

LEAVING FEEDBACK: AN ANALYSIS OF EBAY, ONLINE AUCTIONS, AND PERSONAL JURISDICTION

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The Internet has revolutionized the way that Americans conduct business. In the last decade, online transactions have grown in volume and importance, and Internet marketplaces have become mega centers for e-commerce. Courts and commentators have labored to apply personal jurisdiction analyses to online buyers and sellers generally, but personal jurisdiction in the context of online auctions has created additional confusion and inconsistencies. As technology has become more sophisticated, Internet auction websites like eBay have created numerous customization tools to make their services more appealing to a wide range of sellers—from one-time sellers, to small businesses just starting to create an internet presence, to businesses that revolve entirely around eBay’s services. The depth of customization offered to sellers has been overlooked by courts in personal jurisdiction inquiries and this, in turn, has created surprising inconsistencies in personal jurisdiction determinations between seller activity on personal e-commerce websites and seller activity on online auction websites. This Note discusses the mechanics of eBay listings and their implications for personal jurisdiction determinations. Specifically, does it make sense for courts applying the Zippo test to personal websites to avoid an interactivity analysis for transactions that occur over eBay? This Note further suggests that the nearly limitless options for customization available to sellers require a fact intensive, case-by-case analysis of personal jurisdiction that avoids broad conclusions about the mechanics of eBay auctions. Among other things, courts should consider the restrictions sellers place on their listings, the listing activity itself (such as whether the seller rejected bids, communicated with buyers, and the extent and content of those communications), and the use of outside media or other sites by which sellers might maximize their online presence. The level of control that online auction sellers enjoy undermines current judicial understanding of the online auction process, and by focusing on the tools that sellers actually use to sell their items, courts will be able to reach more consistent and equitable results in personal jurisdiction challenges.

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I. INTRODUCTION

AuctionWeb, the website that would one day become the auction supercenter “eBay,” has surprisingly humble origins. It was born not as a business, but as a hobby for its founder, Pierre Omidyar.¹ To save money on internet hosting fees, AuctionWeb was linked to the already existing website of Omidyar’s consulting and technology business: Echo Bay Technology Group, located at ebay.com.² One of the first items sold on AuctionWeb was Omidyar’s “Broken Laser Pointer.”³ It sold for \$14.⁴

1. Martin Gitlin, *eBay: The Company and Its Founder* 7–9 (Karen Latchana Kenney ed., 2011).

2. *Id.* at 9.

3. Jennifer Viegas, *Pierre Omidyar: The Founder of eBay* 39 (2007).

4. *Id.*

On the website's 1995 debut weekend, not a single person visited the site.⁵

Despite its humble origins, word of AuctionWeb spread quickly around the Internet. Its expansion was meteoric, growing at a monthly rate of twenty to thirty percent for its first two years.⁶ By the end of 1995, "thousands of auctions had been hosted on the site, and approximately 10,000 bids had been placed."⁷ By the end of 1996, eBay reported \$358,000 in gross profits.⁸ Two years later, that number had risen to \$40,493,000.⁹ In 2011, gross profits measured over eight billion dollars.¹⁰ Just four short years after its creation, roughly ten million users were registered on eBay.¹¹ As of December 2011, there were over 100 million active users of the website whose "collective impact on ecommerce is staggering: In 2011, the total value of goods sold on eBay was \$68.6 billion—more than \$2,100 *every second*."¹²

eBay's growth has impacted not only the company's shareholders, but the lives of millions of individuals by providing them a forum through which to sell their goods. In 2005, CNBC noted that if eBay employed the 430,000 people who earn an income selling on its site, it would be the nation's number two private sector employer.¹³ Today, the number of people earning an income on the website has more than doubled.¹⁴

Individuals have access to the auction service not only through computers, but also through mobile phones.¹⁵ As of September 24, 2012, eBay's mobile app has been downloaded over 100 million times and has been utilized for over 100 million mobile auctions.¹⁶ The company expects to handle \$10 billion in mobile volume through the app in 2012.¹⁷ eBay's popularity has tremendously impacted the profits of businesses in the shipping industry, such as the United States Postal Service (USPS) and FedEx,¹⁸ and has prompted the creation of entirely new businesses,

5. Gitlin, *supra* note 1, at 9.

6. *Id.* at 30.

7. *Id.* at 10.

8. eBay Inc., Annual Report (Form 10-K) (Mar. 29, 1999).

9. *Id.*

10. eBay Inc., Annual Report (Form 10-K) (Jan. 30, 2012).

11. Aron Hsiao, *An eBay 1999–2000 Timeline*, About.com, http://ebay.about.com/od/ebaynews/archive/a/_ena_decade.htm (last visited Oct. 30, 2013) [hereinafter *Timeline*].

12. *Who We Are*, eBay inc, http://www.ebayinc.com/who_we_are/one_company (last visited Oct. 29, 2013) [hereinafter *Who We Are*] (emphasis added).

13. *The eBay Effect: Inside A Worldwide Obsession: About the Show*, CNBC, <http://www.cnbc.com/id/18803668> (last visited Oct. 30, 2012).

14. Daniel Gross, *My eBay Job*, Slate (May 21, 2008), http://www.slate.com/articles/business/moneybox/2008/05/my_ebay_job.html (noting that "1.3 million people in the world make a living off eBay," but that this number may fail to distinguish between those using the website for primary and secondary income) (quoting John McCain).

15. Sebastian Rupley, *eBay Reaches 100 Million App Downloads and 100 Million Listings via Mobile*, eBay Inc Blog (Sept. 24, 2012), <http://blog.ebay.com/ebay-reaches-100-million-app-downloads-and-100-million-listings-via-mobile/>.

16. *Id.*

17. *Id.*

18. Viegas, *supra* note 3, at 66.

like PayPal, to help buyers and sellers complete transactions safely over the website.¹⁹

The amounts and categories of goods available on eBay has also increased dramatically since the company's inception. While once thought of as a place to sell only collectibles and antiques, additional categories have allowed users to enter into transactions for a plethora of items from clothing to real estate.²⁰ While collectibles and antiques still make up a robust portion of eBay transactions, eBay motors, the section devoted to vehicle sales, is one of the most popular sections of the auction website.²¹ Nearly 5 million passenger vehicles have been sold to date, and more than 38.7 million vehicle parts and accessories are available on eBay motors at any given time.²² These transactions are not limited to cars. A boat sells roughly every twenty-one minutes; an RV or camper every thirty-seven minutes; and a motorcycle sells every seven minutes.²³ In the third quarter of 2013, more than seventy-six percent of these transactions were between sellers of different states.²⁴

In light of its impressive growth, perhaps it is no surprise that eBay has become "the world's largest online marketplace,"²⁵ redefining how businesses and consumers interact on the Internet. At the click of a button, sellers can make their goods and services available to buyers in any of the fifty states and dozens of countries around the world.²⁶ While the reach of sellers has dramatically increased, so too has the potential for lawsuits in foreign jurisdictions. For example, consider the case of an Illinois buyer who purchases a car from a California seller on eBay. The hypothetical buyer electronically transfers payment to the seller at the close of the auction. When the buyer receives the car, he quickly realizes that it does not match the eBay description of the item. If the buyer sues in Illinois, can the court exercise personal jurisdiction over the seller? Should it be able to? Courts across the country have struggled with this question and have often reached different conclusions. Without clear guidance from the Supreme Court, the question remains: how should courts analyze personal jurisdiction for out-of-state defendants conducting business through online auction websites? Several commentators have attempted to create unifying tests to harmonize personal jurisdiction jurisprudence among courts,²⁷ but the actual mechanics of eBay,

19. *See id.*

20. For a list of eBay categories, see *All Categories*, eBay, <http://www.ebay.com/sch/allcategories/all-categories> (last visited Oct. 30, 2013).

21. eBay Inc., eBay Market Places Fast Facts Q3 2013 (2013) (available at www.ebayinc.com/in_the_news/factsheets).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Who We Are*, *supra* note 12.

26. *The eBay Company*, eBay, <http://pages.ebay.com/aboutebay/thecompany/companyoverview.html> (last visited Oct. 30, 2013).

27. See, e.g., Chris Rojao, Buy It Now: Establishing Personal Jurisdiction Over Out-of-State Defendants Who Conduct Business Through Online Intermediaries, 43 Seton Hall L. Rev. 1075 (2013) (advocating a test blending elements of interactivity and traditional minimum contact analysis); Per-

which must inform any iteration of a personal jurisdiction test, have yet to be adequately explored. What factors should courts consider when undertaking personal jurisdiction analyses, and what is the most efficient and accurate method for making that determination? This Note seeks to provide guidance on these issues. This Note focuses its analysis on eBay as it is the largest and most successful of the auction websites, but the principles articulated herein are applicable to any online marketplace.

The jurisdictional differences in determining personal jurisdiction for eBay auctions may result from a lack of information about online auction mechanics. Part II of this note provides guidance in this area by first providing a historical overview of personal jurisdiction followed by a discussion of the process of conducting business through eBay, including the numerous listing options available to sellers such as multiple auction types, exclusionary measures that can be taken before an item is listed, and most importantly, the level of control sellers can actually exert over the auction process. Part III examines the different judicial approaches to personal jurisdiction inquiries and online auctions, focusing on the contrasting approaches articulated in different jurisdictions. Part IV proposes a number of factors that should be taken into consideration when courts are confronted by this problem, examining courts' inconsistent application of the interactivity test between traditional e-commerce websites and online auctions, and advocating a case-by-case, fact intensive personal jurisdiction analysis.

II. BACKGROUND

A. *An Overview of Personal Jurisdiction*

1. *The Constitutional Standard*

Judicial authority to exercise personal jurisdiction stems from the Due Process Clause of the Fourteenth Amendment.²⁸ Due process protects an individual's right to be subject only to lawful powers and restricts courts' authority as a matter of individual liberty.²⁹ It requires that an individual have notice of the suit and that the court have personal jurisdiction over the defendant.³⁰ Constitutional restraint in addition to legislative authority granted through state long-arm statutes govern when state

sonal Jurisdiction—Minimum Contacts Analysis—Ninth Circuit Holds That Single Sale on eBay Does Not Provide Sufficient Minimum Contacts with Buyer's State.—*Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), 122 Harv. L. Rev. 1014, 1021 (2009) (noting that applying traditional minimum contacts analysis without a specialized Internet test will likely lead to more consistent results in personal jurisdiction determinations).

28. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) ("Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power." (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982))).

29. *Id.*

30. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

courts can exercise jurisdiction over an out-of-state defendant.³¹ The Supreme Court has identified two ways through which personal jurisdiction can be executed in compliance with these standards: general and specific jurisdiction.³² General jurisdiction can arise when a defendant's affiliations with the state are "so 'continuous and systematic' as to render them essentially at home in the forum State."³³ Specific jurisdiction requires that a defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"³⁴ The minimum contacts requirement is satisfied when the defendant's contacts with the forum state are such that he should reasonably anticipate being haled into court there.³⁵ This occurs when the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"³⁶ and not when the defendant's contacts with the jurisdiction are a result of "random, fortuitous or attenuated contacts or of the unilateral activity of another party or a third person."³⁷ Even limited interaction with the forum state may meet the purposeful availment requirement if the obligations created by the limited interaction are ongoing.³⁸ The Court has cautioned that the minimum contacts analysis cannot be simply mechanical or quantitative, but is more nuanced, based on the nature and quality of the defendant's activity and the facts in each case.³⁹ The "fair play and substantial justice" component of the test requires a court to evaluate "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies" to determine if jurisdiction is proper.⁴⁰

31. See, e.g., *Foley v. Yacht Mgmt. Grp., Inc.*, No. 08 C 7254, 2009 WL 2020776, at *2 (N.D. Ill. 2009).

32. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985).

33. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). This Note focuses on specific jurisdiction. General jurisdiction can be particularly relevant when the court is tasked with analyzing the conduct of Powersellers and eBay Storefront owners who continuously and systematically sell a high volume of goods to a particular state. Additionally, while at least one court has relied on the effects test established in *Calder v. Jones* when analyzing personal jurisdiction between eBay users who continuously and systematically sell a high volume of goods to a particular state.

34. *International Shoe*, 326 U.S. at 316 (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

35. *World-Wide Volkswagen*, 444 U.S. at 291.

36. *Rudzewicz*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); see also *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) ("As a general rule, the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'").

