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# Online Auctions of Repossessed Collateral Under Article 9

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# ONLINE AUCTIONS OF REPOSSESSED COLLATERAL UNDER ARTICLE 9

*Michael Korybut\**

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Under section 9-504 of Article 9 of the Uniform Commercial Code (“Code”), a secured creditor may repossess a defaulting debtor’s personal property serving as collateral for her loan and “dispose” of it by way of a “commercially reasonable” sale. A traditional form of foreclosure sale is an auction conducted by a professional auctioneer. With the rapid growth of electronic commerce on the World Wide Web<sup>1</sup> and the mushrooming of commercial Web sites selling all manner of goods, cyberspace auctions conducted by virtual software auctioneers may offer a secured party an increasingly attractive alternative for disposing of repossessed collateral. Online auctions are expedient and relatively inexpensive to use and tap a tremendously large, worldwide audience. In 1998, online auctions like eBay, Onsale atAuction, and Yahoo!Auctions accounted for about \$2.1 billion of the total \$13 billion in Internet commerce, and sales are expected to triple by the year 2000.<sup>2</sup>

But conceived in the 1940s, Article 9 was not drafted with a cyberspace world in mind. As interpreted by the courts during the last forty years, the secured creditor will have difficulty predicting *ex ante* whether section 9-504(3)’s requirements for a “commercially reasonable” sale will accommodate an online auction of repossessed collateral. The Internet’s new communication technology stretches long-held notions of time, geography, and communal gatherings that are rooted in the requirements of a commercially reasonable sale and challenges many of the precepts that the Code’s drafters and the courts have used to create the existing body of law on commercially reasonable sales. The secured creditor is faced with many

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1. The terms “Web,” “cyberspace,” and “Internet” have different meanings, but unless otherwise indicated, they are used synonymously in this article. See Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 611 n.3 (1998); DEP’T OF COMM., *The Emerging Digital Economy Report 1* (1998), available at <<http://www.ecommerce.gov/view.html.htm>> [hereinafter *Digital Economy*].

2. Ken Bensinger, *Collectin: The Perils of Online Auctions*, WALL ST. J., Mar. 5, 1999, at W1.

novel questions, not the least of which is, when deciding to sell by public or private sale, whether, in an increasingly zoned cyberspace, the defining characteristics distinguishing a "public" sale from a "private" sale remain coherent and applicable. More pointedly, can an online auction run by a virtual auctioneer of sophisticated computer software adequately perform the important tasks of a live, professional auctioneer? Do online auction bidders sitting passively in their armchairs at home and staring at their computer screens become emotionally stimulated and feel the excitement of real world auctions so that their bidding is zealous and a reasonable purchase price is realized? Can legally appropriate advertising of an online auction to the relevant group of potential bidders occur over the Web? How can a potential bidder exercise his right to inspect tangible collateral in cyberspace? Is it ever "commercially reasonable" for a secured party to employ an online auction to dispose of repossessed collateral?

Courts too will need to wrestle with these questions. Their task should be informed by one of the Code's central policies: "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."<sup>3</sup> The Code's drafters knew, indeed intended, that as commercial practices evolved, so would the Code. "[T]he U.C.C. was written largely to supplant the common law by clearing 'statute and case law debris from the field so that commercial law could follow the natural flow of commerce.'"<sup>4</sup> Code standards like "commercial reasonableness," "trade usage," and "reasonable commercial practices" permit injection through the courts of new commercial practices. Said Professor Grant Gilmore, one of the principal architects of Article 9: "The basic policy of Article 9 is to allow disposition of the collateral without hampering restrictions, in the hope that, as to many types of goods, there will develop a pattern of using commercial outlets to sell goods for the going price at the least possible cost."<sup>5</sup> However, because the Internet and electronic commerce in many significant ways depart from traditional methods of advertising and selling goods, the existing body of Article 9 case law and judicially-created factors courts use to review repossession sales may unduly impede the secured creditor's use of an online auction to dispose of repossessed collateral.

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3. U.C.C. § 1-102(2)(b) (1995).

4. Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 334 (1995) (citation omitted); see also Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962).

5. Grant Gilmore, *Article 9 of the Uniform Commercial Code-Part V*, 7 CONF. PERS. FIN. L.Q. REP. 4 (1952).

This Article examines these and other questions. Part I describes the Internet, electronic commerce, and online auctions. Focusing on the online auctions Onsale atAuction, eBay, and Yahoo!Auctions, it sets forth the technological and business advantages and limitations to using an online auction to sell tangible goods.<sup>6</sup> The remaining two Parts discuss legal barriers to such use raised by Article 9 and its surrounding body of case law concerning commercially reasonable sales. Part II discusses certain difficulties in classifying online auctions as “public” or “private” sales under section 9-504(3). Correct classification is necessary for determining the proper notice of sale that a secured party must send to the debtor; improper notice may result in a commercially unreasonable sale and prevent the secured party from collecting any deficiency from the debtor. Part III applies selective factors to an online auction of repossessed collateral that courts traditionally use to assess the sale’s “commercial reasonableness” under section 9-504(3). The factors considered are the (a) sale’s advertising, (b) use of a professional auctioneer, (c) price realized for the collateral, (d) place of the sale and the opportunity to inspect the collateral, and (e) commercial practices of dealers and business selling the subject type of collateral.

Let me also explain what the Article does not attempt to do. The judicial assessment of Article 9 sales is fact-specific; courts review them on a case-by-case basis. Typically, courts measure a sale’s commercial reasonableness against not only the factors listed above, but also a variety of others (such as whether the sale was wholesale or retail). Rather than cover every factor of a commercially reasonable sale, I discuss only those factors and other issues that I feel are most affected by cyberspace and online auctions.

Finally, Article 9 is being revised. Although for purposes of my treatment none of the Code sections I discuss are significantly affected by these revisions, I will mention in the footnotes relevant new sections and cross-references to re-numbered existing sections.<sup>7</sup>

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6. While intangible goods like software and services like banking, insurance, and air travel are also sold online, I focus on the sale of tangible goods because most of the reported cases involving Article 9 foreclosure sales involve tangible personal property.

