as a whole tends to be underreported by its victims.⁷⁴ Even when victims do report, they may report to entities other than eBay, such as their credit card companies, local law enforcement or consumer protection authorities, the Federal Trade Commission, or private watchdog groups such as the National Consumers' League Fraud Information Center (<http://www.fraud.org>).⁷⁵ Although many law enforcement and online entities are now trying to cooperate and share information regarding fraud, the lack of completely centralized reporting increases the difficulty of assessing eBay's efforts.

Third, a problem lies in simply defining what can be considered "eBay fraud." In the past, eBay has defined fraud as a seller not delivering any product or delivering one that is "counterfeit, damaged, or otherwise not as promised," or a buyer receiving goods without paying for them.⁷⁶ eBay has also taken significant steps against "account hijacking" – theft of a legitimate user's personal information, such as eBay user ID and Paypal account – suggesting

⁷⁴ Dolan, *supra* note 11, at 4 (noting that "[o]ne of the main reasons that [Internet auction fraud] has been able to stay under the radar is that victims . . . often fail to report the crime to the Internet auction houses and/or law enforcement authorities."). See also Joseph Menn, *California Elections: Both Resumes Long on Business Experience*, L.A. TIMES, June 1, 2006, at A1 (suggesting that eBay statistics on fraud are artificially low because they exclude cases where no complaint was filed with eBay within a certain time window, and do not include sales of counterfeit goods).

⁷⁵ The FTC suggests that victims of problem transactions who fail to resolve problems with the transaction partner or site operator should file a complaint with their state attorney general's office, local consumer protection agencies, the Better Business Bureau, or the FTC directly online at ftc.gov. FTC, *Internet Auctions*, *supra* note 12, at 27. A press release from the National Consumers League at the end of 2006 noted that "[i]n the fall of 2003, online giant eBay removed the link from its website to [fraud.org](http://www.fraud.org). As a result, the number of auction complaints reported to NCL's fraud center has dropped to a fraction of its previous levels." Press Release, National Consumers' League, 2006 Top 10 Internet Scam Trends, <http://www.fraud.org/stats/2006/internet.pdf> (last visited Sept. 9, 2007).

⁷⁶ Day, *supra* note 56 (stating that eBay "defines fraud as either a buyer not paying for goods received or a seller not delivering a product or sending one that is counterfeit, damaged or otherwise not as promised."). eBay does not disclose specific totals of incidents falling in each category, making the size of the problem somewhat unclear. *Id.*

that eBay recognizes this as a form of fraud, whether or not it is included in fraud definitions and statistics.⁷⁷

However, despite the seeming inclusion of counterfeit items in eBay's official definition of fraud, some critics have argued that eBay's conception of fraud minimizes the sizable problem of counterfeit item sales.⁷⁸ Buyer dissatisfaction with counterfeits might also be seen as the result of miscommunication or naiveté, especially if the item listing does not clearly present an item as genuine or includes other hints that the product might be a fake, such as a price far below the market price of a genuine item.⁷⁹ Indeed, some buyers might even be satisfied with a fake item because of its ready availability or lower price. However, regardless of the seller's representation or the buyer's reaction, manufacturers and sellers of genuine items would probably consider any transaction involving counterfeit goods to be fraudulent.⁸⁰

eBay also does not consider bad transactions made outside of eBay, also known as "off-eBay transactions," to constitute "eBay fraud" for reporting purposes, even though contact may be made as the result of an eBay listing and the eBay site warns against such transactions and attempts to prohibit them.⁸¹ In a typical off-eBay transaction, a scam artist contacts a losing

⁷⁷ See Ian Austen, *On eBay, E-mail Phishers Find a Well-Stocked Pond*, N.Y. TIMES, Mar. 7, 2005 at C1 (describing steps eBay has taken to combat theft of user IDs and Paypal data); Hafner, *Vigilantes*, *supra* note 69 (describing account hijacking problems).

⁷⁸ See Menn, *supra* note 74 (recent article stating that "if practically any item is shipped, eBay doesn't consider it fraud" causing reported fraud statistics to be artificially low).

⁷⁹ See, e.g., Katie Hafner, *Seeing Fakes*, *supra* note 62, and correction, Feb. 12, 2006 (describing purchase of large lot of fake designer vintage costume jewelry on eBay, and seller's subsequent protest that her eBay listing had not guaranteed authenticity, nor was she convinced that the accused pieces were the same ones she had sold).

⁸⁰ Even if the buyer of a counterfeit item is satisfied, third party manufacturers and sellers involved in the particular market may object on the basis that sales of fakes deflate the price of legitimate items. See *id.*

⁸¹ See Menn, *supra* note 74 (eBay does not consider it fraud "when a bad seller persuades buyers to conclude their transactions offline"); Jeff Gelles, *Wedding Gown Snares Victim in eBay Scam*, CHI. TRIB., Mar. 8, 2006, at 6B (quoting eBay spokesman as saying that eBay can warn against but not prevent transaction scams outside eBay which are caused by a buyer's "greed", and that such crimes are not counted by eBay in fraud statistics); eBay, *About Transactions Outside of eBay*, <http://pages.ebay.com/help/tp/isgw-fraud-non-ebay.html> (last visited Sept. 9, 2007) (warning that such transactions are not eligible for feedback or other buyer protection mechanisms, stating that members are not permitted to solicit transactions outside of eBay, and providing reporting form).

auction bidder and offers a similar item for direct sale outside of eBay, sometimes impersonating the seller of the legitimate auction, and usually requesting a form of payment other than Paypal. When the buyer does not receive the promised item, the buyer has no recourse to eBay's or Paypal's buyer protection mechanisms.⁸² This type of fraud appears highly likely to pose a continuing problem, and is discussed further in section III of this article.

In summary, while eBay has taken significant steps to reduce fraud on its site, considerable uncertainty remains for those outside eBay regarding what eBay is doing and in what areas it might need to do more. Two areas in which eBay has been visibly active include cooperation with law enforcement and work with intellectual property rights owners, both of which are discussed further in the following sections.

B. eBay's Work With Third Parties To Prevent Fraud

In at least two areas, eBay has shared responsibility with third parties to prevent fraud. First, eBay appears to work vigorously with law enforcement to prevent clearly criminal acts such as the sale of illegal or stolen goods, identity theft, and large-scale fraud. Second, eBay also works somewhat visibly, although perhaps to a lesser degree, with private intellectual property rights owners to prevent the sale of infringing products.