37. *Rudzewicz*, 471 U.S. at 475 (internal quotation marks omitted).

38. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222–23 (1957).

39. *International Shoe*, 326 U.S. at 319.

40. *Rudzewicz*, 471 U.S. at 476–77 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (internal quotation marks omitted).

2. *A Changing Standard*

Changing economic realities have altered the application of the personal jurisdiction analysis over time.⁴¹ Its evolution has been tethered to an increasing ease through which consumers can participate in interstate commerce.⁴² The Supreme Court acknowledged this expansion of the personal jurisdiction threshold in *McGee v. International Life Insurance*, noting:

[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In part this is attributable to the fundamental transformation of our national economy over the years. . . . With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.⁴³

Recognition of changing economic activities was at the heart of the Court's departure from the strict *Pennoyer* standard to the more flexible minimum contacts test articulated in *International Shoe*.⁴⁴ In the 1877 *Pennoyer* decision, the Court held that a state's power over a defendant was grounded on the defendant's presence within its territorial jurisdiction.⁴⁵ Thus, each state was powerless over people and property outside its state lines.⁴⁶ When travel between states was cumbersome, expensive, and lengthy, the Court's holding was easy to apply.⁴⁷ But technological advancements over the past seventy years rendered *Pennoyer* ineffective as interstate travel became increasingly easy and inexpensive.⁴⁸ The Court in *International Shoe* recognized these new concerns and, as a result, changed the rule to reflect a new age of widespread, accessible, and efficient interstate commerce.⁴⁹ While *International Shoe* was a fundamental departure from *Pennoyer*, subsequent Supreme Court decisions have been careful to acknowledge that economic realities may change,

41. See *McGee*, 355 U.S. at 220.

42. *Id.* at 222–23.

43. *Id.*

44. See Craig Peyton Gaumer, *The Minimum Cyber-Contacts Test: An Emerging Standard of Constitutional Personal Jurisdiction*, 85 Ill. B.J. 58, 60 (1997).

45. *Pennoyer v. Neff*, 95 U.S. 714, 736 (1877).

46. See *id.*; Gaumer, *Cyber-Contacts Test*, *supra* note 44, at 60.

47. See Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo. L. Rev. 753, 753 (2003) [hereinafter *Drop the Shoe*].

48. *Id.* at 755 (“[T]he Supreme Court and other courts increasingly struggled to apply this seemingly clear test in individual cases for two primary reasons. First, the test was created at a time in American history when travel from state to state was difficult and meaningful; in the twentieth century, interstate travel became cheap and common. Second, the test was created for natural persons, not for fictional entities such as corporations; in the twentieth century, America's business was becoming the domain of corporations. A court could rather easily determine when a natural person was served within state boundaries, but faced difficulties when dealing with a fictional person without a corporeal body.”).

49. See *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

but the principles underlying the personal jurisdiction analysis remain constant.⁵⁰

B. *How eBay Works*

To properly analyze personal jurisdiction over out-of-state defendants using eBay, it is essential to have an understanding of how the website actually operates and the level of control sellers have throughout the listing process. Whether a sale to an individual in another state is random and fortuitous, or constitutes a purposeful avilment of the benefit of that jurisdiction's laws, will likely depend on the actions a seller takes when setting up a transaction. Background knowledge of the actions available to eBay sellers is therefore essential when determining if a foreign state should exercise personal jurisdiction over a seller. Entire books have been written describing the various customization options available to eBay users.⁵¹ The purpose of this Section is to discuss some of the more basic elements of conducting business through eBay and to provide a brief overview of the options available to eBay users when they decide to sell an item on the website.

1. *Listing an Item: The Basics*

The process of listing an item on eBay may seem fairly straightforward. Sellers list an item, potential buyers bid on the item, pay the seller, and then eagerly await the item's arrival. In reality, the listing process offers a wide range of customization options and a large degree of seller control.⁵² Before a potential seller can begin using eBay, the website requires users to register with the website.⁵³

a. Registration

Before an item can be listed, a potential seller must register with eBay.com and create a username.⁵⁴ The registration process requires sellers to provide their home address, email account, and phone number to eBay.com.⁵⁵ This information is saved in the user's account and, unless altered after registration, the address information provided in registration will be listed as the location of the item on the seller's future eBay listings.⁵⁶ This item location information is available to anyone viewing

50. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789–90 (2011).

51. See, e.g., Nancy Conner, *eBay: The Missing Manual* xvi (Sarah Milstein et al. eds., 2005).

52. See *infra* Part II.

53. *Getting Started*, eBay, <http://pages.ebay.com/help/account/getting-started.html> (last visited Oct. 29, 2013).

54. *Id.*

55. *How to Register*, eBay Inc., <http://pages.ebay.com/help/account/how-to-register.html> (last visited Oct. 30, 2013).

56. *Changing Your Account Information*, eBay, <http://pages.ebay.com/help/account/change-account.html> (last visited Oct. 29, 2013).

the auction⁵⁷ and includes the zip code, city, and state in which the item is located.⁵⁸ eBay recommends sellers post as much location information as possible to increase bidder confidence.⁵⁹ Users are also required to agree to eBay's privacy policy and user agreement.⁶⁰ The privacy policy lists users' privacy rights regarding eBay's collection, use, storage, sharing, and protection of personal information,⁶¹ while the user agreement sets forth the terms that users' must agree to in order to use the eBay website.⁶²

b. Categories, Titles, Pictures

After users confirm their registration information, they are able to begin the selling process.⁶³ First, sellers select the relevant eBay categories and subcategories that best describe their item.⁶⁴ Typically, only one main category is selected per item, but sellers can, for a fee, add additional categories to have their item turn up in more searches.⁶⁵ Next, sellers can use up to eighty characters to create a title for their auction.⁶⁶ Subtitles can also be added to the auction title for an added fee.⁶⁷ Sellers then flesh out the specifics of their listing. Pictures are often utilized to make the listing more appealing to potential bidders.⁶⁸ These pictures can either be uploaded from an electronic device (such as a phone or computer) or sellers can host the pictures of the item on their own website and link the image to the eBay listing.⁶⁹ eBay allows multiple pictures and large pictures to be uploaded to the listing.⁷⁰ The first twelve pictures are free and additional and super-sized images can be added for a small fee.⁷¹

57. This information is required to be accurate based on eBay's item location misrepresentation policy, "Sellers must be clear and accurate about the location their item will be shipped or picked up from. We don't allow false, inaccurate, vague, or misleading information about the location of an item in the Item location field or description." *Item Location Misrepresentation Policy*, eBay, <http://pages.ebay.com/help/policies/item-location.html> (last visited Oct. 30, 2013).

58. See *2012 Fall Seller Update; Boost Your Sales*, eBay, <http://pages.ebay.com/sellerinformation/news/fallupdate2012b/boostsales.html> (last visited Oct. 30, 2013).

59. *Id.* ("Seeing an accurate item location helps build buyer confidence in listings.")

60. *Getting Started*, *supra* note 53.

61. Privacy Policy, eBay, <http://pages.ebay.com/help/policies/privacy-policy.html?rt=nc> (last visited Oct. 30, 2013).

62. *eBay User Agreement*, eBay, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Oct. 30, 2013).

63. *Getting Started*, *supra* note 53.

64. Conner, *supra* note 51, at 156.

65. *Id.* at 157.

66. *2011 Fall Seller Update*, eBay, <http://pages.ebay.com/sellerinformation/news/FallUpdate2011.html> (last visited Oct. 30, 2013).

67. Conner, *supra* note 51, at 158.

68. eBay, *New Seller Guide: A Step-by-Step Guide to Selling on eBay 3, 9*, available at http://pics.ebaystatic.com/aw/pics/pdf/us/sellercentral/pdf/New_Selling_Guide_20110930.pdf [hereinafter *New Seller Guide*].

69. Conner, *supra* note 51, at 203.

70. *Adding Pictures to your Listing*, eBay, <http://pages.ebay.com/help/sell/pictures.html> (last visited Oct. 30, 2013).

71. *Id.*

c. Item Description

Perhaps the most important part of the listing is the item description. Sellers have great latitude when describing their item and can write nearly anything to provide information about the item and the listing to potential buyers.⁷² This can include the history of the item or a story of how the item was purchased, an in depth discussion of the item's condition, or even a friendly message.⁷³ Often, additional terms are included in this section.⁷⁴ These terms include limitations on when a payment must be made at the conclusion of the listing and additional information about shipping options and restrictions.⁷⁵ Extra visual flare can be added to a listing if a seller elects to use a listing designer.⁷⁶ For ten cents, sellers can choose from over 100 templates to customize their listing and offer more visual appeal to attract potential bidders.⁷⁷

d. Listing Types

ebay transactions are not limited solely to auctions. There are a number of listing options available. Auction-style listings are the format most commonly associated with eBay.⁷⁸ In the auction format, potential buyers place bids on the listed item with the highest bidder ultimately winning the auction.⁷⁹ Sellers set the duration of the auction (ranging anywhere from 3–10 days⁸⁰ or longer), the starting bid price, and may even include a reserve price that must be met by the winning bidder in order for the item to sell.⁸¹ While the auction duration is set by the seller at the start of the listing, sellers may, at their discretion, end the auction early in exchange for a small fee.⁸² “Buy It Now,” an additional option for auction style listings, gives buyers an opportunity to forego the auction and buy the item at a specific price set by the seller so long as it is at least

72. Conner, *supra* note 51, at 157–60.

73. *Id.*

74. *Id.*

75. *Id.* at 164–66.

76. *Id.* at 163.

77. *eBay: Sell Your Item*, eBay Inc., <http://cgi5.ebay.com/ws/eBayISAPI.dll?aidZ153=&MfcISAPICCommand=SellHub3> (last visited Mar. 13, 2013) [hereinafter *Sell Your Item*] (This source can be viewed by registered eBay users who click on the “sell your item” link. Interested readers will need to create a free account on eBay to view the Page or log in with an existing account.).

78. See *Timeline*, *supra* note 11.

79. *Different Buying Options*, eBay, <http://pages.ebay.com/help/buy/formats.html> (last visited Oct. 30, 2013).

80. *Selecting a Listing Duration*, eBay, <http://pages.ebay.com/help/sell/duration.html> (last visited Oct. 30, 2013). Note that this requires a small fee. *2012 Fall Seller Update: Ending Auction Style Listings Early*, eBay, <http://pages.ebay.com/sellerinformation/news/fallupdate2012b/earlyendingauctions.html> (last visited Nov. 21, 2013) [hereinafter *Ending Auction Listings Early*].

81. This also requires a small fee. And may only be available for auctions of specific kinds at specific values. See Conner, *supra* note 51, at 161.

82. *Ending Auction Listings Early*, *supra* note 80. This fee is equal to the fee that sellers would have paid had the auction ended at its scheduled time. The fee can vary depending on the listing type. See *id.*

thirty percent higher than the auction starting price.⁸³ Under these circumstances, the “Buy It Now” option runs concurrently with the auction until a potential buyer places a bid on the listed item.⁸⁴

Sellers can also choose to sell an item at a fixed price through the “Buy It Now” feature.⁸⁵ Fixed price listings eliminate bidding entirely, and at price.⁸⁶ These listings are often utilized when a seller is selling numerous, identical items.⁸⁷ The “Best Offer” option allows buyers to submit offers to sellers for less than a “Buy It Now” asking price.⁸⁸ When buyers submit a “Best Offer,” they have the option to include a message to the seller which may include anything from the buyer’s reasoning for submitting the particular offer to questions about the item.⁸⁹ A seller has no obligation to accept a best offer.⁹⁰ The service is offered for free from eBay and can accompany “Buy It Now” listings.⁹¹

Other auction formats, such as Dutch Auctions, allow sellers to sell a number of identical items at once through an auction instead of a fixed price.⁹² Finally, sellers can elect to host preapproved bidder auctions.⁹³ This listing method allows sellers to create a list of preapproved bidders and apply it to the auction.⁹⁴ Only individuals that have received the seller’s approval are eligible to bid on the item and eBay automatically blocks the bids of unapproved users.⁹⁵ If a seller is interested in bidding on the item but is not on the list of approved bidders, they can contact the seller and ask for approval.⁹⁶ It is ultimately up to the seller’s discretion whether to add the user to the list of approved bidders.⁹⁷

e. Shipping

After setting up the item description, sellers are required to enter shipping information for the listing. Numerous shipping options and combinations are available for different items. First, sellers indicate the method by which the item will be shipped.⁹⁸ Options include “flat [rate] shipping,” in which the seller selects a price that must be paid by the

83. *2013 Spring Seller Update: Simplified Rate Plans*, eBay, <http://pages.ebay.com/seller-information/news/springupdate2013/springfeesimplification.html> (last visited Oct. 29, 2013).