7. Section 9-504(3) has been re-numbered, in relevant part, as section 9-610(b). UNIFORM COMM. CODE REVISED ART. 9, A.B.A. SEC. BUS. L. 361 (Proposed Official Draft 1998) [hereinafter THE NEW ARTICLE 9].

## I. THE INTERNET, ELECTRONIC COMMERCE, AND ONLINE AUCTIONS

A. *An Internet Primer*

The Internet is a vast and growing worldwide matrix of linked computer networks. Each computer in any network can communicate and exchange information with computers on any other network. This "information highway" facilitates the exchange of textual information (e-mail) and "documents" (books, contracts, articles), images (photographs, schematics), and sound (voice, music), and anything else that can be reduced to digital bits. The Internet is thus a global, decentralized medium of communications.<sup>8</sup>

To use the Internet, a person employs a computer "connected" to the Internet through one of several technical methods, such as modem access or ISDN.<sup>9</sup> The connected computer may reside in the user's home, business, local library, or any other place. Once technical connection exists, the user must also have "access" to the Internet through an Internet access provider, Internet service provider ("ISP"), or online service provider ("OSP"). Essentially, these entities (commonly universities or commercial enterprises) are Internet gatekeepers that may charge monthly or hourly access fees. In addition, ISPs provide users with the ability to set-up and maintain Web sites, send and retrieve e-mail, and use other Internet resources. OSPs are typically commercial entities that provide to fee-paying subscribers not only access and services similar to those offered by ISPs, but also proprietary content and services.<sup>10</sup> America Online ("AOL") is the largest OSP, with 13 million subscribers.<sup>11</sup>

The World Wide Web is part of the Internet, and is comprised of thousands and thousands of "Web sites," each of which is composed of individual electronic documents called "Web pages." These Web sites and their respective Web pages are stored on computer servers worldwide, and each Web site and Web page has its own unique address defined by its URL

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8. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). For more expansive primers on the Internet's development, see JULIAN S. MILLSTEIN ET AL., *DOING BUSINESS ON THE INTERNET* ch. 1 (1997); O'Rourke, *supra* note 1, at 614-30.

9. MILLSTEIN ET AL., *supra* note 8, at 1-9. Modem access uses a modem attached to, or built into, a personal computer and a standard telephone line connection. ISDN (Integrated Services Digital Network) is essentially a high-speed Internet hook-up which eliminates the modem's process of converting data from a digital signal to an analog signal for transmission.

10. MILLSTEIN ET AL., *supra* note 8, at 1-7, 1-8; *see also* *ACLU v. Reno*, 929 F. Supp. at 832-33.

11. Jerry Adler, *Online and Bummed Out*, NEWSWEEK, Sept. 14, 1998, at 84.

(Uniform Resource Locator). Any Web site or Web page can be remotely accessed from any computer that has Internet access using Web "browsing" software such as Netscape Navigator or Microsoft's Internet Explorer.<sup>12</sup> The Web uses a formatting language called hypertext markup language ("HTML") that allows Web sites and Web pages to be linked to each other using "hypertext links" or "links."<sup>13</sup> Thus, like the Internet, the Web is a distributed system that has no centralized control, location, or storage.<sup>14</sup>

The first page on a Web site is referred to as the "home page" and typically is used to introduce the Web site and provide a table of contents comprised of hypertext links through which a Web user can access the contents of the site or other Web sites.<sup>15</sup> A hypertext link typically appears on a user's computer screen in an easily-recognized font (highlighted), or it may be a written message ("CLICK HERE"). The Web user employs her computer's mouse to point her cursor to the hypertext link and "click" through to the current Web site's next page or another Web site altogether. This movement through the Web is called "surfing;" hence people "surf the Net" through "point and click."

Web users can search the Web's thousands of sites for particular information by using services such as Yahoo! and Excite. For example, a Web user looking to buy a computer might use Yahoo! to locate an online auction selling computers and other goods or the Web site of a computer manufacturer like Dell Computers.<sup>16</sup>

Besides the Web, other common methods of Internet communication include electronic mail ("e-mail"), "mailing lists," "newsgroups," and real-time communication through "Internet Relay Chat" ("chat rooms").<sup>17</sup> E-mail is a widely-used method of Internet communication and is analogous to sending a first-class letter. An e-mail message can be sent to one person or "broadcast" to thousands of recipients. "Newsgroups" are essentially electronic bulletin boards open to all persons and divided into tens of thousands of subjects, and are typically started and maintained by individuals, corporations, and universities. Members post messages on the newsgroup to which other members respond and so on. Any person with Internet access can participate in a newsgroup discussion by monitoring the

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12. MILLSTEIN ET AL., *supra* note 8, at 1-6.3.

13. JIM STERNE, WHAT MAKES PEOPLE CLICK: ADVERTISING ON THE WEB 408 (1997).

14. ACLU v. Reno, 929 F. Supp. at 838.

15. *Id.* at 836.

16. Dell (visited Oct. 29, 1999) <<http://www.dell.com>>.

17. ACLU v. Reno, 929 F. Supp. at 834-35.

posted newsgroup messages.<sup>18</sup> E-mail “mailing lists” are online discussion groups like a newsgroups whose members are united around a topic or interest and have submitted their e-mail addresses to an electronic mailing list. However, subscribers receive every e-mail message posted to the list members directly instead of on a bulletin board as with newsgroups. They, in turn, can respond directly by e-mail to the list members. There are thousands of newsgroups and mailing lists, collectively with hundreds of thousands of participants.<sup>19</sup> “Chat rooms” allow Internet users to engage in an immediate dialog with other people on the Internet in “real time” rather than posting and responding to messages on newsgroups and mailing lists. “Chat rooms” resemble a telephone party line, using a computer and keyboard instead of a telephone.<sup>20</sup>