1. eBay's Work With Law Enforcement

eBay states that it "cooperates with all law enforcement investigations," and provides a law-enforcement specific web form for use only by law enforcement agencies to report

⁸² See Gelles, *supra* note 81 (scam involving wedding gown); Austen, *supra* note 77 (scam involving rare coin, where scam artist pretended to be an employee of eBay seller). Both buyers were contacted after losing apparently legitimate eBay auctions and offered the chance to buy the same item directly. In each case, the fraudulent sellers claimed that their Paypal accounts were not working and requested payment by Western Union cash transfer, a payment method not allowed on eBay. After sending the money, neither buyer received the promised item.

information and suspicious auctions to eBay.⁸³ This policy helps law enforcement officials to investigate sales of illegal or highly suspicious items, such as drugs, body parts, stolen goods, or goods with removed serial numbers.⁸⁴ eBay itself also forbids sales of illegal items and some legal items that may be subject to regulation, such as food.⁸⁵

Law enforcement works with eBay regarding fraud schemes that are large, visible or ongoing enough to command investigative resources. eBay maintains a “Police Blotter” page on its site listing recent “success stories” where eBay “[has] assisted law enforcement in catching a fraudster.”⁸⁶ For example, a 2006 entry, “ID Thieves Find Time to Reflect,” detailed eBay and Paypal’s participation with law enforcement in the investigation of several individuals who pled guilty to charges arising from their theft of \$350,000, by using stolen credit cards and failing to deliver goods listed for sale on eBay.⁸⁷ eBay’s cooperation with law enforcement in these areas is not only likely to keep the company on good terms with legal authorities, but also provides good publicity for eBay, while law enforcement presumably helps to manage the investigative burden.⁸⁸

⁸³ eBay, Understanding eBay’s Role, *supra* note 61 (providing link to reporting form for law enforcement agency reports to eBay); eBay, Security & Resolution Center – Law Enforcement Center, http://pages.ebay.com/securitycenter/law_enforcement.html (last visited Sept. 9, 2007) (providing contact information and tips for law enforcement personnel seeking eBay assistance in investigations).

⁸⁴ Fairly early in eBay’s history, auctions were posted for illegal items, including military weapons and a human kidney, prompting the company’s involvement with law enforcement officials. Amy Harmon, *Auction For a Kidney Pops Up On eBay’s Site*, N.Y. TIMES, Sept. 3, 1999, at A13.

⁸⁵ See eBay, Prohibited and Restricted Items – Overview, <http://pages.ebay.com/help/policies/items-ov.html> (last visited Sept. 9, 2007) (listing categories of items).

⁸⁶ eBay, eBay Security Center Law Enforcement Case Study – Police Blotter, http://pages.ebay.com/securitycenter/law_case_study.html (last visited Sept. 9, 2007).

⁸⁷ *Id.* (last visited Sept. 8, 2006).

⁸⁸ See Eugenie Samuel Reich, *Fair Cop: eBay’s Hugely Successful Online Auction Site Is Pioneering New Forms of Law Enforcement. But At What Cost?*, NEW SCIENTIST, July 3, 2004, at 26 (noting that eBay’s cooperation with law enforcement “has certainly effected a remarkable turnaround in official attitudes to the business”).

eBay also works with law enforcement to combat identity theft involving its website, a major problem for eBay.⁸⁹ The FTC reportedly led a team that investigated a couple who used stolen identities to defraud buyers of over \$90,000 on eBay. Although eBay's participation in the investigation was not specifically detailed, eBay would presumably be a vital part of such an investigation in order to provide documented evidence regarding the couple's activity on its site.⁹⁰

In a common form of eBay identity theft, "phishing," also known as "spoofing,"⁹¹ the fraud perpetrator sends a false e-mail purporting to come from some reputable entity, such as eBay or Paypal, asking or even demanding under pain of threat that the user take some action. The e-mail may demand that the users fill their personal information into an online form or click on a hyperlink to visit a website. The e-mail might state, for example, that eBay will shut down a user's account if the link is not clicked, or it may be framed as a non-payment notice regarding a particular auction. Although these forms and websites look legitimate, they actually transmit personal information such as account passwords to the fraud perpetrator, who uses the information to steal the user's identity and "hijack" her accounts.⁹² eBay is an attractive target for phishing scams because of the wide varieties of fraud that can be committed with a stolen, legitimate-appearing eBay account.⁹³

⁸⁹ Lynch, *supra* note 17, at 267-70 (listing eBay and Paypal as top phishing targets along with U.S. Bank and Citibank); Austen, *supra* note 77 (noting that eBay is among the top five companies most frequently targeted by phishers).

⁹⁰ Leslie Walker, *Bidding for Trouble?: Online Auctions Have Everything – Including, Increasingly, Scam Artists*, WASH. POST, May 11, 2003, at F01.

⁹¹ See discussion *supra* note 57.

⁹² See FTC, Internet Auctions, *supra* note 12, at 4; Lynch, *supra* note 17, at 267-70 (listing eBay and Paypal as top phishing targets along with U.S. Bank and Citibank); Austen, *supra* note 77 (noting that eBay is among the top five companies most frequently targeted by phishers).

⁹³ See Wolfe, *supra* note 13.

eBay clearly has a strong motivation to work with law enforcement to combat identity theft fraud because it harms eBay's business by tarnishing its goodwill and eroding user trust. Ironically, the fact that eBay is such a frequent target of phishing attempts suggests that eBay is regarded as very trustworthy by its users, to the point where they might enter private information at the supposed request of eBay without stopping to think twice.⁹⁴ eBay also provides extensive information and some technology tools on its website to help users protect themselves against phishing, and has a special reporting address (spoof@ebay.com) where users can forward suspicious e-mails.⁹⁵ Forwarding such e-mails to eBay generally triggers an automated reply with information about how to recognize false e-mails and protect oneself against phishing scams.

Finally, eBay will likely have to work with law enforcement officials in order to cope with jurisdictional issues, language barriers, and other difficulties associated with cross-border enforcement of fraud committed by foreign sellers.⁹⁶ In at least one documented case, eBay helped the FBI carry out a sting to lure a Canadian seller of items illegal in the U.S. into making an illegal transaction on U.S. soil, where he was arrested and later convicted. The seller was sentenced to time served and a minimal fine after his attorney argued that he had been punished

⁹⁴ See, e.g., Austen, *supra* note 77 (quoting a victim of phishing indicating that he responded to a phishing e-mail thinking it was from eBay because it "look[ed] so real").