84. Conner, *supra* note 51, at 161.

85. *Sell Your Item*, *supra* note 77.

86. *Selling Using a Fixed Price*, eBay, <http://pages.ebay.com/help/sell/fixed-priced.html> (last visited Dec. 2, 2013).

87. *Selling Multiple Items*, eBay, <http://pages.ebay.com/help/sell/multiple.html> (last visited Oct. 30, 2013).

88. Conner, *supra* note 51, at 28.

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.* at 30.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Sell Your Item*, *supra* note 77.

winner regardless of their location, “local pickup only,” in which the winning bidder must pick up the item from the seller, “freight shipping” for items over 150 pounds, and “calculated shipping” in which eBay automatically calculates the shipping cost based on the size of the item and shipping distance.⁹⁹ Any combination of these options can be selected on a given listing.¹⁰⁰ Sellers can also choose to offer free shipping to attract potential customers.¹⁰¹ eBay offers sellers thirty different shipping carrier options, including various services offered by USPS, United Parcel Service (UPS), and FedEx.¹⁰²

Multiple shipping options can be presented to buyers.¹⁰³ For example, “Get It Fast” options offer an expedited shipping service which requires the seller to ship the item within one business day of receiving payment.¹⁰⁴ Sellers listing multiple items can elect to offer combined shipping options when the same bidder wins multiple items.¹⁰⁵ Sellers can also elect to add various optional shipping services such as shipping insurance and package tracking for items.¹⁰⁶ Shipping insurance payments can be mandatory, optional, or not offered at all.¹⁰⁷ Tracking numbers, though not required, can be added to the listing page after the item has been shipped to the buyer.¹⁰⁸ Insurance and tracking options can be offered for free, for charge, or not at all depending on the preference of the seller.¹⁰⁹

Next, sellers have the option to select certain preset conditions that will automatically prevent qualifying bidders from bidding on the item. For instance, sellers can create an exclusion list to identify regions to which the seller will not ship items.¹¹⁰ The regions available to select under this method include: Hawaii, Alaska, U.S. protectorates, PO boxes, APO/FPO, and any country or continent outside of the United States

99. *Id.*; *Specifying Your Shipping Costs and Locations*, eBay, <http://pages.ebay.com/help/pay/shipping-costs.html> (last visited Oct. 30, 2013).

100. *See supra* note 99.

101. *Specifying Your Shipping Costs and Locations*, *supra* note 99.

102. *Shipping Basics: Choose your Service*, eBay, <http://pages.ebay.com/sellerinformation/shipping/chooseservice.html> (last visited Oct. 30, 2013).

103. For instance, eBay helpfully offers the tip that “[s]ome buyers prefer to pay a little more to get their items quickly, so it’s always a good idea to consider offering 2 options—one economical and one fast shipping service.” eBay, *Shipping Made Easy 6 (2012)*, available at http://pics.ebaystatic.com/aw/pics/pdf/eba219_shippingguide_final.pdf.

104. *Selling Get It Fast Items*, eBay, <http://pages.ebay.com/help/sell/get-it-fast.html> (last visited Oct. 30, 2013).

105. *Offering Shipping Discounts*, eBay, <http://pages.ebay.com/help/pay/shipping-discounts.html> (last visited Oct. 30, 2013).

106. *See Adding Tracking Information*, eBay, <http://pages.ebay.com/help/pay/upload-tracking.html> (last visited Oct. 30, 2013); *Offering Shipping Insurance*, eBay, <http://pages.ebay.com/help/pay/shipping-insurance.html> (last visited Oct. 30, 2013).

107. *Sellers—Protect Yourself, Buy Shipping Insurance!*, eBay, <http://www.ebay.com/gds/Sellers-Protect-Yourself-Buy-Shipping-Insurance-/10000000003416320/g.html> (last visited Oct. 30, 2013).

108. *Adding Tracking Information*, *supra* note 106.

109. *See Sellers—Protect Yourself, Buy Shipping Insurance!*, *supra* note 107.

110. *Specifying Your Shipping Costs and Locations*, *supra* note 99.

that the seller wishes to exclude.¹¹¹ This is one method in which sellers can “block buyers whose primary shipping address is in a location [they] don’t ship to.”¹¹² Once certain regions are selected, those exclusions are “used as the default for all of [their] future listings, and [sellers] can make listing-specific changes to them at the time of listing.”¹¹³ eBay automatically prevents users in excluded regions from bidding on the listing.¹¹⁴ Sellers can also automatically exclude buyers who do not have a PayPal account, who have received a number of unpaid item cases within a timeframe selected by the seller, who have a number of policy violation reports within a certain time period selected by the seller, who have a low feedback score, who have previously bought the seller’s items within the last ten days, and any other individual eBay user that the seller wishes to block.¹¹⁵ eBay automatically prevents users meeting any of these criteria from bidding on the listing.¹¹⁶

Sellers can also add their own additional bidder exclusions to the item description. For example, if a seller does not wish to sell the item to individuals living in California, he can state this in the item description.¹¹⁷ eBay will not automatically block users that meet these personal exclusions, but sellers can prevent a sale to individuals that do not meet conditions listed in their item description.¹¹⁸ First, sellers can cancel bids by going to “Help → Selling → Managing Your Item → Managing Buyers → Cancel Bids.”¹¹⁹ After entering the item number, the bidder’s eBay identification, and the reason for the cancellation, the bid will be cancelled.¹²⁰

f. Payment

After the listing has concluded, successful bidders are required to pay the seller according to the terms of the auction.¹²¹ A number of payment options and combinations are available for most listing types. The most common payment method is payment through PayPal.¹²² When a seller accepts PayPal, the buyer can pay instantly and securely using a

111. *Excluding Shipping Locations*, eBay, <http://cgi5.ebay.com/ws/eBayISAPI.dll?NewListing&itemid=&cpg=148&sid=147390005020&userid=&pass=&aid=178&ej2child=true&ej2parent=SellerGaranularity> (last visited Nov. 11, 2012).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Managing Bidders and Buyers*, eBay, http://pages.ebay.com/help/sell/manage_bidders_ov.html#set (last visited Oct. 30, 2013).

116. *Id.*

117. *Id.*

118. *See id.*

119. Conner, *supra* note 51, at 231.

120. *Id.*

121. *See id.* at 51–58 (describing how a buyer proceeds after the auction and the type of payment options available).

122. *See Choosing a Payment Method (for Buyers)*, eBay, <http://pages.ebay.com/help/pay/methods.html#other> (last visited Oct. 30, 2013).

credit card or checking account linked to their PayPal account.¹²³ Sellers can choose to accept only PayPal payments and can even require immediate PayPal payments from buyers purchasing fixed price items.¹²⁴ Other electronic payments options are available as well, including: credit card payments and payments through other processing software such as Skrill, Paymate, and ProPay.¹²⁵ As an alternative to electronic payment, sellers can require the buyer to pay for the item upon pickup and can specify which payment methods will be accepted, such as cash or check, when making the pickup.¹²⁶ “Checks, money orders, and bank wire transfers aren’t allowed for most eBay purchases. But sellers can offer these payment methods for certain items in some categories, including Motors, Capital and Business Equipment, Real Estate, and Adult Only.”¹²⁷ It is fairly common for sellers to include a time limit in which payments must be received in the item description.¹²⁸ If the buyer fails to meet the established payment requirements, the seller can file a claim with eBay and void the listing.¹²⁹

At any time during the listing process, a bidder can use eBay messaging or email to contact a seller and ask him or her questions about the item.¹³⁰ Sellers can elect to share those conversations with other potential bidders by adding them to the listing page, or they can keep those discussions private.¹³¹ It is not uncommon for sellers and buyers to send multiple messages to each other during the listing period and at the conclusion of a successful listing to confirm shipping locations and payment information.¹³² These messages are not limited to text, but can include pictures as well.¹³³ When issues arise between sellers and buyers, the parties are required to use this message system to discuss the problem before the dispute can be examined by eBay’s resolution center.¹³⁴ The eBay message system is automatically integrated with each user’s email address.¹³⁵ Thus, when users contact each other through eBay, they are doing so through their own personal email addresses.¹³⁶

123. *Id.*

124. *Id.*; see *Requiring Immediate Payment*, eBay, <http://pages.ebay.com/help/pay/require-immediate-payment.html> (last visited Oct. 30, 2013).

125. *Choosing a Payment Method (for Buyers)*, *supra* note 122.

126. *Id.*

127. *Id.*

128. See *Unpaid Item Policy*, eBay Inc., <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited Oct. 30, 2013).

129. *Id.*

130. *Answering Buyers’ Questions*, eBay, http://pages.ebay.com/help/sell/answer_qs.html#giving (last visited Oct. 30, 2013).

131. *Id.*

132. See *id.*

133. *2012 Fall Seller Update*, *supra* note 58.

134. *2012 Fall Seller Update: Seller Protections*, eBay, <http://pages.ebay.com/sellerinformation/news/fallupdate2012b/newsellersafeguards.html> (last visited Oct. 30, 2013).

135. *2012 Fall Seller Update, Enhancements in My Messages*, eBay, <http://pages.ebay.com/sellerinformation/news/fallupdate2012b/mymessages.html> (last visited Sept. 19, 2013).

136. See *id.*

2. *Additional Options*

As previously discussed, the basic process of listing an item for sale on eBay contains numerous opportunities for customization. After users have completed multiple transactions through eBay, even more options for personalization on the website are available.

a. The eBay Community

One of Pierre Omidyar's goals during eBay's first years of business was to create a service that "could better operate on its own, with little or no seller-buyer management required from himself or other workers, especially in the potentially difficult matter of resolving disputes."¹³⁷ From this goal came the creation of the feedback system and user forums, tools that expanded the role of eBay from marketplace to virtual community for users of the website.

Conceptually, the idea of eBay is daunting. It requires buyers around the world to trust that anonymous sellers, who have already been paid, will ship to them goods that they have never seen. This may seem like a difficult proposition, but the eBay feedback system allows users of the website to confidently make transactions with other users.¹³⁸ Whenever a user buys or sells an item on eBay, he or she can leave feedback for the trading partner.¹³⁹ Buyers can leave positive, negative, or neutral feedback and a short comment, while sellers can also leave positive or neutral feedback with a short comment.¹⁴⁰ Each positive feedback rating is worth one point while each negative rating is worth negative one point.¹⁴¹ As points are accumulated, eBay users

develop a Feedback Profile, or reputation, based on the comments and ratings left by other members. The Feedback score is one of the most important pieces of a Feedback Profile. It's the number in parentheses next to a member's user ID and it's also located at the top of the member's Feedback Profile.¹⁴²

Feedback messages are a permanent part of a seller's record and a critical element of the eBay community.¹⁴³ High feedback scores indicate that the seller is very experienced with performing eBay transactions and shows potential bidders that a seller is trustworthy.¹⁴⁴ Conversely, a low feedback score can indicate an inexperienced or untrustworthy seller, and users will typically be more cautious when dealing with an individual

137. Viegas, *supra* note 3, at 46.

138. See *How Feedback Works*, eBay, <http://pages.ebay.com/help/feedback/howitworks.html> (last visited Oct. 30, 2013).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.*

with low feedback.¹⁴⁵ Feedback provides an incentive to complete transactions effectively and for users to sell more items via eBay. The higher a user's feedback score, the better his or her standing in the eBay community.¹⁴⁶

In addition to feedback, users are able to further immerse themselves in the eBay community by taking an active role in the website's discussion boards. The discussion boards offer a forum for users to post questions about eBay and to allow eBay staff or other users an opportunity to answer those questions.¹⁴⁷ Individual users have been extremely effective at answering questions in the discussion boards, suggesting changes to the website, and gaining exposure for their username.¹⁴⁸ eBay groups are another method of further integration into the website. Groups are online clubs created and administered by eBay users.¹⁴⁹ Members can receive special newsletters, answer polls, and post and view photo albums.¹⁵⁰ Groups can be public (open to anyone) or private (requiring approval to join).¹⁵¹ Users who have been members for at least ninety days with a feedback score of fifty or better can even start their own group.¹⁵² Like the discussion boards, groups provide a valuable method of networking for users with similar interests on the website.¹⁵³

b. Powersellers and Top Rated Sellers

eBay takes the benefits of positive feedback to the next level through the use of its Powerseller and Top Rated Seller programs. These programs are tailored to high-volume eBay sellers and will not apply to low-volume or infrequent eBay users.¹⁵⁴ Both programs are automatically applied to accounts that meet certain minimum requirements.¹⁵⁵ Powersellers are divided into five different tiers.¹⁵⁶ At the lowest tier, bronze, sellers are required to annually sell \$3,000 worth of goods and have over one hundred transactions annually.¹⁵⁷ After reaching this minimum threshold, sellers can move to higher powerseller tiers.¹⁵⁸ Powersellers must also be members of eBay for at least ninety days, have an

145. See *id.* Individuals may prohibit an untrustworthy seller from bidding on their auctions or use other measures. *Buyer/Bidder Management*, eBay, <http://pages.ebay.com/services/buyandsell/biddermanagement.html> (last visited Oct. 30, 2013).