### *B. Online Sales of Tangible Goods*

Businesses and individuals are increasingly selling tangible goods through the Web, and electronic commerce has grown dramatically in the last several years. IDC Research predicts that by December 2001, thirty-nine percent of online users will buy goods and services on the Web as compared to twenty-five percent in December 1996. IDC Research also forecasts that the amount of commerce conducted over the Web will grow from \$2.6 billion in 1996 to more than \$220 billion during 2001.<sup>21</sup> Thus, for example, in 1996 Cisco Systems booked \$100 million in sales of its software on the Internet. In 1997, Cisco booked at least \$3.2 billion in sales. Amazon.com had sales of less than \$16 million in 1996; in 1997, it had \$148 million in sales. On the Internet, Dell Computers sold less than \$1 million of computers per day during January 1997. By December 1997, the company reported reaching daily sales of \$6 million several times.<sup>22</sup>

Online business retailers range from traditional retailing Web sites of established companies, to “cybermalls” with hypertext links to hundreds of retailers’ Web sites, to online auctions. Cendant Corporation, for example, is a \$5.3 billion consumer goods and services company. It sells over \$1 million

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18. MILLSTEIN ET AL., *supra* note 8, at 1-7, 1-8; *see also* USAWEB & RICK E. BRUNER, NET RESULTS: WEB MARKETING THAT WORKS 149-50 (1998); *ACLU v. Reno*, 929 F. Supp. at 834-35.

19. MILLSTEIN ET AL., *supra* note 8, at 1-12, 1-13; *see also* USAWEB & BRUNER, *supra* note 18, at 160; *ACLU v. Reno*, 929 F. Supp. at 834-35.

20. MILLSTEIN ET AL., *supra* note 8, at 1-12, 1-13; *see also* *ACLU v. Reno*, 929 F. Supp. at 835.

21. ALLEN ET AL., INTERNET WORLD GUIDE TO ONE-TO-ONE WEB MARKETING 2 (1998).

22. *Digital Economy*, *supra* note 1, at 2.



products and services on its Web site "netMarket," including automobiles, appliances, computer hardware and software, and electronics. To participate in its Web site, users pay a \$69 annual membership fee, and Cendant claims that 20 percent of an average family's shopping needs can be done through netMarket. In 1997, Cendant facilitated over \$1.2 billion in Internet sales of products and services.<sup>23</sup> Similarly, Yahoo!'s Web site has "Yahoo!Shopping," a sort of portal to the Internet shopping with links to retail Web sites organized by merchandise category (e.g. "Books," "Office").<sup>24</sup>

The top-ranking goods purchased over the Internet have been software (31%), CDs/tapes (24%), women's apparel (17%), men's apparel (17%), sporting goods (17%), toys (14%), electronics (13%), jewelry (12%), and computers (12%).<sup>25</sup> eBay, the largest online auction in terms of registered user-base, reported that as of August 31, 1998, the following products were the major types of items listed for sale on its Web site: antiques; books, movies, and music; coins and stamps; collectibles; computers; dolls and figures; jewelry and gemstones; photo and electronic equipment; pottery and glass; sports memorabilia; and toys and Beanie Babies.<sup>26</sup>

Automobile sales are increasingly being "facilitated" by the Web. Buyers can conduct the entire automobile transaction through the Web site or merely retrieve pricing and other information. Web car shoppers can typically view pictures of different automobiles, read descriptions and other product information, and find "links" to online financing and insurance companies.<sup>27</sup> Even used car sales are being made or facilitated over the Internet. Auto-by-Tel's Web site has a database of 20,000 certified used cars, where buyers can view the car's condition through photographs and descriptions. In January 1998, the site's used car database received 600,000 inquires.<sup>28</sup> Similarly, Yahoo!Auctions, an online auction site that Yahoo!

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23. *Digital Economy*, *supra* note 1, at 36.

24. Yahoo! (visited Oct. 29, 1999) <<http://www.yahoo.com>>.

25. ALLEN ET AL., *supra* note 21, at 302. Measuring online commercial activity is difficult, and these figures change as electronic commerce grows. For different figures, see *Digital Economy*, *supra* note 1, at app. A5-1.

26. eBay, Inc., *SEC Form 10-K*, Dec. 31, 1998 at 10 [hereinafter, *eBay Form 10-K*].

27. Auto-by-Tel, a Web-based automotive marketplace, had 345,000 purchase orders via its Web site in 1996, for a total of \$1.8 billion in auto sales. By the end of November 1997, the company had over 100,000 purchase orders per month and \$500 million per month in auto sales (\$6 billion annualized). *Digital Economy*, *supra* note 1, at app. A5-11, A5-12.

28. *Digital Economy*, *supra* note 1, at app. A5-12.

runs in association with Onsale, regularly auctions used cars; on February 16, 1999, for example, it listed 126 "vehicle" auctions.<sup>29</sup>

### C. Online Auctions and Onsale atAuction

Online auctions are a significant and growing Web market channel for goods and services, with about \$2.1 billion of the total \$13 billion in Internet commerce in 1998, and sales are expected to triple by the year 2000.<sup>30</sup> On May 14, 1999, the "Internet Auction List" listed 169 online auctions sites, auctioning a broad variety of merchandise under various auction models, formats, and procedures.<sup>31</sup> Currently, four auction models dominate. Under a "person-to-person" auction like eBay, individuals sell directly to other individuals using the Web site's auction system. The sellers own their goods, and the Web site acts as facilitator to the transaction, charging a fee usually based on the amount of the sales price. Under a "business-to-consumer" model like Onsale, the Web site may own the goods, or the seller may use the Web site as the selling agent. Under a "name-your-own price" model like Priceline.com, buyers provide their best price for a given item such as an airline ticket, and the Web site seeks an airline that will match this price. Under a "business-to-business" model like Manheim Online, manufacturers and distributors typically auction excess inventory to dealers and are usually restricted to known customers.<sup>32</sup>

To explore online auctions in detail, I focus on Onsale atAuction.<sup>33</sup> I will, however, throughout the Article contrast Onsale atAuction with eBay and Yahoo!Auctions.