⁹⁵ eBay, Recognizing Spoof (Fake) eBay Web Sites, <http://pages.ebay.com/help/confidence/isgw-account-theft-spoof.html> (last visited Sept. 9, 2007) (providing information about phishing including a list of secure eBay sign-in websites, a tutorial on how to recognize phishing e-mails, and a link to the Account Guard toolbar that can be added to a user's web browser for quick and secure access to eBay). See also Lynch, *supra* note 17, at 287 (discussing how eBay uses security software in its Internet toolbar to detect fake eBay and Paypal websites).

⁹⁶ See eBay, Police Blotter, *supra* note 86 (last visited June 3, 2007) (on file with author) (describing two recent cases of fraud investigated jointly by eBay and law enforcement authorities in the United Kingdom); Hafner, *Vigilantes*, *supra* note 69 (quoting head of FTC commission's task force on Internet auction fraud as saying, "It's very difficult to find people who are hiding in foreign countries where there's a language barrier and it requires cooperation with foreign agencies[.]").

enough by the confiscation of his illegal goods and by being banned from eBay. eBay stated that it would continue to cooperate with such law enforcement stings.⁹⁷

2. eBay's Work With Private Intellectual Property (IP) Rights Holders

eBay states on its website that it is also “committed to protecting the intellectual property rights of third parties,” and that it created the Verified Rights Owner (VeRO) program as a way for rights holders to easily report violations.⁹⁸ However, eBay also indicates that the enforcement burden is largely on the IP rights owner, stating that “because eBay cannot be an expert in your intellectual property rights in over 25,000 categories, and cannot verify that sellers have the right to sell the millions of items they post on eBay each day, we need your help in identifying listings which do not appear on their face to infringe your rights.”⁹⁹ The VeRO program requires a rights owner to register with eBay and fill out a “Notice of Claimed Infringement” under penalty of perjury and send it to eBay, identifying all listings that are in violation.¹⁰⁰ Only the registered rights owners or their authorized agents can make reports to eBay. eBay, upon receiving the rights owner's report, removes the offending listings and in some cases may take other steps such as temporarily suspending sellers' accounts.¹⁰¹

⁹⁷ Reich, *supra* note 88.

⁹⁸ eBay, How eBay Protects Intellectual Property (VeRO), <http://pages.ebay.com/help/tp/programs-vero-ov.html> (last visited Sept. 9, 2007). The VeRO program stemmed from an earlier, similar program known as “Legal Buddy” developed by eBay in 1997 in response to a watchmaker's complaint that users were selling counterfeits on eBay. Fara S. Sunderji, Note, *Protecting Online Auction Sites from the Contributory Trademark Liability Storm: A Legislative Solution to the Tiffany Inc. v. eBay Inc. Problem*, 74 FORDHAM L. REV. 909, 916-17 (2005). In addition to removing reported listings, eBay also performs some self-monitoring for infringing items. *Id.*

⁹⁹ eBay, Reporting Intellectual Property Infringements (VeRO), <http://pages.ebay.com/help/tp/vero-rights-owner.html> (last visited Sept. 9, 2007) (giving guidelines for rights owners to report infringements).

¹⁰⁰ Sunderji, *supra* note 98, at 916-17.

¹⁰¹ *Id.*

VeRO members sometimes wrongly report non-infringing items, which eBay then may remove without conferring with the seller.¹⁰² eBay encourages sellers who feel that their listings were removed in error to contact the rights owners directly and only e-mail eBay if no resolution is reached.¹⁰³ These disputes can be both legitimate and complex. For instance, one seller of fabric items bearing popular images such as cartoon characters and baseball team logos reportedly had her auction listings removed multiple times at the request of VeRO members. The seller eventually sued VeRO members Disney and Major League Baseball, obtaining settlements that included the removal of the complaints to eBay.¹⁰⁴ One can understand eBay wanting to keep its distance from such disputes.¹⁰⁵

The VeRO program presents eBay as taking action on behalf of private rights owners, thus avoiding lawsuits and direct regulation of its own website. However, in this area, eBay has shifted the main burden of IP rights enforcement onto the rights owner. Enforcing IP rights under this scheme is likely to require steady vigilance and expense of resources on the part of the rights owner over time, particularly for popular or constantly changing items such as designer apparel and accessories. Furthermore, where a rights owner does not or cannot exert such effort, the VeRO program is highly unlikely to make a significant impact in reducing the number of

¹⁰² Reich, *supra* note 88 (discussing cases where items were removed despite the rights being legitimately licensed or disputed). See also ADAM COHEN, *THE PERFECT STORE: INSIDE EBAY* 215-18 (2003) (describing efforts by mother of deceased recording artist Jeff Buckley to remove legitimate auctions under “Legal Buddy” predecessor program to VeRO, and community’s resulting protest, including referring to “Legal Buddy” program as “Legal Bully” and posting auctions for products unrelated to Buckley but containing his name in the listing).

¹⁰³ eBay, What is VeRO and why was my listing removed because of it?, available online at <http://pages.ebay.com/help/policies/questions/vero-ended-item.html> (last visited Sept. 9, 2007) (providing information for sellers whose listings were removed due to VeRO).

¹⁰⁴ Reich, *supra* note 88 (discussing Karen Dudnikov case).

¹⁰⁵ eBay has defended its “act-first, ask-questions-later policy” as being the only appropriate legal response under the “notice and takedown” provisions of the Digital Millennium Copyright Act, which require a service provider to remove potentially infringing material in some circumstances. See *id.* However, as has been noted, while the DMCA applies to copyrighted items, there is no analogous legal provision covering eBay’s removal of trademarked items. Sunderji, *supra* note 98, at 926-27.

counterfeit items. Such situations may arise where the legitimacy of an item is hard to verify at a distance (e.g., artwork), or where the original rights owner has gone out of business (e.g., collectable vintage jewelry).¹⁰⁶

eBay's activities in this area recently came under greater scrutiny when the well-known jeweler Tiffany and Co. filed suit against eBay for contributory trademark infringement. Tiffany claimed that eBay facilitated the sale of phony Tiffany items on its site, even though eBay had removed 19,000 listings reported by Tiffany. The Tiffany suit alleged that eBay received fees from counterfeit auction listings that were not removed, and also advertised on the Internet that it sold Tiffany and other brand name products.¹⁰⁷ Yet, the economic burden allegedly fell on Tiffany to police eBay's listings. The 19,000 listings Tiffany identified to eBay were reportedly compiled by two Tiffany employees who "spent most of their working hours" for five months searching through eBay auctions for counterfeit items.¹⁰⁸