146. See *How Feedback Works*, *supra* note 138.

147. Viegas, *supra* note 3, at 53.

148. Uncle Griff is one of the most known of these individuals. See *id.* at 53–54.

149. Conner, *supra* note 51, at 366.

150. *Id.*

151. *Id.*

152. *Id.* at 368.

153. See *id.* at 366.

154. *Top Rated & PowerSeller Program: Requirements*, eBay, http://pages.ebay.com/sellerinformation/sellingresources/powerseller_requirements.html (last visited Oct. 30, 2013).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* The final tier, titanium, requires sellers to have annual sales of at least \$1,800,000 or 180,000 annual transactions. *Id.*

account in good standing in compliance with eBay policy, have ninety-eight percent positive feedback, and meet certain positive feedback criteria for shipping time, communication, item as described, and shipping and handling charges.¹⁵⁹ Powersellers receive a number of benefits including a prominently displayed Powerseller badge that can be seen on all of the seller's eBay auctions and pages, access to one-on-one phone consultations with eBay personnel to achieve Top Rated seller status, reduced shipping rates, and access to additional discussion boards and newsletters.¹⁶⁰ Health insurance benefits are also available for qualifying users as "eBay, through Mercer Health & Benefits, offers PowerSellers a diverse suite of health insurance plans and services that allow sellers to build plans to meet sellers' or their employees' healthcare coverage needs and budgets."¹⁶¹

Top Rated seller status confers even more benefits to qualifying users. Like the Powerseller program, certain minimum requirements must be met in order to qualify, and eligibility is evaluated at the end of each month.¹⁶² To achieve Top Rated status, sellers must have \$1,000 or more in annual sales to U.S. buyers, upload tracking information on at least ninety percent of transactions to U.S. buyers within the seller's stated handling time, have an active eBay account for at least ninety days, and have one hundred or more transactions with U.S. buyers over the past year.¹⁶³ Like Powersellers, certain minimum feedback scores are also required to qualify.¹⁶⁴ When these requirements are met, top sellers gain access to a Top Rated seller badge prominently displayed in search results and the item page for all of their listings, boosts in search results for certain types of listings, access to one-on-one phone consultations with eBay personnel to help maintain top-seller status, shipping discounts, discounts on final-value fees, and access to special newsletters and discussion boards.¹⁶⁵

Both the Powerseller and Top Rated seller designations provide additional benefits to sellers who frequently use eBay. Like the benefits of the feedback system, these programs give sellers tangible rewards for further integrating their business with the eBay website including: added recognition, credibility, discounts, improved marketability.¹⁶⁶ As sellers conduct increasing business on the website, further customization and branding opportunities become economically feasible with eBay Storefronts.

159. *Id.*

160. *Top Rated & PowerSeller Program: Benefits*, eBay, http://pages.ebay.com/sellerinformation/sellingresources/powerseller_benefits.html (last visited Oct. 30, 2013).

161. *Id.*

162. *Top Rated & PowerSeller Program: Requirements*, *supra* note 154.

163. *Id.*

164. *Id.*

165. *Top Rated & PowerSeller Program—Benefits*, *supra* note 160.

166. *Id.*

c. eBay Storefront

For sellers who want the ultimate degree of customization, eBay Stores provide an even more personalized method of conducting business through the website. An eBay Store is “a page on eBay that contains your listing, and only yours, [and] you have a virtual shop where buyers can look around, search your inventory, compare your products—and buy from you.”¹⁶⁷ There are numerous advantages to creating an eBay Store. First, the user’s eBay Store has a name and web address of its own, making it the equivalent of having an e-commerce website within eBay.¹⁶⁸ Like any other website, sellers using an eBay Store can “establish [their] brand with a custom Store home page and custom header and logo that appear in [their] listings.”¹⁶⁹ Store owners can even utilize HyperText Markup Language (“HTML”) to create thoroughly unique store headers.¹⁷⁰

Second, opening an eBay Store provides numerous marketing tools for the store owner: All of the seller’s item pages contain an “eBay Stores” icon next to the seller’s user identification.¹⁷¹ Clicking this icon takes buyers to the user’s eBay Store.¹⁷² Buyers will also be able to see the user’s store when browsing the eBay Store Directory, a searchable list of the eBay Stores currently hosted on eBay.¹⁷³ As previously noted, each eBay Store has its own personalized web address, making it easy for a seller to advertise their entire list of products through advertisements outside of eBay or in eBay message boards.¹⁷⁴

Store owners also gain additional opportunities to promote their products through the “Cross-Promotions” tool which enables sellers to show buyers additional items to choose from during their shopping experience and puts the right product in front of the right buyer at the right time.¹⁷⁵ Cross-Promotions allow sellers to sell more items to more buyers and encourage buyers to purchase additional or higher-value items.¹⁷⁶ Cross-Promotions can even be placed in bidding and purchase confirmation screens, an option not available to sellers without an eBay Store.¹⁷⁷ Unlike many of the previously discussed features, eBay Stores require a monthly payment ranging from \$15.95 to \$199.95 depending on the service selected by the store owner.¹⁷⁸ In exchange for the monthly pay-

167. Conner, *supra* note 51, at 259.

168. *Id.*

169. *eBay Stores: Frequently Asked Questions*, eBay, <http://pages.ebay.com/storefronts/faq.html> (last visited Oct. 30, 2013).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Conner, *supra* note 51, at 259, fig. 7-7.

178. *eBay Stores: Subscriptions & Fees*, eBay, <http://pages.ebay.com/storefronts/subscriptions.html> (last visited Oct. 30, 2013).

ment, store owners receive a number of reduced fees and discounts for selling their items.¹⁷⁹ eBay Stores are expensive, but allow a truly personalized e-commerce experience and are often utilized with great success by heavy volume eBay sellers.¹⁸⁰

d. Third Party Options

eBay users are not limited to using only services from eBay to manage their listings and attract customers.¹⁸¹ A number of third party tools are available to give sellers a competitive advantage on eBay.¹⁸² Third-party websites like www.mystorecredit.com provide additional marketing opportunities to subscribers by providing them with detailed lists of previous buyer locations and providing personalized marketing communications to attract repeat customers.¹⁸³ A number of third-party applications (“apps”) and software add-ons are available for Internet browsers and mobile devices.¹⁸⁴ Apps such as “Turbo Seller 2” allow sellers to create complex personalized auction listings by allowing them to customize the HTML on their listing pages while other apps provide detailed statistical analysis to subscribers to keep them abreast of changing eBay trends.¹⁸⁵ Sellers using third-party services often do so through the third party’s website.¹⁸⁶ Thus, while these actions directly benefit their listings, there may be only limited evidence of their existence on the eBay website.¹⁸⁷

C. *The Importance of eBay Policies*

The preceding Section illustrates two main points. First, sellers have a great deal of latitude in designing and controlling their listings. Sellers set the item’s category, its title, upload pictures, and ultimately write the description of the item.¹⁸⁸ They determine what listing format to use and what combinations of listing features are available.¹⁸⁹ They have control of how the item is shipped, when the item is shipped, if the item is going to be shipped at all or available only for local pickup, and sellers set the fees associated with shipping the item.¹⁹⁰ Sellers can automatically exclude certain buyers who are from outside the continental United States, who have low feedback scores, have previously purchased

179. *Id.*

180. *Id.*

181. Mark Buckingham, *10 Killer Apps for eBay Buyers and Sellers*, Techradar, (Feb. 11, 2009), <http://www.techradar.com/us/news/internet/web/10-killer-apps-for-ebay-buyers-and-sellers-528505>.

182. *See, e.g.*, [Mystorecredit.com](http://www.mystorecredit.com), <http://www.mystorecredit.com/> (last visited Oct. 30, 2013).

183. *Id.*

184. Buckingham, *supra* note 181.

185. *Id.*

186. *Id.*

187. *See id.*

188. *See supra* Part II.B.1.b.

189. *See supra* Part II.B.1.d.

190. *See supra* Part II.B.1.e.

some of the seller's items, are on the seller's blocked list, have violated eBay policies, and who meet certain other criteria.¹⁹¹

Sellers can impose additional restrictions by listing these in the item description. These terms can be enforced by sellers cancelling the bids of users who fail to meet the stated terms.¹⁹² While eBay requires payment for items to be electronic in most circumstances, sellers are ultimately in control over which of these payment methods will be accepted.¹⁹³ If a seller selects to receive payment when the buyer picks up the item, he or she can set additional conditions on how to pay for the item at that time.¹⁹⁴ Thus, from the beginning of a listing to its conclusion, sellers maintain a fair amount of control over what is for sale, how it can be purchased and shipped, and which categories of users are eligible to bid on the item. How and to what extent sellers exercise this control should inform a court's purposeful availment analysis.

Second, as sellers conduct more business through the website, they gain additional advantages and opportunities to integrate their business with eBay's platform. This is accomplished on the most basic level through the feedback system.¹⁹⁵ The more eBay transactions a seller conducts, the higher his or her feedback score and the better his or her reputation and credibility on the website.¹⁹⁶ When certain threshold conditions are met, eBay rewards sellers with Powerseller or Top Seller designations.¹⁹⁷ These reward users with reduced rates, even greater standing in the eBay community, and access to more tools to reach potential buyers.¹⁹⁸ eBay Stores offer the greatest level of user control and rewards.¹⁹⁹ This option is only economically feasible for sellers who conduct a large volume of business on eBay, but it provides sellers with their own personal e-commerce experience within the website, including a unique URL, personal store layout, and even greater marketing opportunities to reach eBay users.²⁰⁰ Taking these incentives into account, users are encouraged to continuously use eBay as a part of their business or *as* their business as they are rewarded with increased opportunities and recognition for doing so. These two points are critical elements of the eBay experience that have been often addressed inconsistently or not at all by different courts determining personal jurisdiction over out-of-state eBay sellers.

191. See *supra* note 116 and accompanying text for list of those additional criteria.

192. See *supra* Part II.B.1.e.

193. See *supra* Part II.B.1.f.

194. See *supra* Part II.B.1.f.

195. See *supra* Part II.B.2.a.

196. See *supra* Part II.B.2.a.

197. See *supra* Part II.B.2.b.

198. See *supra* Part II.B.2.b.

199. See *supra* Part II.B.2.c.

200. See *supra* Part II.B.2.c.

III. ANALYSIS

A. *Internet Personal Jurisdiction Standards*

eBay has changed substantially in the years since its creation.²⁰¹ The advent of the Internet has similarly changed world commerce in the seventy plus years since the Supreme Court decided *International Shoe*.²⁰² Applying traditional jurisdictional analysis to a digital context has proved a difficult prospect for courts around the nation.²⁰³ As the Supreme Court has yet to reach a definitive ruling on the subject, a variety of different standards for analyzing personal jurisdiction over the Internet have emerged.