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29. Yahoo! (visited Sept. 6, 1999) <<http://auctions.yahoo.com/26318-category.html>>.

30. Bensinger, *supra* note 2, at W1.

31. The Internet Auction List includes Utrade ("a person-to-person Internet auction service . . . [where] items can be auctioned individually or in multiple units via a Dutch auction"); Time Machine—Silent Watch Auction; Going, Going . . . Sold!!! ("online auction for used scientific equipment"); Auction First Online America ("Items include computer hardware and software, beanie babies, collectibles of all types, electronics, photography and more . . ."); Guitarauction.com ("dedicated exclusively to musical instruments and related accessories"); Hotel-Co-op Online Auction ("includes items used in restaurant, hotel and hospitality industries"); The Cloths Link ("Quality new and used cloths"). Each of these sites can be accessed through hypertext links on the *Internet Auction List* (visited Sept. 6, 1999) <<http://www.internetauctionlist.com>>.

32. Tim Clark, *Sites Redefine Buying Online* (visited Jan. 4, 2000) <<http://www.cnetnews.com/news/0-1007-201-339000-0.html?tag=st.cn.1>>.

33. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com>>. I focus on Onsale for several reasons. First, because it is one of the oldest and largest online auction services; academics and online marketers have studied Onsale more extensively than other

Onsale's Web site uses real-time, interactive auctions to sell retail and wholesale goods to businesses, resellers, and consumers.<sup>34</sup> Onsale's Web site is divided into two "stores": Onsale atAuction and Onsale atCost.<sup>35</sup> Unless otherwise stated, references to "Onsale" are to Onsale atAuction. Onsale atAuction sells other companies' excess and close-out merchandise.<sup>36</sup> At the end of 1998, its primary merchandise categories were personal computers, printers, monitors, scanners, computer peripherals, network equipment, consumer electronics, housewares, sports and fitness equipment, and vacation packages.<sup>37</sup> Onsale obtains merchandise from vendors through one of two primary arrangements: the Principal Sales model or the Agent Sales model. Under the Principal Sales model, Onsale purchases the merchandise or takes it on consignment, conducts the auctions, ships the merchandise to the customer, and processes merchandise returns. Under the Agent Sales model, Onsale conducts the auctions and processes orders for vendors as a sales agent and receives a commission for its services. The seller is responsible for setting up the auction and completing the transaction, including collection of the sales price and shipment of the merchandise. I only consider consignment and Agent Sales auctions.<sup>38</sup>

In its 1998 Form 10-K filed with the Securities and Exchange Commission ("SEC"), Onsale reported that it operated auctions every day and generally offered over 1,400 different merchandise items at any given time. At such time, Onsale sold quantities from one to several hundred of each item, generally ranging in price from \$1 to \$3,000, on which customers

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online auction sites. Thus, it provides a body of literature not available for the other sites. Second, Onsale is a public company, and its SEC filings provide copious amounts of data about Onsale in particular and the online marketplace generally.

34. *Onsale, Inc. SEC Form 10-K*, Dec. 31, 1998 at 3 [hereinafter, *Onsale Form 10-K*].

35. *Id.* Opened in 1999, Onsale atCost sells new, current model computer products at wholesale invoiced prices, plus certain fees.

36. *Id.* at 3, 17. Onsale's Web site used to contain a "person-to-person" auction model called The Onsale Exchange. Onsale sold The Exchange to Yahoo! in September 1998, but retains responsibility for running the auctions and processing transactions. *Id.* at 18.

37. *Id.* at 4.

38. *Id.* at 6-7, 37-38. A secured party could sell repossessed collateral directly to Onsale, but this would not involve use of an online auction, and Onsale's subsequent sale through its auction site would not implicate Article 9. Thus, I consider only transactions under the consignment or Agent Sales model.

could bid 24 hours a day, 7 days a week.<sup>39</sup> For the quarter ending March 31, 1999, Onsale reported gross merchandise sales of \$73.3 million.<sup>40</sup>

Onsale at Auction contains "departments" for Computer Products, Sports and Fitness, Home and Office, and Vacation and Travel. Each of these virtual department stores is divided into, and has hypertext links to, various merchandise categories. For example, the Computer Products department store has such linked categories as "Desktops," "Printers," and "Software."<sup>41</sup> Under the appropriate category, Onsale places brief hypertextual descriptions of the items being auctioned (e.g. "Compaq Pro Workstation 5100 w/ PII 333, 64MB, 4GB HD, 24X CD, 10/100DT (New) from \$1").

The brief hypertextual description links to the described item's merchandise auction page, which displays a detailed textual description (and sometimes a photographic image) of the item, the number of units available, warranty information, billing and shipment information, the auction's length, and the interactive auction feature where bidders in real-time can participate in the auction. To open a merchandise auction page, a seller submits an electronic registration form providing a variety of information, including the item's category, the textual description and optional photograph of the item, the auction's length, and the minimum bid for the item. Onsale's auction management software automatically creates the item's merchandise auction page and lists the item in the appropriate department store's merchandise category. At this point, the item's auction is immediately open for bidding and will remain open until the designated closing time.

All of Onsale's auctions use its "Yankee Auction" format. In Yankee Auctions, a number of identical items can be offered for sale at the same time.<sup>42</sup> The seller selects a minimum bid price for his item and Onsale then sets the auction's bid increment accordingly.<sup>43</sup> While no longer present on

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39. *Onsale Form 10-K*, *supra* note 34, at 3-4.

40. *Onsale Reports Record First Quarter Results* (press release, April 15, 1999), available at Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/aboutus/ir/pr/pr041599a.html>> (photocopy of Web page on file with author).

41. *Onsale Form 10-K*, *supra* note 34, at 4; see also Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/howto/overview.html>> (photocopy of Web page on file with author).

42. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/howto/process.html>> (photocopy of Web page on file with author).