Because many well-known companies with deep pockets could file similar complaints, eBay must work to resolve this situation in a way that will placate or deter other potential corporate plaintiffs. Otherwise, eBay might be faced with a flood of lawsuits or the specter of formal regulation.¹⁰⁹ eBay's motivation to resolve issues in this arena is thus driven by its

¹⁰⁶ See Hafner, *Seeing Fakes*, *supra* note 62 (noting that artwork is particularly vulnerable to counterfeiting, quoting art gallery owner as saying "[t]he majority of [artworks] that appear on eBay are fakes", and also noting difficulties of policing allegedly fake Weiss costume jewelry on eBay where original Weiss manufacturer has gone out of business). In 2000, a painting falsely attributed to the artist Richard Diebenkorn nearly sold on eBay for \$135,000; eBay reportedly alerted the winning bidder not to complete the transaction. Hafner, *Vigilantes*, *supra* note 69.

¹⁰⁷ Chris Gaither, *Tiffany Lawsuit Alleges Jewelry in eBay Auctions Doesn't Ring True*, L.A. TIMES, June 22, 2004, at C1; Hafner, *Seeing Fakes*, *supra* note 62. Because Tiffany's action was based in trademark rather than copyright law, the notice and takedown provisions of the DMCA did not apply. See Sunderji, *supra* note 98, at 926-27.

¹⁰⁸ Gaither, *supra* note 107.

¹⁰⁹ Hafner, *Seeing Fakes*, *supra* note 62 (legal analyst noting that an unfavorable court decision or even a settlement in the Tiffany suit could force eBay to police its own listings, thus affecting its business model and adding cost). See also Hafner, *Going Once*, *supra* note 68 (discussing eBay's efforts to avoid regulation).

sizable risk exposure. Recently, eBay announced that it would tighten its standards for foreign sellers, whom it claims are responsible for many counterfeit item listings.¹¹⁰

III. Between the Devil and the Sea: Areas Where Fraud Is Likely to Continue

First, your return to shore was not part of our negotiations nor our agreement, so I must do nothin'. And secondly, you must be a pirate for the Pirate's Code to apply, and you're not. And thirdly, the Code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl, Miss Turner.

- *Captain Barbossa*, "Pirates of the Caribbean: The Curse of the Black Pearl"

Although eBay is working to prevent some forms of fraud, there are other areas where eBay has been less effective or proactive in preventing fraud or offering remedies. Some types of fraud, such as transactions occurring off eBay, may be somewhat beyond eBay's capability to effectively regulate. eBay is also less likely to address forms of fraud where it lacks economic incentives to intervene, or where enforcing a strong anti-fraud policy would conflict with eBay's features or policies designed to increase user trust.

Trust in the overall website or transaction process, as well as trust in a user's individual transaction partner, has been shown to be important in getting consumers to transact via e-commerce on a website, where they cannot see their transaction partners.¹¹¹ To that end, eBay has implemented particular trust-building features and policies to encourage users to trust the overall eBay marketplace site, as well as their individual transaction partners on eBay.

However, these trust-building features or policies are in some cases inadequate to prevent fraud from occurring, a fact which eBay cannot readily acknowledge or address without undermining

¹¹⁰ Day, *supra* note 56.

¹¹¹ See, e.g., Yao-Hua Tan & Walter Thoen, *Toward a Generic Model of Trust for Electronic Commerce*, 5 INT'L J. OF ELEC. COMMERCE 61, 61-65 (2000) (describing the choice to engage in an electronic transaction as dependent upon a party's level of trust in the other party and/or the control mechanism for the transaction); D. Harrison McKnight, et al., *The Impact of Initial Consumer Trust On Intentions To Transact With a Web Site: A Trust Building Model*, 11 J. OF STRATEGIC INFO. SYS. 297, 313-15 (linking willingness to transact with a website to a combination of factors that built trust in a website vendor, particularly those showing good reputation and quality).

the trust it worked to build. As a result, eBay users may be lulled into a false sense of security inconsistent with the actual level of fraud protection.¹¹²

The following section examines three situations where user trust can be misplaced in this manner, including fraudulent “off-eBay” transactions occurring outside eBay, misuse of eBay’s feedback system, and misuse of trust seals such as SquareTrade.

A. Fraudulent “Off-eBay” Transactions

Fraudulent transactions occurring outside eBay, also known as “off-eBay” transactions, are a classic example of an area where eBay has little incentive to do more than issue a general warning. Such general warnings may be ineffective because they appear to contradict eBay’s built-in trust mechanisms. Off-eBay transactions involve a dishonest user luring an honest user into a fraudulent transaction outside the framework of the eBay listing.¹¹³ Usually, a fraudulent seller attempts to trap a buyer by offering a listed item for direct purchase outside eBay, and then, after receiving payment, failing to provide the advertised goods. There is also at least one documented case of a dishonest buyer attempting to lure a seller off eBay.¹¹⁴ An example of a typical attempt at off-eBay fraud is shown in Figure 3.

eBay’s response to this fraud is simply to strongly encourage users to perform all transactions on, rather than off, the eBay website. eBay has posted warnings about off-eBay transactions and allows users to submit complaints regarding them, which it indicates might be

¹¹² See, e.g., Hafner, *House of Cards*, *supra* note 10 (Quoting defrauded eBay buyer as saying, “[Users] get lulled into a false sense of security with the name eBay, then get scammed in a big way,” and that she would not have continued with suspect transaction, “if it wasn’t eBay.”).

¹¹³ See discussion *supra* notes 81-82. It is likely that such contacts would be made between two eBay users, as eBay’s current messaging systems hide contact information, making it difficult for a non-user to contact users.