1. *The Zippo Standard: Interactivity*

When analyzing minimum contacts involving a defendant's own website, many jurisdictions²⁰⁴ rely on the sliding scale interactivity test articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*²⁰⁵ In *Zippo*, Zippo Manufacturing Corporation, a Pennsylvania corporation and the maker of Zippo lighters, filed suit against Zippo Dot Com, Inc. ("Dot Com"), a California corporation, alleging trademark infringement and related claims pertaining to Dot Com's use of the domain names www.zippo.com, www.zippo.net, and www.zipponews.com.²⁰⁶ Dot Com's websites contained information about the company, advertisements, and an application process in which visitors could input their personal information to subscribe to one of three Internet news services offered by the company.²⁰⁷ After subscribing, users were given an account on the website and were able to download and view Internet newsgroup messages.²⁰⁸ Dot Com did not have offices or employees in Pennsylvania.²⁰⁹ Its contacts with the forum were almost exclusively over the Internet in the form of Internet advertisements on its own web page.²¹⁰ Only two percent of Dot Com's customers were residents of Pennsylvania and, unsurprisingly, Dot Com moved to dismiss for lack of personal jurisdiction.²¹¹

Writing for the court, Judge McLaughlin noted that technological advances increasing the flow of commerce to the states have historically

201. See *Timeline*, *supra* note 11.

202. See McFarland, *Drop the Shoe*, *supra* note 47, at 810.

203. See *id.* at 809.

204. Richard K. Greenstein, Essay, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of Zippo Dot Com*, 80 TEMP. L. REV. 21, 30 (2007) (describing the "utter dominance" of the *Zippo* test and the "difficult[y]" in finding a jurisdiction which uses a different analysis for internet jurisdiction).

205. 952 F. Supp. 1119 (W.D. Pa. 1997).

206. *Id.* at 1121.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1121–22.

211. *Id.*

been met with an increase in the need for states to exercise jurisdiction over nonresidents.²¹² Recognizing that the proliferation of Internet use has provided users access to commerce around the world, the court determined that “the *likelihood* that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”²¹³ Under the court’s test, the “nature and quality of commercial activity” is analyzed on a sliding scale.²¹⁴ On one end of the spectrum are “passive Web site[s]”: websites which “do[] little more than make information available to” internet users.²¹⁵

Courts have consistently held that the use of a passive website is “not grounds for the exercise of personal jurisdiction.”²¹⁶ On the other end are active websites through which defendants “enter[] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.”²¹⁷ Courts applying the *Zippo* test have usually held that the contacts created through active websites can be sufficient grounds for the exercise of personal jurisdiction.²¹⁸

In between these extremes are “interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”²¹⁹ Using the sliding scale as a starting point, the court determined that Zippo Dot Com maintained an active website through which it “repeatedly and consciously chose to process Pennsylvania residents’ applications and to assign them passwords.”²²⁰ The court then engaged in a traditional personal jurisdiction analysis noting that Dot Com knew that the result of these contacts would be the transmission of electronic messages into Pennsylvania and thus purposefully availed itself of the benefit of the laws of the state.²²¹

In the wake of *Zippo*, numerous jurisdictions adopted the sliding scale test for analyzing Internet contacts over a defendant’s own website.²²² While the *Zippo* court itself did not ultimately rely on interactivity as the determining factor in the personal jurisdiction analysis, other

212. *Id.* at 1123.

213. *Id.* at 1124 (emphasis added).

214. *Id.*

215. *Id.*

216. *Id.*; see, e.g., *Illinois v. Hemi Group LLC*, 622 F.3d 754, 759 (7th Cir. 2010); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252–53 (2d Cir. 2007); *McBee v. Delica Co.*, 417 F.3d 107, 124 (1st Cir. 2005).

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

218. See *id.*

219. *Id.*

220. *Id.* at 1126.

221. *Id.*

222. See, e.g., *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

courts have taken this additional step.²²³ Many jurisdictions have expressly adopted the interactivity framework,²²⁴ others have relied on interactivity as one factor among many in the jurisdiction determination,²²⁵ while others have refused to alter their personal jurisdiction analysis for the internet entirely.²²⁶ More recently, the *Zippo* approach has been met with increased scrutiny.²²⁷ Commentators have noted that the test is difficult to apply and a focus on interactivity alone is insufficient to determine whether the website owner is actively targeting a forum state.²²⁸ Recognizing these criticisms, some courts have restricted their use of the *Zippo* test, using it as a “guidepost” and relying on the interactivity scale only to the extent it reveals that a defendant purposefully availed himself of the protections of the forum state.²²⁹ Many jurisdictions require

223. See, e.g., *Roblor Mktg. Grp., Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1142 (S.D. Fla. 2009) (“Many courts may have given more weight to the sliding scale analysis than the *Zippo* court itself intended to do.”).

224. See *Toys “R” Us, Inc.*, 318 F.3d at 452 (“The opinion in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site.”) (citation omitted).

225. See, e.g., *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 711 (8th Cir. 2003) (“Certainly, we believe that a consideration of the ‘nature and quality’ of a Web site and a determination of whether it is ‘interactive,’ ‘does business,’ or is merely ‘passive’ is an important factor in our analysis. However, we have long held that the ‘nature and quality’ of contacts is only one factor to consider. Instead, we consider a variety of factors . . . in a personal jurisdiction analysis.”); *ALS Scan, Inc.*, 293 F.3d at 714 (“Thus, adopting and adapting the *Zippo* model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.”); *Zamora Radio, LLC v. Last.FM, Ltd.*, No. 09-20940-CIV, 2010 WL 3893985, at *4 (S.D. Fla. Sept. 30, 2010) (“In addressing the first prong of purposeful availment, we applied a two-prong test that analyzed the interactivity of the defendant’s website, and the foreseeability of being haled into the forum State.”).

226. See, e.g., *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510–11 (D.C. Cir. 2002) (“Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.”); *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (E.D. Mich. 2000) (“[T]he distinction drawn by the *Zippo* court between actively managed, telephone-like use of the Internet and less active but ‘interactive’ web sites is not entirely clear to this court. Further, the proper means to measure the site’s ‘level of interactivity’ as a guide to personal jurisdiction remains unexplained. Finally, this court observes that the need for a special Internet-focused test for ‘minimum contacts’ has yet to be established. It seems to this court that the ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient ‘minimum contacts’ in the forum state. The manner of establishing or maintaining those contacts, and the technological mechanisms used in so doing, are mere accessories to the central inquiry.”).

227. See, e.g., *Roblor Mktg. Grp.*, 645 F. Supp. 2d at 1141–42.

228. *Id.* (“The sliding scale offers little guidance in the case of a defendant running a website that falls in the middle ground. Moreover, this test is likely to be too rigid with regards to the passive and active categories of websites. Passive websites could very well target a specific forum state and give rise to personal jurisdiction. Similarly, an active website, which does not target a forum state, should perhaps not give rise to personal jurisdiction by itself.”).

229. *Id.* at 1142 (“Given no clear holding on the issue from the Federal Circuit and the divergent outcomes reached among the circuits, we decline to find that our determination under the sliding scale analysis is dispositive. We will use it as a guidepost but also turn to analyze the purposeful availment requirement under a more traditional approach. The outcome of that broader traditional analysis, however, is the same.”); see also *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (“[N]o court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff’s home state. Rather, in each, there has been ‘something more’ to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the

“something more” than the mere presence of an online website to exercise jurisdiction over an out-of-state defendant.²³⁰ Thus, for a majority of courts, interactivity is at least the starting point in the analysis, while a separate minimum contacts test is often the ultimate determining factor.²³¹

a. *Zippo* and eBay: Interactivity

Courts that have applied *Zippo* to online auctions have done so with inconsistent results and have announced their holdings on a categorical basis.²³² A Michigan federal court in *Dedvukaj v. Maloney* held that online auctions fall in the interactive portion of the test²³³ while the Kentucky Supreme Court in *Hinners v. Robey* concluded that typical eBay transactions were merely passive.²³⁴ These determinations, while appropriate for some auctions, may result in overbroad precedent if applied automatically to all future eBay cases. For example, holding that all one-shot eBay listings are passive may not make sense in cases involving invite only auctions, listings with item descriptions identifying certain states or users, or situations where a limited eBay presence is only one part of a seller’s overall online commercial activity.²³⁵

Despite the holdings of *Dedvukaj* and *Hinners*, *Zippo* has been routinely questioned and rejected by courts analyzing transactions conduct-

forum state.”) (citation omitted); *Innovative Garage Door Co. v. High Ranking Domains, LLC*, 981 N.E.2d 488, 497 (Ill. App. Ct. 2012) (“[W]hile a highly interactive website might indicate the quality of commercial contacts with the forum, it is the contacts themselves that would allow us to exercise jurisdiction rather than the mere fact that the website is interactive.”).

230. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891 (6th Cir. 2002) (“‘[P]urposeful availment’ is something akin to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities.”) (quoting *Khalaf v. Bankers & Shippers Ins. Co.*, 273 N.W.2d 811, 819 (Mich. 1978)).

231. *See, e.g., id.* at 891–92.

232. *See, Hinners v. Robey*, 336 S.W.3d 891, 901 (Ky. 2011); *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 816–17 (E.D. Mich. 2006).

233. *Dedvukaj*, 447 F. Supp. at 821 (“Under the *Zippo* analysis, internet auctions, by nature, are interactive. Sellers post pictures and descriptions of their items, and set the terms of the auction. Potential buyers log on to the host computer with passwords and bid competitively against one another throughout the auction. Potential buyers receive email messages generated by the site updating the status of their bids, frequently log in to monitor and increase their bids, and communicate with other buyers and sellers through the website. Successful bidders send their money to the seller and receive their newfound treasures in the mail. On the interactivity scale, the auctions constitute more than a passive website containing only posted information, and will support a finding of purposeful availment, but are probably insufficient to create purposeful availment alone.”); *see also Crummey v. Morgan*, 2007-0087 (La. App. 1 Cir. 8/8/07); 965 So. 2d 497, 503 *writ denied*, 2007-1806 (La. 11/9/07), 967 So. 2d 509 (“[T]he use of the eBay website to market and sell the RV to a Louisiana buyer is, on the *Zippo* sliding scale, more akin to those situations for which a finding of personal jurisdiction is proper.”).

234. *Hinners*, 336 S.W.3d at 901 (“[A] typical single eBay transaction occupies the section of the scale where the defendant has simply posted information on a passive Internet website which is accessible to users in foreign jurisdictions and which does little more than make information available to those who are interested.”).

235. For a discussion of this latter scenario see *infra* part IV.C.

ed through online auctions.²³⁶ Many courts recognize that eBay transactions fall in the “interactive” section of the *Zippo* scale but hold that interactivity is irrelevant to personal jurisdiction inquiries because the defendant does not actively control the eBay website.²³⁷ In this context, most jurisdictions follow the lead of *Winfield Collection Ltd. v. McCauley*.²³⁸ In *Winfield*, the court held it did not have personal jurisdiction over a defendant who sold two items over eBay to the Michigan plaintiff.²³⁹ The court rejected the *Zippo* standard for online auctions,²⁴⁰ and took “judicial notice that the function of an auction is to permit the highest bidder to purchase the property offered for sale, and the choice of that highest bidder is therefore beyond the Control of the seller.”²⁴¹ It thus concluded that the defendant’s sales were “random and attenuated” and did not constitute purposeful availing of “the privilege of doing business in Michigan.”²⁴²

The more recent Ninth Circuit decision, *Boschetto v. Hansing*, further added that interactivity measures are inapplicable to online auctions because, unlike personal webpages, they are temporary in nature and do not represent ongoing commercial activity with a forum state.²⁴³ Thus, eBay listings are not part of broader e-commerce activity but are temporary contacts that are extinguished at the listing’s close.²⁴⁴

b. *Zippo* and eBay: Control

In addition to its rejection of the *Zippo* scale, *Winfield*’s analysis of the uncontrollable nature of eBay auctions has also been relied upon in

236. See, e.g., *Foley v. Yacht Mgmt. Grp., Inc.*, No. 08 C 7254, 2009 WL 2020776, at *3 (N.D. Ill. July 9, 2009) (“The *Zippo* test . . . is generally applied to cases involving a defendant’s conduct over its own website, not to a public auction site such as eBay. . . . [T]hus it should not be applied in the context of a public internet auction site.”); *McGuire v. Lavoie*, No. Civ.A. 3:03-CV-0161-BH, 2003 WL 23174753 at *3 (N.D. Tex. Aug. 19, 2003) (“Because the majority of cases applying the *Zippo* test involve a defendant’s conduct over its own website, its application to an internet auction site is questionable.”); see also *Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008) (“[T]he issue is not whether the court has personal jurisdiction over the intermediary eBay but whether it has personal jurisdiction over an individual who conducted business over eBay.” In *Cybersell* and related cases where the Internet site actually belongs to and is operated by the defendant, the nature of the website has jurisdictional significance because the website allows the defendant to maintain some ongoing contact with the forum state (as well as every other state that can access the site).”).