43. In the past, Onsale's site had stated that if the minimum bid price ("MBP") is \$0 to \$50, the bid increment ("BI") is \$1.00; if MBP is \$50.01 to \$100, BI is \$2.50; if MBP is

Onsale's Web site, Onsale had offered generic "tips" to sellers to secure the "best possible prices."<sup>44</sup> For example, with respect to the seller's selection of his auction's length (which could run from two to fourteen days), Onsale had advised that "[s]electing a longer auction will give your item more exposure, but a shorter auction can give it a sense of urgency (2 Days ONLY!!!), and will allow you to complete your sale more quickly."<sup>45</sup> Similarly, because the seller must choose a minimum bid for his item, Onsale had offered some limited advice for valuing the goods.

It may not be easy to determine the value of your goods, so you may set the minimum price too high. Be realistic about the value of an item, and remember that in an online auction, people competitively drive the price up. If you would like \$600 for an item, consider starting the bidding at \$399, or even lower. Keeping the minimum low encourages bidding. Once an initial bid is placed, it is easy for others to follow.<sup>46</sup>

Under Yankee Auctions' bidding procedures, bids are first ranked by price. If there are competing bids at the same price, larger quantities win over

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\$100.01 to \$500, BI is \$5.00; and if MBP is \$500.01 and above, BI is \$10.00. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/howtopost.html>> (photocopy of Web page on file with author).

44. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/sell.html>> (photocopy of Web page on file with author).

45. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/exchange/howtopost.html>> (photocopy of Web page on file with author). Similarly, the seller must provide a description for the item which will appear on its merchandise auction page. In earlier versions of its Web site, Onsale had suggested that sellers add  
as detailed a description of your item as possible. Unlike a newspaper classified ad, Onsale does not charge you for the amount of text you write. Go crazy. List anything you can think of about the item. Do you have the manuals? What color is it? Is it under warranty? What is the model number?

Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/sell.html>> (photocopy of Web page on file with author). Onsale had also strongly encouraged sellers to post a picture of the item. "Items with pictures get more bids, and they get higher bids." Jerry Kaplan, *Onsale* (visited June 4, 1998) <http://www.onsale.com/howtopost.html> (photocopy of Web page on file with author).

46. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/sell.html>> (photocopy of Web page on file with author). Further, "in our experience, lower minimum bids attract much more bidding activity than higher minimum bids. Low minimum bids are essential for attracting a larger number of early bidders. Generally speaking, the more bidders in an auction, the higher the resulting price." *Id.*

smaller ones. If bids are for the same price and quantity, earlier bids win over later bids.<sup>47</sup>

For a bidder to participate in an Onsale auction, she must register, learn about Onsale's bidding procedures, and locate the merchandise auction page for the desired item. To register, the first-time bidder submits an electronic registration form providing certain biographical and financial information (including name, address, e-mail (optional), and credit card number) with which the user creates a secret password. Upon submission, the bidder is registered and instantly receives an account number which allows her to place her first bid. To teach bidders about Onsale's auction process, Onsale provides instructions on two Web pages: "Bidding Tutorial" and "Auction Process."<sup>48</sup> To locate the merchandise auction page for a desired item, the bidder can search for an item by using Onsale's search engine of its auction database, or review the brief textual descriptions in each department store's various merchandise categories. Hypertext links carry the user from her search results to the desired merchandise auction page. There, in addition to the information discussed above, the bidder will see the current winning bid, the current high bidder's initials, city and state, and optional bidder comments. The bidder can then submit her own bid using the page's bid feature. As bids are received, the merchandise auction page is instantly updated to display the current high bidder.

Bidders are notified by e-mail when they are outbid and can then increase their bids through the merchandise auction page. In addition, customers can monitor their bid status in real-time on the merchandise auction page or via "Bidwatch," a feature that displays current auction status.<sup>49</sup> Once the auction is closed, Onsale sends the seller an e-mail notifying her that the item's auction has closed and instructions on contacting the winning bidder. For Agent Sales transactions, the seller is responsible for collection of bid proceeds and shipment of merchandise.<sup>50</sup>

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47. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/howto/process.html>> (photocopy of Web page on file with author).

48. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/howto.html>> (photocopy of Web page on file with author).

49. Jerry Kaplan, *Onsale* (visited May 5, 1999) <<http://www.onsale.com/tools/bidwatch/bidwatch.html>> (photocopy of Web page on file with author).

50. *Onsale Form 10-K*, *supra* note 34, at 6-7, 37-38. The seller's merchandise auction page describes his payment and shipping policies, including method of payment, which party shall pay shipping costs, method of shipping, and time of shipment (before or after payment).

This entire auction process is fully automated by Onsale's "auction management technology."<sup>51</sup>

*D. Advantages to Selling Tangible Goods Through Online Auctions*

Sellers are increasingly using online auctions to sell tangible goods because of several important features that have made the Web the primary Internet platform for electronic commerce. The most prominent features include the Web's interactive, multimedia nature, its relatively low cost, and its tremendously large, worldwide consumer audience that is segmentable and targetable through online data-gathering techniques and online advertising.<sup>52</sup> Internet consumers like Web shopping for its convenience, good price, and ease of research.<sup>53</sup>

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51. *Onsale, Inc. SEC Form 10-K*, Dec. 31, 1997 at 5 [hereinafter, *1997 Onsale Form 10-K*]. "This software conducts automated auctions with thousands of customers, processes those customers' orders and payments, coordinates and performs order fulfillment and provides certain customer support functions." *Id.* Onsale's "Auction Management Applications" consist of "a set of continuously running application programs that manage the auctions and sales, update merchandise Web pages to show the currently winning bidders, and send a variety of e-mail messages to customers informing them that they have been outbid or have won merchandise." *Id.* at 9. Onsale's "Transaction Processing Applications" consist of a "set of applications for receiving and validating bids, entering registrations to place the customer on the Company's mailing list, listing currently active and recent winning and losing bids, and reviewing and submitting customer service requests." *Id.* Onsale's "Order Processing Applications" consist of "applications for processing successful bids as they are converted into customer orders. These applications charge customer credit cards, print order information, transmit order information electronically to the Company's contract warehouse and vendors, and deposit transaction information into the Company's accounting system." *Id.*; see also *Onsale Form 10-K*, *supra* note 34, at 4-5.