¹¹⁴ See *id.* (discussing cases of fraudulent off-eBay sellers). In the P-P-P-Powerbook! scam, the fraudulent buyer tried to entice a seller to sell him an item off eBay through a fraudulent escrow service. See Harris, *supra* note 70.

used for law enforcement investigations or user account sanctions.¹¹⁵ eBay's involvement appears to stop there, unless the off-eBay transaction triggers a law enforcement investigation or involves some other form of fraud, such as phishing, that eBay has committed itself to addressing. As previously noted, eBay has stated that it does not even consider off-eBay transactions to be a form of "eBay fraud" for reporting purposes.¹¹⁶

It is true that fraud occurring off-eBay is to some extent outside the scope of eBay's power and control. Given that eBay attempts to distance itself even from the transactions taking place *on* its own website, it would probably be even less willing or able to get involved in what its users might choose to do *off* the website.¹¹⁷ Furthermore, eBay has a strong economic interest in encouraging people to transact on eBay, thus generating revenue for eBay in the form of seller fees and paid advertisements. It is therefore not surprising that eBay candidly states: "[o]ffers to buy or sell listed items outside of the eBay site are not permitted. Offers of this nature are a potential fraud risk for both buyers and sellers and circumvent eBay's fees."¹¹⁸ Similar warnings are automatically appended to messages sent between users over eBay's built-in messaging system.¹¹⁹ These warnings are supported by publicized tales of disappointed buyers who wanted an item so badly they ignored eBay's warnings, only to lose their money.¹²⁰

¹¹⁵ eBay, About Transactions Outside of eBay, *supra* note 81.

¹¹⁶ See discussion *supra* notes 81-82.

¹¹⁷ See Gelles, *supra* note 81 (eBay spokesman suggesting that off-eBay fraud occurs due to human greed and eBay thus cannot prevent it).

¹¹⁸ eBay, Offers to Buy or Sell Outside of eBay, <http://pages.ebay.com/help/policies/rfe-spam-non-ebaysale.html> (last visited Sept. 10, 2007) (emphasis added).

¹¹⁹ See Message from eBay Member Regarding Item #200147589261, Sept. 10, 2007 (on file with author) (eBay attaches a warning to communications sent between users through its messaging system, stating: "Do not respond to the sender if this message requests that you complete the transaction outside of eBay. This type of offer is against eBay policy, may be fraudulent, and is not covered by buyer protection programs.").

¹²⁰ See discussion *supra* notes 81-82.

A major problem with eBay's general warning approach is that, aside from the fee circumvention issue, the warning lacks credibility in the context of eBay's business model. Because eBay currently facilitates contact only between registered users (as opposed to the original eBay which publicly displayed a user's e-mail address as his or her user ID, allowing anyone to contact a user), a seller's eBay track record is likely to be considered by the buyer in deciding whether to engage in an off-eBay transaction. Many sellers appear generally trustworthy based on their "eBay reputation," as shown by feedback scores and comments and patterns of transaction activity. If a seller seems trustworthy while trading on eBay, it is contradictory for eBay to suggest that the same seller would suddenly act fraudulently off eBay. eBay's warnings against off-eBay transactions, although perhaps true in some cases (including account hijacking cases), amount to a suggestion that untrustworthy parties do operate on eBay. Such a suggestion may well fall on the deaf ears of users who are accustomed to trusting other users with good eBay reputations.¹²¹ eBay's general warning further rings hollow given that many eBay sellers clearly sell regularly through a variety of outlets, and promote their off-eBay businesses, including direct sales websites and brick-and-mortar stores, either directly in the copy of their eBay item listings or on their eBay "About Me" pages linked to their listings.

Furthermore, the potential penalty for offering to buy or sell a listed item off-eBay – suspending or banning a seller's eBay account – provides weak fraud protection. Scammers are unlikely to have a strong interest in keeping a particular eBay account, and can likely get around any suspension by simply creating or hijacking a new account. This penalty appears much more likely to effectively weed out sellers who attempt to get around paying eBay fees, for example,

¹²¹ See Austen, *supra* note 77 (showing how many buyers are willing to purchase expensive goods from sellers with high eBay feedback ratings, including through possibly fraudulent off-eBay transactions).

by selling a listed item directly after its auction ends and reporting it to eBay as unsold, regardless of whether such sellers deliver the promised goods to their customers.

Finally, eBay does not mention that if Paypal is used to fund an off-eBay transaction, some level of fraud protection, operating through Paypal's dispute resolution processes, probably applies to the transaction even though it occurs off-eBay.¹²² Based on law enforcement reports, a trader's refusal to use Paypal is a more reliable indicator of fraud than whether the transaction takes place on or off-eBay.¹²³

Overall, eBay's general warning and suspension policy for off-eBay transactions appears to be designed to protect eBay's revenues and promote its trustworthy image, rather than eBay's lack of incentives to prevent or even realistically address the issue of off-eBay fraud. This underscores the need for systems of centralized fraud reporting and control that span all e-commerce, not just eBay. As previously discussed, where the market centers around a relatively specialized group of collectors, some centralized controls often develop naturally as a result of the information exchange within the collectors' community. Therefore, collectors will probably be alerted to fraudsters whether they are operating on or off eBay. Traders of more generic or sporadic sales items such as consumer electronics might have to rely more heavily on general Internet fraud reporting and education resources, such as the Internet Crime Complaint Center (IC3) operated by the FBI (<http://www.ic3.gov/>).

¹²² Paypal's dispute resolution and claims process for goods not received and/or goods received significantly not as described applies to all transactions funded by Paypal, not just those that occur on eBay. See Paypal User Agreement, *supra* note 40, at § 13.1. See also Wolfe, *supra* note 13 (noting that if fraud cannot be prevented by eBay directly, it might be prevented through Paypal's mechanisms).

¹²³ See Wolfe, *supra* note 13 (quoting eBay's head of trust and safety as stating that "bad guys" do not like to use Paypal as a payment mechanism due to its traceability to a particular bank account).

B. Feedback Misuse

Feedback misuse refers to a fraudulent seller masquerading as an honest seller through the distortion of eBay “feedback” – the comments attached to each user account. Feedback is designed to show the party’s transaction history and reputation, thus signaling to potential transaction partners whether the person is a reputable vendor or a risky dealer before the transaction occurs. Although feedback misuse on eBay is an eBay-specific form of fraud, feedback misuse is similar to off-eBay transactions, in that eBay cannot effectively warn that feedback may be faulty without undermining its own business model.

eBay has stressed that the online reputation created by feedback is key to maintaining a safe trading environment.¹²⁴ In eBay’s early years, its feedback system was the major protection it offered users against fraud, although it suffered from numerous weaknesses.¹²⁵ Over the years, eBay has taken steps to improve its feedback system, including requiring that feedback be related to a specific transaction, indicating next to each feedback whether the recipient acted as buyer or seller, and allowing users to respond to each feedback comment. More recently, eBay has allowed buyers to leave more specific information about sellers concerning such aspects of the transaction as communications and shipping speed, in such a way that ratings cannot be easily traced back to an individual buyer. However, some of the original weaknesses are still likely to persist, such as the tendency of users to avoid leaving openly negative comments for fear of getting a “retaliatory negative” in return, thus creating an incomplete picture of a trading

¹²⁴ See, e.g., *id.*; David Steiner, *Auctionbytes.com Update No. 87, Survey: How Do Users Feel About eBay’s Feedback System?*, Jan. 19, 2003, available online at <http://www.auctionbytes.com/cab/abu/y203/m01/abu0087/s02> (last visited Sept. 10, 2007) (describing eBay advertising campaign using jingle “[t]he feedback shows, you won’t get hosed when you do it eBay!”).