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

238. *Id.*

239. *Id.* at 751.

240. *Id.* at 750.

241. *Id.* at 749; see also *Metcalf v. Lawson*, 802 A.2d 1221, 1226 (N.H. 2002) (approving the reasoning of *Winfield Collection* and stating “the defendant’s sales in the forum were the result of random and attenuated contacts, insufficient for finding that the defendant purposefully availed herself of the privilege of doing business in Michigan”).

242. *Metcalf*, 802 A.2d at 1226; see also *Winfield Collection, Ltd.*, 105 F. Supp. 2d at 749.

243. *Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008) (stating that the seller’s “eBay listing was not part of broader e-commerce activity; the listing temporarily advertised a good for sale and that listing closed once the item was sold, thereby extinguishing the Internet contact for this transaction within the forum state (and every other forum”).

244. *Id.*

numerous jurisdictions.²⁴⁵ The Northern District of Texas has noted that “[t]he sellers and buyers who connect through eBay cannot be said themselves to control eBay’s degree of commercial interactivity any more than a buyer and seller at Sotheby’s can be said to be responsible for the premises or to control the auctioneer.”²⁴⁶ In *Metcalf v. Lawson*, the Supreme Court of New Hampshire noted that the defendant eBay seller “had no control over who would ultimately be the winning bidder [of the item], nor could she exclude bidders from particular jurisdictions.”²⁴⁷ Illinois courts have also consistently followed Winfield’s example in eBay jurisdiction cases.²⁴⁸ In *Foley v. Yacht Management Group, Inc.*, Massachusetts defendants listed a yacht on eBay.²⁴⁹ The defendants contacted Foley, an Illinois resident, via phone and email about the auction.²⁵⁰ Foley was ultimately the highest bidder.²⁵¹ The terms of the auction required the winning bidder to submit a \$2,000 deposit through PayPal, and after the plaintiff complied, the defendants refused to accept the deposit and transfer over the yacht.²⁵² The plaintiff sued for breach of contract, and the court dismissed the case for lack of personal jurisdiction.²⁵³ After rejecting the applicability of *Zippo* to online auctions, the court noted that eBay sellers “post items for auction on eBay and have no control over who ultimately wins the auction and purchases the item [T]he seller cannot choose who buys the item and where that person is located and the contact between the seller and buyer is the type of random, fortuitous, and attenuated contact that is excluded from the reach of personal jurisdiction.”²⁵⁴

Relying on this interpretation of eBay auctions, the court determined that a seller does not purposefully direct conduct toward any particular forum, but only toward the highest bidder, and thus does not purposefully avail himself of the protections of the forum state.²⁵⁵ A subsequent Illinois appellate case, *MacNeil v. Trambert*, reaffirmed *Foley*’s eBay analysis.²⁵⁶ The court noted that “a seller of an item on eBay has no control over who purchases that item”²⁵⁷ and agreed with the *Foley* court that “a seller of an item on eBay, without further ties to a forum, is not subject to specific jurisdiction in that forum.”²⁵⁸ Judicial emphasis on the “random” nature of online auctions is troubling given the amount of con-

245. See, e.g., *Foley v. Yacht Mgmt. Grp., Inc.*, No. 08 C 7254, 2009 WL 2020776 (N.D. Ill. July 9, 2009); *Action Tapes, Inc. v. Weaver*, No. Civ. 3:05-CV-1693-H, 2005 WL 3199706 (N.D. Tex. Nov. 23, 2005); *Metcalf*, 802 A.2d 1221.

246. *Action Tapes*, 2005 WL 3199706, at *2.

247. *Metcalf*, 802 A.2d at 1226.

248. See, e.g., *Foley*, 2009 WL 2020776.

249. *Id.* at *1.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at *1, *4.

254. *Id.* at *3.

255. *Id.*

256. *MacNeil v. Trambert*, 932 N.E.2d 441, 446–47 (Ill. App. Ct. 2010).

257. *Id.*

258. *Id.*

trol sellers actually enjoy over the auction process²⁵⁹ and continued reliance on this understanding of online auctions may lead to inappropriate results in future personal jurisdiction determinations.

Beyond the “random” nature of eBay transactions, courts declining to find jurisdiction have noted that the mere existence of a contract between the parties does not automatically establish minimum contacts in the plaintiff’s home forum.²⁶⁰ Furthermore, individual eBay sales often fail to create substantial, ongoing obligations between the parties which typically support personal jurisdiction.²⁶¹ Summarizing these concerns, the Ninth Circuit in *Boschetto v. Hansing* noted that the “one-shot” eBay transaction between the parties did not create any ongoing obligations or continuing commitment assumed by the seller in the contract, the performance of the contract did not require the seller to engage in any substantial business with the forum state, and the seller did not specifically direct his sale to California residents.²⁶² Rather, the court determined, eBay was a conduit for a one-time transaction to the California buyer and not indicative of purposeful availment.²⁶³

2. *Dedvukaj: Interactivity and Seller Sophistication*

Given the judicial understanding of eBay articulated by these courts, it is unsurprising that the vast majority of cases result in the jurisdiction challenge being granted.²⁶⁴ A few notable cases have provided different results. In *Dedvukaj v. Maloney*, a Michigan plaintiff purchased two paintings from New York defendants’ eBay auctions.²⁶⁵ When the paintings were revealed to be replicas, the plaintiff sued and the defendants filed a motion to dismiss for lack of personal jurisdiction.²⁶⁶ Relying on *Winfield* and its progeny, the defendants challenged the applicability of *Zippo* to the determination of purposeful availment, noting that interactivity was irrelevant as the defendants had no control over the eBay website.²⁶⁷ The court acknowledged that while this argument may be plausible for a novice seller, it was not applicable for sophisticated eBay users like the defendants.²⁶⁸ The court identified a number of facts supporting the conclusion that the defendants were sophisticated eBay users: the defendants were Powersellers, regularly and systematically used eBay to conduct business, operated an eBay Store offering multiple categories of merchandise, required a warehouse for their eBay goods, offered a toll-free number that prospective bidders could call, had multiple

259. See *supra* Part II.

260. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008).

261. *Mcgee v. International Life Ins. Co.*, 355 U.S. 220, 222–23 (1957); *Boschetto*, 539 F.3d at 1017.

262. *Boschetto*, 539 F.3d at 1017.

263. *Id.*

264. See *supra* Part IIIA.1.

265. *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 816–17 (E.D. Mich. 2006).

266. *Id.* at 817.

267. *Id.* at 820.

268. *Id.* at 823.

employees running the eBay business, held themselves out as shipping to the entire United States and the rest of the world, and placed “extensive photographs, detailed descriptions, logos, slogans, and other marketing materials on the auctions screens.”²⁶⁹ Given the high level of customization and personalization employed by the defendants in their eBay listings, the court determined that:

It may . . . be difficult for a novice buyer to understand where eBay stops and MrLister begins. [The] [d]efendants’ experience and extensive use of the eBay website entwine the two entities. . . . Where a knowledgeable seller has entangled itself with the eBay website for its own promotion and success, it presents a difficult argument to sever the relationship along bright lines.²⁷⁰

The defendants further argued that in spite of interactivity, purposeful availment could not be satisfied as sellers have no control over who ultimately wins an item, and single sales through eBay are random and fortuitous contacts that do not constitute purposeful availment.²⁷¹ Thus, the seller’s contacts with the buyer will always be “attenuated” unless the auction process itself is somehow targeted or marketed to a specific forum state.²⁷² The court rejected this argument, noting that the very reason sellers use eBay is to make their goods available to buyers across the country and the world.²⁷³ The court again referenced the sophistication of the defendants’ eBay auctions, noting that their listings and eBay Storefront page stated that goods would be shipped anywhere in the country, that employees discussed the specifics of the auction with the plaintiff over the toll-free phone number, engaged in multiple email communications with the plaintiff through eBay, confirmed shipping quotes to Michigan before the buyer submitted the payment, accepted payment in the mail from Michigan for the painting, accepted winning bids from Michigan, and encouraged buyers from Michigan through these communications.²⁷⁴ The level of customization and personalization employed by the defendants in their listing such as the “extent of the auction listing, the multiple photographs, the close-ups and the multiple listings as ‘original’ as well as the extent to which Defendants personalized their auction pages with their information and logos” all further contributed to the intentional nature of the communications between the de-

269. *Id.*

270. *Id.*

271. *Id.* at 820.

272. *Id.*

273. *Id.* (“Internet forums such as eBay expand the seller’s market literally to the world and sellers know that, and avail themselves of the benefits of this greatly expanded marketplace. It should, in the context of these commercial relationships, be no great surprise to sellers—and certainly no unfair burden to them—if, when a commercial transaction formed over and through the internet does not meet a buyer’s expectations, they might be called upon to respond in a legal forum in the buyer’s home state. Sellers cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it.”).

274. *Id.* at 822.

fendants and Michigan²⁷⁵ and thus supported the conclusion that the defendants met the purposeful availment threshold.²⁷⁶

The *Dedvukaj* court's emphasis on eBay customization and user sophistication influenced the court's ultimate decision to reject the seller's personal jurisdiction challenge.²⁷⁷ Other courts have also acknowledged a distinction between casual and sophisticated sellers.²⁷⁸ The *Boschetto* court, while rejecting that single "one-shot" eBay transactions are sufficient to constitute purposeful availment, noted that a different result may be reached when the defendant uses eBay as a broader vehicle for commercial activity.²⁷⁹

3. Attaway: Item location and Buyer Jurisdictional Challenges

Apart from sophistication concerns, the recent Indiana Appellate case, *Attaway v. Omega*, indicates that knowledge of an item's location and the party bringing suit may influence the jurisdiction determination.²⁸⁰

Nearly all the litigated eBay personal jurisdiction disputes involve defendant sellers challenging the jurisdiction chosen by the plaintiff buyers.²⁸¹ In *Attaway*, the eBay sellers filed suit after the winning bidder of a Porsche took possession of the car without submitting payment.²⁸² In determining that jurisdiction was proper, the court noted that the item's auction listing included the seller's location.²⁸³ As the defendants were able to see the seller's location prior to bidding on the Porsche, they thus

275. *Id.*

276. *Id.*

277. *Id.*

278. See *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008); *Malcolm v. Esposito*, No. 215392, 2003 WL 23272406, at *4 (Va. Cir. Ct. Dec. 12, 2003) (noting that "the Defendants are commercial sellers of automobiles who, at the time the BMW was sold, were represented on eBay as "power sellers" with 213 transactions. [And] at the time of the transaction, the Defendants also represented that they had local, national, and international eBay customers. . . . Defendants foresaw potential transactions with non-resident buyers based on the "Winning Bidder" email it sent to the Plaintiff"); *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 846 (N.Y. Civ. Ct. 2007) (indicating that a defendant's overall eBay statistics, experience, marketing directed at potential customers, and designations welcoming bids from New Yorkers may impact the analysis).

279. *Boschetto*, 539 F.3d at 1019 ("[T]he cases that have found that jurisdiction was proper based on eBay sales relied heavily on the fact that the defendant was using the platform as a broader vehicle for commercial activity. . . . Where eBay is used as a means for establishing regular business with a remote forum such that a finding of personal jurisdiction comports with 'traditional notions of fair play and substantial justice,' then a defendant's use of eBay may be properly taken into account for purposes of establishing personal jurisdiction.") (citations omitted). The *Hinners* court also noted "that a single listing, as is typical in an eBay sale, is to be distinguished from situations where a dealer maintains an ongoing commercial website." *Hinners v. Robey*, 336 S.W.3d 891, 901 (Ky. 2011). While the court did not explicitly discuss if or how the analysis would change when confronted with a sophisticated seller who used eBay as his ongoing commercial website, it is possible these factual distinctions would prompt a different result.

280. *Attaway v. Omega*, 903 N.E.2d 73, 79 (Ind. Ct. App. 2009).

281. *Id.* at 77 ("Our research . . . has not revealed any cases in which an eBay seller has sued a buyer for rescission of payment after the buyer has picked up the item in the seller's state. These distinctions are significant to our analysis.")

282. *Id.* at 79.