52. MILLSTEIN ET AL., *supra* note 8, at 1-6. See also ROBBIN ZEFF & BRAD ARONSON, *ADVERTISING ON THE INTERNET 12-14* (1997); *eBay, Inc., SEC Prospectus*, at 38, Sept. 25, 1998 [hereinafter *SEC Prospectus*].

The Internet possesses a number of unique characteristics that differentiate it from traditional media: users communicate or access information without geographical or temporal limitations; users access dynamic and interactive content on a real-time basis; and users communicate and interact instantaneously with a single individual or with entire groups of individuals. As a result of these characteristics, Web usage is expected to grow rapidly.

*Id.*

53. *Digital Economy*, *supra* note 1, at 35, app. A5-4.

### 1. Interactive, Multimedia Medium

The Web's interactive, multimedia communication underlies the explosion of electronic commerce.<sup>54</sup> The Web is a "multimedia"<sup>55</sup> communication medium, allowing the exchange of rich digital content, including text, audio, graphics, and video. This multimedia communication is also "interactive," allowing two-way interaction between sellers and buyers. "An advertiser's goal is to engage the prospect with a brand name or product. This can be done more effectively on the Web, where a consumer can interact with the product, test the product, and, if she or he chooses to, buy the product."<sup>56</sup>

### 2. Worldwide Market Without Geographic or Temporal Boundaries

Web electronic commerce is particularly attractive to vendors of goods because the Internet offers access to a vast and growing worldwide consumer audience. It is estimated that between 20 and 30 million people use the Internet worldwide, 10 million of whom use the Web. By the year 2000, this number may surpass 500 million.<sup>57</sup> IDC Research projects the Web population will grow to 174.5 million in 2001, up from 50.2 million in 1997. Cowles/Simba Information forecasts the Web user sessions will hit 15.79 billion in 2000, yielding 94.76 billion "page views."<sup>58</sup> "Traffic" on the Internet has been doubling every 100 days.<sup>59</sup>

Relatedly, electronic commerce removes geographic and time barriers normally distancing customers from vendors' products in the real world. The Internet's network of electronically-linked computer networks creates a

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54. ALLEN ET AL., *supra* note 21, at 18-19.

55. MILLSTEIN ET AL., *supra* note 8, at 1-6.

56. ZEFF & ARONSON, *supra* note 52, at 13; *see also* USAWEB & BRUNER, *supra* note 18, at 36. ("For the marketer, the Web's most important value is direct interaction with customers.").

57. Kent Stuckey, *Market Without Bounds—So Far*, 5 BUS. L. REV. TODAY 52, 55 (1996); *see also* White House, *A Framework for Global Electronic Commerce* (visited Nov. 24, 1999) <<http://www.economic.gov/framework.htm>> (noting that the Web will have 175 to 200 million users by 2000, and Internet sales "could total tens of billions of dollars by the turn of the century").

58. ALLEN ET AL., *supra* note 21, at 2. "Page view" or "view" means "[w]hen a Web page is requested by somebody through a browser. Page views are often used to track the number of impressions a banner gets." STERNE, *supra* note 13, at 409.

59. *Digital Economy*, *supra* note 1, at 2. "Traffic" means "[t]he number and types of people who come to a Web site. Measured in many different ways." STERNE, *supra* note 13, at 410.



“cyberspace” that slips the constraints of physical space.<sup>60</sup> eBay states that traditional person-to-person trading markets through classified advertisements and flea markets or through intermediaries like auction houses are inefficient in part because “their fragmented, regional nature makes it difficult and expensive for buyers and sellers to meet, exchange information and complete transactions.”<sup>61</sup> eBay argues that its online person-to-person auction model will overcome this inefficiency because its “centralized trading place” “facilitates buyers and sellers meeting, listing items for sale, exchanging information, interacting with each other, and, ultimately, consummating transactions; . . . [and] is global in reach, offering buyers a significantly broader selection of goods to purchase and providing sellers the opportunity to sell their goods efficiently to a broader base of buyers.”<sup>62</sup> Furthermore, by operating world wide, twenty-four hours a day, the Internet and electronic commerce is not limited to time zones or regular office hours.<sup>63</sup> Onsale, for example, touts the convenience of “retail shopping directly to customers’ homes and offices. Customers do not need to travel to fixed locations during limited hours to purchase items.”<sup>64</sup>

### 3. Market Segmentation

Vendors can identify and target very specific market segments of online consumers for their products through increasingly powerful technological online tools that gather demographic and profile data about Internet users and the products they buy. Furthermore, online users are increasingly segmenting themselves into virtual communities, each founded upon a

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60. See ALLEN ET AL., *supra* note 21, at 160; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); O’Rourke, *supra* note 1, at 614-630; Stuckey, *supra* note 57.

In the past, communities were defined by [geographical] regional areas, such as neighborhoods, cities, or geographic locations. Online communities have re-defined that definition of community. Online communities are based on the need for people to interact with others with shared interests and commonalties. The physical boundaries of the world aren’t applicable to the Web. Physical location has little to do with the thousands of communities that are actively prospering on the Internet.

ALLEN ET AL., *supra* note 21, at 160

61. *eBay Form 10-K*, *supra* note 26, at 3.

62. *Id.* at 4.

63. “W.W. Grainger, a distributor of MRO supplies in North America, opened a Web site in 1995. By the end of 1997, more than 50 percent of its Web site orders were placed between 5 p.m. and 7 a.m.” *Digital Economy*, *supra* note 1, at 13-15, app. A3-1 to A3-6. The Web never sleeps. *Id.*

64. *Onsale Form 10-K*, *supra* note 34, at 3.

shared interest or topic that can be used to identify a product's relevant market segment.