¹²⁵ See *id.*; see generally Calkins, *supra* note 33 (describing weaknesses of feedback system as implemented on eBay in the late 1990s).

partner's behavior.¹²⁶ Although eBay will now, under some limited circumstances, remove retaliatory negatives, the requirements and administrative procedures required for this suggest it is not an easy process.¹²⁷

Furthermore, fraud perpetrators can take advantage of eBay users' trust in the feedback system by creating a false positive feedback record that portrays them in a deceptively trustworthy light. One way to do this is to hijack a legitimate account with good feedback through phishing, a fraud which eBay, as previously noted, does work to prevent. However, eBay is less likely to prevent other forms of false positive feedback, such as a seller engaging in a number of transactions to build up positive feedback before perpetrating a major fraud. One extreme case involved a California man who built a good feedback record by selling \$150,000 of merchandise at low prices, then used his account to perpetrate what the Justice Department termed "the largest Paypal and eBay fraud scheme in history," transferring nearly \$800,000 of his customers' money overseas and then fleeing the country without delivering any goods.¹²⁸ More common are scam artists who engage in a few sham transactions to build up some positive feedback before committing larger-scale fraud. An example of sham transaction feedback is shown in Figure 4.

¹²⁶ See Day, *supra* note 56; Calkins, *supra* note 33.

¹²⁷ See eBay, Help – "I Received Retaliatory Negative Feedback. Can It Be Removed?" <http://pages.ebay.com/help/feedback/questions/retaliatory-feedback.html> (last visited Sept. 18, 2007); eBay, Help - Feedback Abuse, Withdrawal and Removal, <http://pages.ebay.com/help/policies/feedback-abuse-withdrawal.html> (last visited Sept. 18, 2007) (eBay will only remove feedback if it violates eBay policies (for example by containing profane language or by having the leaving party be unreachable) or in certain other circumstances such as a formal or legal dispute resolution.).

¹²⁸ Saul Hansell, *U.S. Tally in Online-Crime Sweep: 150 Charged*, N.Y. TIMES, Aug. 27, 2004, at C4; Press Release, U.S. Dept. of Justice, Background of Operation Web Snare: Examples of Prosecutions (Aug. 27, 2004), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/2004/websnare.pdf>. A similar case involved a U.S. seller of collectible figurines, who, despite thousands of "stellar" feedback ratings, suddenly disappeared with hundreds of thousands of dollars of his customers' money. Steiner, *supra* note 124.

Although eBay has prohibitions against “feedback manipulation,”¹²⁹ the potential punishments, such as account suspension and loss of Power Seller status, do not effectively deter those engaged in fraud. As discussed in the previous section, fraud perpetrators are unlikely to care about maintaining an ongoing positive image on eBay under a single identity, and can probably circumvent suspensions by creating or hijacking another account.

While feedback may provide some useful information pertinent to transactions for regular eBay users, it is not a strong protection against serious fraud, and may even have the opposite effect of promoting misplaced trust. eBay has difficulty acknowledging this without undermining the trustworthiness of its much-vaunted feedback model. Feedback misuse is thus a form of eBay-specific fraud that is likely to continue.

C. Misuse of Outside Trust Services

Just as fraud perpetrators may manipulate feedback to use this trust mechanism to their advantage, so may they also misuse outside trust and protection services designed to lend extra credibility to eBay transactions. As previously noted, one of the best-known outside trust services associated with eBay is SquareTrade.¹³⁰ Although eBay helped develop this program and continues to support it, SquareTrade maintains a separate identity from eBay (including a separate website at <http://www.squaretrade.com>) and can operate as a trusted third party, a model

¹²⁹ See [ebay.com, Feedback Manipulation, http://pages.ebay.com/help/policies/feedback-manipulation.html](http://pages.ebay.com/help/policies/feedback-manipulation.html) (last visited Nov. 13, 2007) (listing possible punishments for manipulating feedback to enhance one’s reputation without that feedback being based on “genuine transactional experience.”).

¹³⁰ See generally Orna Rabinovich-Einy, *Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253 (2006) (focusing on SquareTrade’s dispute resolution models). Although SquareTrade’s services are not offered exclusively to eBay members, the largest number of SquareTrade’s disputes come from eBay. *Id.* at 257.

that can promote confidence in electronic transactions.¹³¹ A seller who wants to display the SquareTrade trust seal on her eBay listings must have her identify verified and agree to submit any disputes to SquareTrade’s resolution process. As of 2006, SquareTrade had handled over one million total disputes, with the majority being disputes between eBay buyers and sellers.¹³² The SquareTrade seal, which appears on over 500,000 eBay listings at any given time, has been described as a “distinctive eBay service” to “an even greater extent than SquareTrade’s dispute resolution services.”¹³³

Although SquareTrade provides benefits and services to both buyers and sellers, on eBay it functions primarily as a sellers’ assistant. Sellers, not buyers, choose whether to opt into the trust seal program, and the SquareTrade website offers other seller services such as warranties and eBay tools.¹³⁴ For buyers, SquareTrade not only reduces uncertainties about seller behavior and dispute resolution, but also guarantees all auctions displaying a verified SquareTrade seal for up to \$250.00 in fraud loss.¹³⁵ Research has indicated that buyers perceive the seal as an added value, which is shown by their willingness to pay a 5% price premium to sellers marked with the seal.¹³⁶

Unfortunately, SquareTrade’s business model leaves gaps in the assurance services they provide – gaps which were soon discovered and exploited by fraud perpetrators. One obvious

¹³¹ See Xiaorui Hu, et al., *Hope or Hype: On the Viability of Escrow Services as Trusted Third Parties in Online Auction Environments*, 15 INFO. SYS. RES. 236, 237 (2004).

¹³² Rabinovich-Einy, *supra* note 130, at 257.

¹³³ *Id.* at 259-60.