283. *Id.*

agreed to appear, in person or by representative, in Indiana to pick up the vehicle.²⁸⁴ After hiring a moving company to pick up and deliver the Porsche, the defendants had conducted more than just a single eBay purchase and purposefully availed themselves of the privilege of doing business in Indiana.²⁸⁵ Under *Attaway*, it appears that the prior knowledge of the seller's location and the buyer's subsequent actions to acquire the item were sufficient to satisfy the purposeful availment standard required for the court to exercise personal jurisdiction.²⁸⁶

As the above cases illustrate, some general trends have emerged in eBay personal jurisdiction challenges. Courts in states applying *Winfield's* understanding of online auctions have been hesitant to hold that personal jurisdiction is proper over eBay disputes.²⁸⁷ These courts have noted (1) that interactivity is irrelevant for personal jurisdiction determinations as individual sellers have no control over the degree of interactivity of eBay, itself, and (2) that sellers do not purposefully avail themselves to a forum state when they list an item for sale as they intend only to sell to the highest bidder and have no control over who ultimately wins the item.²⁸⁸ Other cases, such as the *Dedvukaj* decision, have taken a different approach, noting that purposeful availment requirements are more likely to be satisfied when the eBay seller is sophisticated—integrating their own business and eBay such that the two are indistinguishable.²⁸⁹ These courts have acknowledged that when sophisticated sellers are involved, interactivity may be useful when analyzing online auction transactions.²⁹⁰ Most courts have held that “one-shot” eBay transactions fail to satisfy the due process requirements for exercising personal jurisdiction over a defendant, while some have added that sophistication may affect this analysis.²⁹¹ A surprising trend among many decisions rejecting personal jurisdiction is a relatively sparse discussion of the eBay user's listing language, seller generated terms, auction customization, and prior auction history.²⁹²

284. *Id.*

285. *Id.*

286. *Id.*

287. *See* MacNeil v. Trambert, 932 N.E.2d 441, 446–47 (Ill. App. Ct. 2010).

288. *See supra* note 281.

289. *Dedvukaj v. Mabrey*, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006).

290. *Id.*

291. *See, e.g.*, *Boschetto v. Housing*, 539 F.3d 1011, 1017 (9th Cir. 2008) (citation omitted).

292. *See, e.g.*, *Foley v. Yacht Mgmt. Grp., Inc.*, No. 08 C 7254, 2009 WL 2020776 (N.D. Ill. July 9, 2009); *MacNeil*, 932 N.E.2d at 446–47.

IV. RECOMMENDATION

eBay is the “world’s largest online marketplace.”²⁹³ At any given time, over 200 million items are listed on the auction website.²⁹⁴ These items change hands rapidly: a car sells every 1.6 minutes,²⁹⁵ a boat every twenty-one,²⁹⁶ a pair of shoes every three seconds.²⁹⁷ The eBay process for the millions of registered users engaging in these transactions is uniform, but the resolution of legal issues that arise from these transactions has great variance between jurisdictions.²⁹⁸ A decade of conflicting case law provides an opportunity to reevaluate both the judicial understanding of modern eBay and the precedent analyses employed by the courts deciding personal jurisdiction challenges.²⁹⁹ This section reexamines the rejection of the *Zippo* standard, provides a recommendation for a fact intensive, case-by-case standard when analyzing eBay personal jurisdiction challenges, and discusses the developing trends for litigation in this area.

A. *Inconsistencies in the Application of the Zippo Standard*

Jurisdictions following the *Zippo* standard for personal websites recognize that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”³⁰⁰ Even in *Zippo* jurisdictions, courts have routinely rejected applying the standard to eBay transactions.³⁰¹ This conclusion has been widely adopted and courts have explained that the *Zippo* test is applied to cases involving a defendant’s conduct over its *own* website, not to a public auction site such as eBay.³⁰² Failure to extend *Zippo* to eBay activity has been justified by the lack of control that sellers have over the auction process.³⁰³ As explained by the Ninth Circuit in *Boschetto*, the interactivity of a website is relevant to the jurisdictional analysis when the website actually belongs to and is operated by the defendant.³⁰⁴ This is because the defendant’s ownership and control over the website allows him or her to maintain some ongoing contact with the forum state.³⁰⁵

293. *Who We Are*, *supra* note 12.

294. Janet Driscoll Miller, *Will eBay Trump Google Shopping and Bing Shopping?*, Search Mktg. Sage (June 15, 2011), <http://blog.search-mojo.com/2011/06/15/will-ebay-trump-google-shopping-and-bing-shopping/>.

295. *Id.*

296. *Fast Facts*, *supra* note 21.

297. Miller, *supra* note 294.

298. *See supra* Part III.A.

299. *See supra* Part III.

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

301. *See supra* Part III.

302. *See Foley v. Yacht Mgmt. Group, Inc.*, No. 08 C 7254, 2009 WL 2020776, at *3 n.1 (N.D. Ill. July 9, 2009).

303. *See supra* Part III.A.2.

304. *Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008).

305. *Id.*

The distinction that courts have made between eBay and personal e-commerce webpages, however, has been overstated. eBay serves the same purpose as personal e-commerce websites: selling goods to a wide variety of consumers.³⁰⁶ It does so on a larger scale by providing sellers instant access to millions of consumers and by requiring less technical know-how than starting a personal webpage.³⁰⁷ These advantages may make creating an eBay account more preferable for small businesses than starting a personal webpage, especially for businesses with limited time or programming skills.³⁰⁸ Many online businesses with separate websites take advantage of these features by using eBay as an integral part of their selling activities.³⁰⁹ Given that sellers use eBay in the same way and for the same purposes as personal e-commerce websites, courts should treat eBay as part of a seller's total internet presence and not as an entity somehow distinct from a personal webpage.

While the purposes behind using eBay and personal e-commerce websites is similar, courts have still taken judicial notice of the lack of control sellers have over the auction process.³¹⁰ This paper has articulated that modern eBay users are not helpless when they sell items through the website, but rather enjoy a high degree of customization and control over their listings.³¹¹ Sellers can end an auction at any time.³¹² Sellers can create special auctions in which only preapproved users can participate.³¹³ Sellers can set a wide range of shipping rules and limitations.³¹⁴ Sellers enjoy a great amount of control over their eBay presence.³¹⁵ This is especially true for Powersellers and Storefront owners who have even more opportunities to customize their business presence on eBay.³¹⁶ Some courts have recognized that these types of sophisticated sellers have greater control over the process.³¹⁷ The *Dedvukaj* court relied on an interactivity analysis when analyzing the conduct of a Powerseller over

306. See Nikhil P. Naik, *Things to Take Care While Setting Up an eCommerce Website*, Techarta (Sept. 14, 2012), <http://www.techarta.com/7248/things-to-cover-while-creating-an-e-commerce-website.html> (discussing design options eCommerce websites should take advantage of to retain customers including making websites more customizable and user friendly) [hereinafter Naik, *Things*]; Nikhil P. Naik, *eBay and eCommerce: Which is Better*, Techarta (Oct. 7, 2012), <http://www.techarta.com/7281/ebay-vs-e-commerce-what-you-need-to-know.html> [hereinafter Naik, *Better*].

307. *Who We Are*, *supra* note 12.

308. Naik, *Better*, *supra* note 306 (“eBay is probably better suited for a smaller business with limited time and resources, while building and maintaining an eCommerce site is likely the better option for a larger company with the ability to devote time and energy to the site.”).

309. See, e.g., Adam Gottlieb, *17 Alternatives to eBay in 2013 for Online Sellers and Small Businesses*, *The Frugal Entrepreneur* (July 14, 2011), <http://frugalentrepreneur.com/2011/07/8-alternatives-to-ebay-for-online-sellers-and-small-businesses/> [hereinafter *Alternatives*]; Ina Steiner, *Online Selling Trends Part 2—Opportunities for Sellers in 2012*, *eCommerce Bytes* (Jan. 10, 2012), <http://www.ecommercebytes.com/cab/abn/y12/m01/i10/s02>.

310. See *supra* Part III.A.2.

311. See *supra* Parts II.B, II.C.

312. See *supra* Parts II.B, II.C.

313. See *supra* Parts II.B, II.C.

314. See *supra* Parts II.B, II.C.

315. See *supra* Parts II.B, II.C.

316. See *supra* Parts II.B, II.C.

317. See, e.g., *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822–23 (E.D. Mich. 2006).

eBay³¹⁸ and dicta in the *Boschetto* opinion indicates that regular and systematic use of eBay as a medium to conduct business may change the jurisdictional analysis.³¹⁹ But as previously noted, other jurisdictions have not recognized the true control that sophisticated sellers have over their eBay listings,³²⁰ much less the control enjoyed by more limited eBay users.

Why has this happened? One explanation may be that eBay is complicated. eBay is not just a marketplace, but a virtual community that is constantly expanding.³²¹ Entire books have been written about how to interact on eBay.³²² Like many other websites, eBay is constantly trying to reinvent itself.³²³ Its policies and format have changed numerous times over the years and will likely continue to do so as the needs of its users change.³²⁴ Given the depth and transitive nature of eBay policies and procedures, it is difficult to expect even casual eBay users to stay abreast of these policies, much less judges and lawyers largely unfamiliar with the website.

Another explanation may rest with the type of eBay cases that these courts are hearing. *MacNeil*, *Boschetto*, *Winfield*, and many of the cases discussed in this paper have been one-shot transactions with sellers with limited eBay experience and sophistication.³²⁵ As these sellers had not taken advantage of the many customization tools available to them, the courts may not have had an opportunity to fully address the true depth of control sellers can exercise when listing an item.

Regardless of why courts have reached this conclusion, rejecting *Zippo* for eBay transactions but applying it to personal e-commerce websites does not make sense if owners of e-commerce websites and eBay sellers use the platforms for the same purpose and with functionally similar levels of control. But how would an interactivity analysis work in this context? The test would take into account the fact that different sellers use eBay differently. Some sellers list items only occasionally, others fully integrate their business into the webpage.³²⁶ In light of these varying uses, the relevant *Zippo* inquiry should not be whether eBay itself is interactive, but to what degree the seller's conduct *through* eBay is interactive. The tremendous amount of options sellers can employ when mak-

318. *Id.* at 822.

319. *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008).

320. *See, e.g., MacNeil v. Trambert*, 932 N.E.2d 441, 446–47 (Ill. App. Ct. 2010).

321. Chris Dawson, *eBay Q4 Earnings Call: How eBay Has Changed*, Tamebay, <http://tamebay.com/2012/01/ebay-q4-earnings-call-how-ebay-has-changed.html> (last visited Oct. 30, 2013) (“eBay has changed and will continue to change and the new management haven’t experienced the old eBay from where it grew as an online auction business. They are all about ‘Buy it New, Buy it now!’ which is the direction in which John Donahoe is steering eBay today.”).

322. *See, e.g., Conner*, *supra* note 51.

323. Dawson, *supra* note 321.

324. *Id.*

325. *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008); *MacNeil v. Trambert*, 932 N.E.2d 441, 447 (Ill. App. Ct. 2010); *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000).

326. *See supra* Part II.C.

ing their listing can indicate different levels of interactivity within the eBay website. Sellers with little experience, taking advantage of relatively little customization tools are not likely maintaining an active webpage through eBay, but Powersellers and Storefront owners who have fully integrated their business into the auction website may be performing the functional equivalent of managing an active webpage through eBay. This should not excuse them from the *Zippo* analysis that applies to personal e-commerce websites. Such an approach would recognize that personal webpages and eBay users' accounts are similar, and that eBay users exercise different levels of control over their auctions, and would therefore better reflect the nature of selling through the auction website. Categorical determinations that inexperienced seller transactions meet a lower level of interactivity can be instructive, but the interactivity analysis must still be made on a case-by-case, seller specific basis. Only a factual approach of this nature will be able to sufficiently account for the unique actions different sellers will make throughout a transaction. Strict adherence to bright line category rules will result in overbroad precedent that fails to adequately consider different seller actions between cases.