The interactive nature of Web communication facilitates consumer/user data collection. By simply interacting with a Web site, the user knowingly or unknowingly provides personal data. For example, a Web site can gather "clickstream" data as a user surfs the Net, including the user's e-mail address, the computer and browser she is using, and the address of the Web site from which the user came.<sup>65</sup> A Web site, through "cookies,"<sup>66</sup> can record information about the user's online activities, such as the pages or files the user viewed and how long or frequently the user visited those pages and files. The cookie then sends this information to its originating Web site or to a third party, such as an advertiser who has paid the originating Web site for demographic information about its users.

Online users also consensually provide profile information, typically through electronic registration forms they must complete before accessing a Web site.<sup>67</sup> This information can easily be stored and collated in digital form and is also frequently purchased by third-party advertisers. Other more traditional sources of personal information, such as customer databases and customer feedback, can complement the online data.<sup>68</sup> All of this information can be used to segregate online users into targetable market segments for particular products.<sup>69</sup>

Onsale, for example, uses some of these techniques to collect customer profile, demographic, and goods/price data. For Onsale's registration process, users provide "contact information" such as name, billing address, shipping address, e-mail address, telephone number, and credit card number. Onsale states that it uses this information to verify a user's account when she bids and to complete transactions when she wins.<sup>70</sup> Onsale also uses

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65. MILLSTEIN ET AL., *supra* note 8, at 10-4. All of this data-gathering can be done without the user's knowledge or consent. *Id.*

66. A cookie is a file stored on a user's computer by a Web server when a user visits a Web site. *Id.* at 10-4, 10-5.

67. USAWEB & BRUNER, *supra* note 18, at 312. Many users who are reluctant to provide personal information do not complete the registration forms where optional, which poses a significant limitation to gathering demographic data. *Id.* at 318.

68. ALLEN ET AL., *supra* note 21, at 108. "Customer data such as address, phone numbers, e-mail, inquires, and purchases can be used to personalize Web information. Online user profile and preference information can be used in conjunction with customer data to provide one-to-one Web marketing or service." *Id.*

69. *See, e.g.*, USAWEB & BRUNER, *supra* note 18, at 326; STERNE, *supra* note 13, at 409.

70. Jerry Kaplan, *Onsale Privacy Policy* (visited May 8, 1999)

cookies to identify customers when they use the Web site. Onsale states that cookies "help us understand your buying preferences and customize our service to your needs. By understanding which areas of the site you visit, cookies allow us to present information, products and specials that are of personal interest."<sup>71</sup> As discussed further below, Onsale uses targeted e-mail broadcasts to customers announcing upcoming auctions.

Some of the data Onsale collects is published on its Web site, although "personal identifying information" is kept private from third parties.<sup>72</sup> For example, as of May 8, 1999, over 2.3 million items had been sold, with over 400,000 bids monthly. Onsale had 1,111,111 registered users as of March 1999, and was registering over 50,000 new bidders per month. Onsale had 697,000 customers on its "Steals & Deals" e-mail list who regularly receive e-mail advertisements of upcoming auctions.<sup>73</sup>

With respect to demographic profile, Onsale reported on its Web site that 77.9% of customers were male, 22.1% female; 13.1% were between the ages of 18 and 24, 30.3% between 25 and 34, 28.3% between 35 and 44, 18.6% between 45 and 54, and 9.7% over 55 years old; and 49% were professionals/managers, 16.5% were self-employed, and 33.9% were categorized as "other." The average buyer was male, age 37, a professional/manager, had a household income of \$72,000, purchased items for himself or as a gift, and spent \$800 in the last 12 months. The top 10% of bidders spent an average of \$4,400 in the last 12 months, and the top 1% spent \$16,900 in the last twelve months—77% of purchases went to repeat buyers.<sup>74</sup>

Similarly, eBay collects user information. In eBay's online registration form, users provide their name, street address, phone number, e-mail address, and a password. Users may also provide a billing address, credit card number, and credit card expiration date.<sup>75</sup> eBay also automatically tracks certain clickstream data about users, including the Web site's URL from which the user just came, which URL a user next goes to, the user's browser, and the user's IP address. Furthermore, eBay uses cookies to

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<<http://www.onsale.com/howto/privacy.html>> (photocopy of Web page on file with author).

71. *Id.*

72. *Id.*; see *infra* notes 122-25 and accompanying text.

73. Jerry Kaplan, *Onsale Site Statistics Summary* (visited May 8, 1999) <<http://www.onsale.com/click/ss.html>> (photocopy of Web page on file with author).

74. Jerry Kaplan, *Onsale Demographics Profile* (visited May 8, 1999) <<http://www.onsale.com/click/demo.html>> (photocopy of Web page on file with author).

75. *eBay Privacy Policy* (visited Jan. 4, 2000) <<http://www.pages.ebay.com/aw/privacy-policy-reg.html>>.

facilitate transactions and provide information which eBay uses for targeted advertisements. When a user bids, buys, or sells, eBay collects this information. eBay also collects other users' comments about a user in its feedback area. If a user posts messages in eBay's chat room (the eBay Café) or other message areas or leaves feedback for other users, eBay will collect this information. If a user sends eBay personal correspondence, such as e-mails or letters, or if other users or third parties send eBay correspondence about the user's activities or postings on the site, eBay may collect such information in a file specific to the user.<sup>76</sup>

Internet users are also increasingly segmenting themselves into virtual communities, each founded upon a shared interest or topic that can be used to identify a product's relevant market segment.<sup>77</sup> Cyberspace is populated with thousands and thousands of these commercial and non-commercial virtual communities. The definition of virtual community is elastic, but the term generally describes online gatherings of people with a common interest, hobby, topic, business venture, or other shared characteristic.<sup>78</sup> As such, virtual communities range from small newsgroups,<sup>79</sup> mailing lists, and chat rooms to very large commercial service providers like AOL and Microsoft Network, which, besides constituting online communities themselves, also create proprietary virtual communities.<sup>80</sup> At its broadest, even the Web itself can be classified as a huge online community for certain marketers.<sup>81</sup>

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76. *Id.*

77. For a concise history of online communities, see ALLEN ET AL., *supra* note 21, at 151-87.

78. An important defining characteristic of virtual communities is their distinctive focus. For example, virtual communities can be defined by demographic characteristics (gender or age), a topical area (hiking), a vertical industry (law firm or plumbing supply manufacturer), or functional expertise (market research or purchasing management). Although the Internet is free of geographical boundaries, a geographical area, such as Stanford or California, can define a virtual community. JOHN HAGEL III & ARTHUR G. ARMSTRONG, *NET GAIN—EXPANDING MARKETS THROUGH VIRTUAL COMMUNITIES*, 8, 119-20 (1997); see also ALLEN ET AL., *supra* note 21, at 160 (“Online communities are based on the need for people to interact with others with shared interests and commonalities.”).