¹³⁴ SquareTrade.com, Seller Overview, <http://www.squaretrade.com/pages/seller-overview> (last visited Sept. 10, 2007).

¹³⁵ eBay, Square Trade Seal, <http://pages.ebay.com/help/confidence/programs-square-seal.html> (last visited Sept. 10, 2007).

¹³⁶ See Alexei Nikitkov, *Information Assurance Seals: How They Impact Consumer Purchasing Behavior*, 20 J. INFO. SYS. 1, 14 (2006).

means of misuse is the display of a counterfeit trust and assurance seal. In several instances, following the 2005 expansion of SquareTrade into insurance services, some scam artists copied the look and logo of SquareTrade and attempted to arrange for fraudulent wire transfer payments, as if SquareTrade were acting as a trustworthy escrow service for such a transfer. Much like the selection of eBay as a frequent phishing target, the fact that fraud perpetrators chose to counterfeit the SquareTrade seal speaks favorably about the overall public perception of the company's services, and of trust services in general. At the same time, if either eBay or SquareTrade had taken a more proactive position in disseminating detailed, objective information regarding SquareTrade's newly offered services within the eBay community, misuse of this trust seal might have been prevented.

Even more troubling are incidents where SquareTrade and eBay jointly may have permitted SquareTrade verified, seemingly trustworthy sellers to "take the money and run." Those incidents involved such sellers receiving payments from buyers, then swiftly deregistering from all services and disappearing. For example, research compiled by the authors of this article shows that currently suspended eBay user "chanel****" subscribed to the Square Trade seal beginning January 11, 2006. In August 2006, this seller offered a number of expensive popular items, including Chanel and Louis Vuitton bags, as well as electronics. All these eBay listings contained the trust seal, which asserted that the seller was a "Square Trade seal member in good standing."¹³⁷

Upon the completion of the eBay auctions on August 7 and 8, having received the buyers' contact information and perhaps their payments, this seller promptly deregistered from both eBay and SquareTrade. On August 12, 2006, an attempt to find information about the seller

¹³⁷ Evidence regarding seller "chanel****" and other similar cases was compiled by Alexei Nikitkov as part of a research project into online auction fraud. Supporting documents, including Internet website printouts and case summaries, are on file with the authors.

“chanel***” on the SquareTrade website resulted in the following statement: “SquareTrade shows NO record for this eBay ID.” Evidence suggests that this was not an isolated incident and that other sellers similarly “vanished” in this manner during 2004 and 2005.¹³⁸ An example of a similar incident involving an eBay “Verified” trust assurance seal is shown in Figure 5. SquareTrade and eBay must develop mechanisms to prevent such fast-track deregistration for verified, supposedly trustworthy sellers.

SquareTrade might also consider offering surety bonds for sellers, at least where the value of the individual items sold exceeds the \$250-per-item SquareTrade insurance limit. Bonding sellers is a safety feature that has been implemented by another eBay assurance provider, buySAFE (<http://www.buysafe.com>), which charges a seller one percent of the final sale price of the item in exchange for a full guarantee of a refund or replacement to the buyer in the event of fraud.¹³⁹

IV. Conclusion

In recent years, eBay has taken proactive steps to prevent fraud on its marketplace site, either in order to protect its own brand name and other assets, or at the behest of strong pressure groups, such as law enforcement, well-known corporations, and the sellers who comprise eBay’s customer base. However, more remains to be done, both by eBay and by outside parties such as trust services, which may be in a better position to acknowledge the existence of certain types of online-auction-related fraud and exert appropriate controls.

eBay, like many online businesses, manages buyers’ expectations by managing their trust on a daily basis. Buyers are encouraged by eBay to place their trust in its mechanisms, including its feedback system, its Paypal payment system, and its endorsed third-party trust seals. eBay

¹³⁸ See *id.*

¹³⁹ See Tedeschi, *supra* note 28.

and its related services must continue to look beyond the seller base that provides its immediate revenue, and further address the trusting expectations of the ultimate users of eBay – its buyers.

Pirates of the Caribbean movie film poster Depp

Item number: 3004467

Buyer or seller of this item? [Sign in](#) now for your status

This item has ended with Buy it Now.

[Sell an item like this](#) or [buy a similar item below.](#)



[View larger picture](#)

Buy it Now price: **US \$ 7.50**


Shipping costs: US \$ 4.50 (discount available)
Other (see description)
Service to United States

Ships to: United States
Item location: Buffalo, NY, United States

Buyer: [buyer*xxx](#) (57 ☆)

You can also: [E-mail to a friend](#)

Meet the seller

Seller: [seller*yyy](#) (12345 ☆)  **Power Seller**

me

Feedback: **99.8% Positive**

Member: since Jan-01-04 in United States

[Read feedback comments](#)

[Ask seller a question](#)

[Add to Favorite Sellers](#)

View seller's other items: [Store](#) | [List](#)

Visit Seller's Store:

[The Pirate's Shanty](#)

Buy safely

1. Check the seller's reputation
Score: 12345 | 99.8% positive

Fig. 1. Typical eBay Auction Listing

>Policies/ User Agreement > Won bid, but seller refuses to accept Paypal, or ship item

Sign in to the Answer Center

Search the Answer Center



This question has 2 replies on 1 page.

Won bid, but seller refuses to accept Paypal, or ship item

Posted: Nov-xx-00, 01:01 PST

w****r (2) [View Listings](#) | Posts: 2 | [Report](#)

I bid and won item 1*****6, a Pendleton chair and ottoman. I used Paypal and they took my money, but seller never accepted payment. There is no phone # listed for seller, and e-mails asking seller to please ship item, or contact me, have been ignored for over 2 weeks now.

I believe the seller didn't get what they thought the item should have sold for, and are just ignoring my e-mails, and will not accept payment . . .

. . .
I want the chair and ottoman. If they won't ship it, I can get my money back from Paypal, so that is not the problem. . . . Is there a mechanism for eBay to either ban these folks from selling items, or "suggest" to the seller that they fulfill their contractual obligation?
I just want the chair and ottoman . . . I won the bid, paid for it, but still have no chair.

Won bid, but seller refuses to accept Paypal, or ship item

Posted: Nov-xx-00, 15:34 PST

j***a (30) [View Listings](#) | Posts: 190 | [Report](#)

Hi, Have you tried pulling their contact information by going to Advanced Search . . . Find Contact Information? You can file the seller non-performance. See here:
<http://pages.ebay.com/help/policies/seller-non-performance.html>

Won bid, but seller refuses to accept Paypal, or ship item

Posted: Nov-xx-00, 19:01 PST

w****r (2) [View Listings](#) | Posts: 2 | [Report](#)

I tried pulling contact info . . . At one time I found the info, wrote down the name, but they didn't have a phone # listed. I tried directory assistance, and no one by that name has a listing in that town. . . .