B. *Guidelines for eBay Personal Jurisdiction Analysis*

Independent of the applicability of *Zippo*, the actions eBay sellers take during the selling process must play a critical role in the personal jurisdiction analysis. Online auctions have provided an easy way for individuals to sell goods over the Internet. The processes underlying these transactions are complicated and judges must be sensitive to the mechanics of online auctions to reach equitable results in personal jurisdiction challenges. A number of factors, including the nearly limitless ability to create customized descriptions, numerous shipping options, listing types, and unlimited communication opportunities between eBay users, indicate that no two eBay transactions will ever be exactly the same. To ensure just results, personal jurisdiction analysis must be a case-by-case, fact specific inquiry that avoids bright line rules. Such an approach is most consistent with Supreme Court jurisprudence holding that the minimum contacts analysis cannot be simply mechanical or quantitative, but must be more nuanced, based on the nature and quality of the defendant's activity and the facts in each case.³²⁷ A number of questions should be asked by courts when determining if personal jurisdiction is proper.³²⁸

327. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

328. Parts II.B and II.C do a sufficient job of outlining a large number of the possible actions sellers can take in an eBay listing. To avoid being needlessly repetitive, this Section will only focus on a few relevant questions that have thus far had little discussion in case law.

1. *Limitations*

The restrictions that sellers place on their listings can inform the purposeful availment inquiry. If sellers have restricted their listing to specific regions either through their item description or listing format, it indicates that the seller is purposefully directing his eBay activity towards those particular regions. Similarly, shipping limitations such as requiring “local pickup only” in particular states may indicate that the seller is targeting only those limited areas.

Seller sophistication is also a relevant concern in this area. Novice eBay users may have few terms and conditions and minimal, if any, geographical restrictions on their items.³²⁹ They may have limited selling experience and may have only sold to the forum state in the litigated action. In this situation, it is hard to believe that the seller’s activity constitutes anything more than a “one-shot transaction” with the state.³³⁰ Sophisticated sellers, such as Powersellers and eBay Storefront owners, present a more difficult inquiry.³³¹ These users will have engaged in perhaps thousands of eBay transactions, many of which may be with individuals in the forum state.³³² Sophisticated sellers merge their online presence with eBay to gain distinct advantages in the eBay community, taking advantage of reduced selling costs and higher publicity to sell their items more effectively. Sophistication informs seller intent. It is difficult to believe that an eBay Powerseller is unable to understand how to manipulate the website to suit his or her own needs.³³³ In these situations, courts should carefully consider the seller’s transaction history and eBay communications both on message boards and in statements directed at buyers. Offline communication, such as including thank you notes or special discounts on future purchases with a shipped item, can also be relevant for the jurisdictional inquiry. Many sophisticated sellers even use eBay auctions as advertisement tools for their brick-and-mortar stores.³³⁴ eBay sellers who frequently use these communications may be more likely to meet the purposeful availment threshold. Similarly, multiple transactions with users in the forum state, shipping and listing policies listed on item page and lister’s account information, and corre-

329. See *supra* Part II.B.1.

330. *Boschetto*, 539 F.3d at 1019.

331. See *supra* Part II.B.2.

332. See, e.g., *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006).

333. *Dedvukaj*, 447 F. Supp. 2d at 822–23.

334. See, e.g., Aron Hsiao, *Five Ways to Integrate eBay Into Your Small Business: You Don’t Have to Become a Power Seller*, About.com, (last visited Oct. 30, 2013), http://ebay.about.com/od/ebay_lifestyle/qt/el_smlbusiness.htm (“If you have a specialty, high-profile, or tourist-friendly business or you are located in an area with a large customer base and a large amount of foot traffic, eBay can be an excellent way to advertise. Simply include a prominent section in your item descriptions telling your buyers about your store: ‘Like what you see here? Come and visit our world-famous historic store. We’ve been in a converted townhouse at the corner of Anytown Road since 1812, and you’ll find items like this and much, much more when you drop by. 10% in-store discount if you mention you found us on eBay!’”).

spondence with citizens of the forum state should all contribute to the court's jurisdiction analysis.

A final consideration is identity of the party challenging jurisdiction. While most personal jurisdiction challenges are raised by sellers, occasionally buyers may be the parties seeking to dismiss the lawsuit.³³⁵ In these situations, the *Attaway* analysis is instructive.³³⁶ It is difficult to believe that buyers, who are constantly aware of the item's location, are not purposefully availing themselves of the protections of a seller's state when they elect to purchase items from that seller.³³⁷

2. *Listing Activity*

The actions taken by the seller during the active listing can also inform the purposeful availment inquiry. Did the seller end the auction early after receiving a bid? If so, the seller would have been aware of the buyer's location and taken active steps to sell the item explicitly to that location, supporting a finding of purposeful availment. Similarly, actively rejecting bids during the auction may indicate forum targeting by limiting the available pool of eligible bidders. Courts should also be aware that many sellers host personal webpages in conjunction with eBay to maximize traffic to their listings.³³⁸ Connected websites must be considered to give judges a full picture of the seller's online activity.

A seller's communication during the auction can also provide guidance in this area. What was the nature of the communications between the buyer and seller? Did the parties communicate only through eBay and email or were there outside communications? If the parties communicated only through email how frequent and thorough were those communications? Multiple messages from a seller to a prospective buyer may indicate that the seller is targeting the particular buyer. Messages between the seller and eBay staff or other users about potential buyers may also have taken place, further indicating purposeful availment. Many eBay Stores and even private companies are used by sellers to send newsletters and advertisements to previous auction winners.³³⁹ These communications are designed to promote eBay sales but may take place on completely separate websites.³⁴⁰ These features may include personal emails to previous bidders and detailed state-by-state maps showing the states where eBay users have purchased the seller's goods and tips to target those markets.³⁴¹ These outside activities are very relevant to the purposeful availment inquiry but are easy to overlook as they

335. See, e.g., *Attaway v. Omega*, 903 N.E.2d 73, 76 (Ind. Ct. App. 2009).

336. *Id.* at 79.

337. *Id.*

338. *Alternatives*, *supra* note 309.

339. See, e.g., *FAQ Page*, My Store Rewards, <http://www.mystorerewards.com/msr/faq.htm#q1> (last visited Oct. 30, 2013).

340. See, e.g., *id.*

341. See, e.g., *id.*; *Frequently Asked Questions*, My Store Maps, <http://www.mystoremmaps.com/faqs.php> (last visited Oct 30, 2013).

are conducted by private companies on outside websites.³⁴² The quality of the communications may also be relevant. Lengthy sophisticated communications with attached pictures or descriptive information may weigh towards finding purposeful availment while limited communications may not.³⁴³ Sellers have a wide variety of options at their disposal and correct personal jurisdiction outcomes will only be achieved if judges carefully analyze the actions sellers take throughout the course of their listing.

C. *Beyond eBay*

This note has focused exclusively on eBay as it is the largest of the online marketplaces,³⁴⁴ but eBay is not the only marketplace on the internet,³⁴⁵ and a seller's eBay page may be only one part of a seller's online presence. Numerous other e-commerce hosting websites are available to enterprising sellers including: eCrater, Bidstart, Etsy, Ebid, Bonanza, Amazon.com, and onlineauction.com.³⁴⁶ Many of these websites have been slowly gaining popularity by exploiting specific niches that eBay is ill-equipped to handle.³⁴⁷ Each of these sites has its own services and setup that is distinct from the eBay process.³⁴⁸ Sellers are often not taking advantage of these options in lieu of eBay, but in conjunction with it, using multiple listing services to maximize their online presence.³⁴⁹ In short, "eBay users" are quickly becoming "online marketplace users," relying on multiple services to maximize market presence and revenue.³⁵⁰ Lawyers and judges need to be aware that eBay may only be the tip of the iceberg for a seller's online presence, and seller conduct on other websites needs to be part of the jurisdictional analysis.

Perhaps the biggest new way in which sellers are integrating their web presence is through social media.³⁵¹ Online sellers are making use of Facebook, Twitter, and Myspace to creatively advertise their listings.³⁵² Industry leaders believe this to be the wave of the future, and creative sellers are using these tools to market to new and existing customers.³⁵³

342. *Id.*; see also, e.g., *FAQ Page*, *supra* note 339.

343. See, e.g., *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006).

344. *Who We Are*, *supra* note 12.

345. *Alternatives*, *supra* note 309.

346. For a list of other online marketplaces, see *id.*

347. *Id.*

348. *Id.*

349. *Id.* ("Many experts in online selling recommend that sellers and small business owners continue to maintain a presence on eBay, but they should also try out some of these other sites in order to supplement their income.")

350. See *id.*

351. See Steiner, *supra* note 309. An apt example of the ease through which sellers can harness this technology is the Facebook app, "Easy Social Shop." *EasySocialShop: Sell on Facebook, the Easy Way*, Facebook, <https://apps.facebook.com/easysocialshop/?sc=facebook&m=internal&cp=ts> (last visited Oct. 30, 2013). This application offers users a way to *automatically* integrate their online store with their facebook profile. See *id.* This allows even inexperienced sellers to "[s]tart selling on Facebook in 3 clicks." *Id.*

352. Steiner, *supra* note 309.

353. See *id.*

Integration between highly personal social media websites and online listings illustrates just how complex a seller's online commercial presence can become. Free online social media makes it possible for sellers to maintain a highly sophisticated online presence over multiple virtual communities without ever creating a personal website. These individuals are exerting high levels of targeted communications over multiple platforms and if courts are unaware of these activities and limit jurisdictional analysis to eBay sales alone, their holdings will not accurately reflect the reality of these situations. These sophisticated sellers are the wave of the future³⁵⁴ and further emphasize the importance of fact intensive personal jurisdiction inquiries that take into account the entirety of a seller's online conduct.

Additionally, new virtual frontiers for sellers have emerged in recent years.³⁵⁵ Both cell phones and tablets have provided new mediums through which individuals can access the Internet.³⁵⁶ These mediums currently account for more than twenty percent of U.S. Internet use.³⁵⁷ Tablets especially are experiencing a major surge in popularity and it is estimated that by the end of 2013 nearly half of Internet users will own at least one of the devices.³⁵⁸ Tablets are already used regularly by their owners who spend on average fourteen hours per week on their device, an amount that has been steadily increasing.³⁵⁹ eBay has made users aware of these growing demographics and sellers are gaining new ways to target these markets.³⁶⁰ The eBay app used on these devices already offers features not found on the traditional website and will likely continue to evolve.³⁶¹ Courts will need to stay abreast of the developing differences between eBay platforms as they may one day impact personal jurisdiction challenges.

V. CONCLUSION

Analyzing personal jurisdiction over eBay transactions is a complicated task. Sellers have access to a high level of control over their listings and are becoming more proficient at integrating their eBay listings

354. *See id.*

355. Michael Rougeau, *Smartphones and Tablets Account for More Than 20% of US Internet Use*, Techradar (May 29, 2012), <http://www.techradar.com/us/news/phone-and-communications/smart-phones-and-tablets-account-for-more-than-20-of-us-internet-use-1082617>.

356. *Id.*

357. *Id.*

358. Angela Moscaritolo, *Survey: 31 Percent of U.S. Internet Users Own Tablets*, PCMag, <http://www.pcmag.com/article2/0,2817,2405972,00.asp> (Jun. 18, 2012, 4:32 PM) (stating that by 2013, the Online Publishers Association ["OPA"] expects that 47 percent of the U.S. Internet population will own tablets).

359. *Id.* ("OPA also found that tablets are becoming a part of many users' everyday lives, with 60 percent of tablet owners saying they use their device several times a day, and 14 percent noting they use it at least once a day. Tablet users spend an average of 14 hours per week on their device.")

360. *2012 Fall Seller Update: Boost Your Sales*, *supra* note 58.

361. These added features are tailored for smart phone users and include the ability to use scanned UPCs to run eBay searches. Kathy Totz, *Mobile App Review: eBay*, Foresee, <http://foreseeblog.com/2012/12/03/mobile-app-review-ebay/> (Dec. 3, 2012).

with outside websites. This trend is likely to accelerate in the future and the legal profession needs to be familiar with the changes occurring within this brand of e-commerce. The level of control that sellers now enjoy when using eBay undermines the distinction between personal webpages and eBay accounts. Jurisdictions relying on the *Zippo* test for personal webpages, but rejecting it for online auctions, need to address this inconsistency to avoid unjust outcomes. Even jurisdictions that do not rely on interactivity need to understand the processes behind listing items on eBay and related online marketplaces to reach purposeful availment determinations that accurately reflect the totality of a seller's online conduct. Regardless of the test applied, the depth of control that users of all varieties can exercise over online transactions requires courts to avoid bright line rules in this area and make personal jurisdiction determinations on a fact intensive, case-by-case basis. Such an approach will only become more important as sellers further integrate their online commercial presence between websites. Understanding these processes is a crucial obligation that judges must endure to reach equitable results in personal jurisdiction challenges.