I have a letter into eBay (I think they call it filing) for contract non performance, but what I want to do is drive to [the seller's town] and take my chair.

I guess all I can do is hope my efforts help some other folks evade this person . . .

Fig. 2. Excerpted Answer Center Question and Answer

Luring a buyer off eBay to purchase item through email

!!! VERY IMPORTANT !!!

DO NOT CLICK on ASK SELLER A QUESTION because my eBay e-mail is FULL. CONTACT me on:

FIDELIO @MSN.COM

I will reply in the shortest time or CLICK HERE. YOU HAVE TO specify in the title the name of the product you are interested in.

!!! BUY IT NOW !!!

Up for Auction is a Brand New 17" Apple Powerbook.

The laptop is still in its full original packaging including foam sleeve, box, cables, manuals, and restore CDs.

Invalid Item

This listing (5764342831) has been removed by eBay or is no longer available. Please make sure that you've entered the item number correctly.

If the item was removed by eBay, please consider this transaction canceled. If anybody contacts you to complete the sale, please ignore the request. Completing the sale outside of eBay may be unsafe and will not be covered by eBay purchase protection programs.

Items that ended more than 90 days ago are no longer accessible through the eBay system.

Marketplace Safety Tip

Never pay for your eBay item using instant cash transfer services such as Western Union or MoneyGram. These payment methods are unsafe when paying someone you do not know. Learn more about buying with confidence.

When an email question was sent to the ID holder via "Ask seller a question", the ID holder responded that he knows nothing about this offer. After the seller was contacted on suggested fedelio**@msn.com address, the listing was closed, see picture below, and the following response was received to the researcher's email:

Response received to researcher's e-mail:

Hello,

Your e-mail comes a little bit late. Right now I am in UK, I had to leave the States with urgent business and I didn't read my email until now. Anyway, we can still close that deal. Adrian, my son will make the shipping. He is used with that. Usually I am closing my eBay deals through paypal but now, as I am in London I will need some extra cash for this trip. As you know, it takes 3-5 business days to withdraw funds from paypal to my bank account, and I will be glad if you will be able to make a wire transfer through Money Gram, directly here in UK. It is fast and easy. It takes five minutes.

Here you have my full name and address where you have to make the payment: [name withheld]

Figure 3. A Typical Attempt at Off-eBay Fraud

Collecting positive feedback on small transaction to appear as a trustworthy seller for larger transactions


<p>🚫 BUYERS BEWARE! good until money received then get NO RESPONDENT, NO PRODUCT</p>	Buyer	29314 (89 ★)
<p>🚫 Took the money w/o answering emails or sending product. Still waiting....</p>	Buyer	loggies (12 ☆)
<p>🚫 money send, no goods send, no returned contact at all for more than 3 weeks</p>	Buyer	10 (3)
<p>🚫 Money sent w/in 2 days. Hasn't responded to emails, item not recieved. Waiting.</p>	Buyer	55699 (2)
<p>👍 Nice transaction. Prompt payment. Thanks</p>	Seller	je-auctions (53659)
<p>👍 Good seller,had account problems, refunded quickly! account refunded promptly!</p>	Buyer	120 (5)
<p>👍 Thank-you from CompUSA Auctions!! Fast transaction!</p>	Seller	isa_auctions (5995)
<p>👍 Thank-you from CompUSA Auctions!! Fast transaction!</p>	Seller	isa_auctions (5995)
<p>👍 Seller promptly refunded when troubles beset him; i am fully satisfied</p>	Buyer	rk (66 ★)
<p>🚫 paid them never got anything from them dont deal with them</p> <p>Reply by to 72: this crack smoker,charges back money ,&thinks im gonna still send product,fraud</p>	Buyer	upples (73 ★)
<p>🚫 ** DO NOT BUY FROM THIS SELLER! Their PayPal account has been frozen for fraud!</p> <p>Reply by ton 72: an idiot,a liar,disgusting cry baby,got his refund then makes false statements,</p>	Buyer	scott (71 ★)
<p>👍 good</p>	Buyer	laver2 (78 ★)
<p>👍 great item, good price</p>	Buyer	w (72 ★)
<p>👍 very fast service ++++great doing business with++very happy with service</p>	Buyer	ej_aia (22 ☆)
<p>👍 i love the sites</p>	Buyer	naster32 (14 ☆)
<p>👍 thank you.</p>	Buyer	sco (28 ☆)
<p>👍 He is a very good salesman. He was very understanding and helpful.</p>	Buyer	201984 (0)

Before dishonoring seven transactions, for which “to***ss72” received negative feedbacks, the seller has accumulated a total of 32 positive feedbacks, of which 26 were for small sales (value <\$10) and 6 for purchases.

Figure 4. Example of Misleading Feedback Score




Using accessible assurance seals

Member Profile: cm

ing (26 ☆)  me

Feedback Score: 26
Positive Feedback: 90.6%
 Members who left a positive: 29
 Members who left a negative: 3
 All positive feedback received: 29

Recent Ratings:








	Past Month	Past 6 Months
 positive	0	0
 neutral	0	0
 negative	0	0

[Learn about](#) what these numbers mean.

Bid Retractions (Past 6 months): 0

Feedback Received From Buyers From Sellers Left for Others

37 feedback received by cm: ing (0 mutually withdrawn)

Comment	From
 directs you to a matrix	Buyer
 provided what they said they would	Buyer
 great product, fast shipping, would buy from again!!!	Buyer
 this is a scam	Buyer
Reply by cm: ing: not a scam it is a legit and the sites are all real...its how my business got off	
 Quickly delivered info, But expected more than to be sent to a product pyramid	Buyer
 Not what was promised, site was to enter for a chance to win, and did not sell it	Buyer
Reply by cm: ing: non of my websites wholesale list off prizes they all offer to sell the items	
 Purchased and paid for item----15 days later and still no product	Buyer

cm***ing (26 ☆) appears to have several designations, the most meaningful of which is Verified seal. This seal states that eBay has collected a proof of seller's identity. This verification did not prevent the seller from misrepresentation or failure to fulfill the transaction and then closing his user ID after all.

Figure 5. Example of Fraud Despite Assurance Seal