79. For advertisers, knowing a newsgroup's particular subject may identify that group as a likely pool of potential purchasers for their product or service. USAWEB & BRUNER, *supra* note 18, at 149-50.

80. AOL, for example, by early 1997 had 15,000 chat rooms for use by its subscribers covering a wide variety of topics. *Id.* at 166.

81. ALLEN ET AL., *supra* note 21, at 232. “[T]he Web could be considered a very large target market to some large advertisers. To many marketers, the online audience will be considered a segment of their total market. To other marketers, such as a business or publisher

The rapid growth of virtual communities will affect how vendors define and target their market audience. In their book *Net Gain*, John Hagel and Arthur Armstrong describe a "virtual community business model"<sup>82</sup> and argue that virtual communities will expand markets for goods and services by becoming the markets themselves. "Communities [redefine markets] . . . by *becoming* the markets . . . . The virtual community can . . . [present] the producer [of a good] with one physical set of customers that have already defined themselves as a group based on similar buying needs and interests."<sup>83</sup> Thus, virtual communities "serve as a meeting point for a critical mass of customers who are thereby put within reach of advertisers."<sup>84</sup>

Online auctions create robust commercial virtual communities for goods and services. At the end of 1998, eBay had 2.1 million registered users,<sup>85</sup> and, like Onsale, sold a significant amount of tangible goods, including computer hardware and software.<sup>86</sup> In fact, eBay refers to itself as "the

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that is *only* online, the Web audience will be their whole market." *Id.*

82. HAGEL & ARMSTRONG, *supra* note 78, at 8-9. Hagel and Armstrong posit that the "virtual community business model" has five defining elements: a distinctive focus, the capacity to integrate content and communication, an appreciation for member-generated content, access to competing publishers and vendors, and an increasingly commercial orientation. *Id.*

83. HAGEL & ARMSTRONG, *supra* note 78, at 206. Hagel and Armstrong argue that virtual communities will expand markets by becoming the market for several reasons. First, they suggest that vendors and customers will be able to find each other more easily because virtual communities aggregate relevant vendors and customers and provide information about these participants. *Id.* at 9-10. As such, virtual communities reduce transaction costs and help sellers and buyers to find each other more efficiently, thereby expanding demand. *Id.* Second, virtual communities will expand markets by providing a safe and engaging place to purchase goods and services. *Id.* at 11. Third, using data-gathering technology, virtual communities themselves will gather data about their members that can be sold by the community to advertisers and vendors with goods and services targeted to the profiles of the communities' members. *Id.*

84. HAGEL & ARMSTRONG, *supra* note 78, at 205; *see also* ALLEN ET AL., *supra* note 21, at 105.

We are now in the second phase [of the Web], which is characterized by the clustering of information and the need for users to identify themselves in order to receive enhanced value from the Web in the form of time savings and personalized communications. The second phase of the Web will be a place where online users gravitate to specialized online communities, super sites, channels and Web sites that *narrowcast* specific information to a segment of the online user population.

*Id.*

85. *eBay Form 10-K*, *supra* note 26, at 5.

86. eBay sold \$306.6 million in goods and services in the 4th quarter of 1998. Clark,

leading person-to-person auction community on the web!”<sup>87</sup> Through such devices as its chat room for “members of the eBay community” called “The eBay Cafe” where registered users can exchange messages on any topic, including their auctions,<sup>88</sup> eBay has built a “loyal, active community of users.”<sup>89</sup> One of eBay’s major goals is to “maintain a critical mass of frequent buyers and sellers with a vested interest in the eBay community so that sellers will continue to be attracted to the service by the large number of potential buyers and the buyers will be attracted to eBay by the large number of items listed by these sellers.”<sup>90</sup>

#### 4. Target Advertising

Beyond allowing online vendors of tangible goods to refine the worldwide population of online consumers into market segments, these vendors can precisely and efficiently deliver online target advertising to these segments.

The benefits of Web advertising include the ability to put the right message in front of the right audience at the right time, encouraging dialog with customers, taking advantage of one of the lowest costs available to provide hundreds of different messages to different audiences, and the ability to track, report and actually know if an online ad is successful.<sup>91</sup>

Because advertising plays a crucial role in an Article 9 foreclosure sale, I discuss in detail the types and methods of online advertising and their powerful ability to target identified market segments. Finally, I also review

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*supra* note 32. eBay stated that on June 2, 1998, it had 455,170 items for sale in 846 categories, and that over 12 million items had been for sale since eBay’s inception in September 1995. eBay also stated that as of June 2, 1998, 51,746,937 bids had been made since its inception and that bidders viewed over 8,000,000 “pages” on eBay’s site per day. *eBay* (visited June 2, 1998) <<http://www.pages.ebay.com/aw/index.html>> (photocopy of Web page on file with author).

87. *Id.*

88. *eBay* (visited June 2, 1998) <<http://www.ebay.com/aw-cgi/eBayISAP.dll?ViewBoard&name+cafe.html>> (photocopy of Web page on file with author).

89. *SEC Prospectus, supra* note 52, at 41.

90. *Id.* at 41-42. Similarly, Onsale states that its auctions build a sense of community. Onsale bidders can place brief comments with their bids that are displayed on the list of currently winning bids on each auction merchandise page. Onsale believes, “These comments, which generally are humorous, good-natured and in the spirit of competition, build a sense of community among our bidders.” *Onsale Form 10-K, supra* note 34, at 5.

91. ALLEN ET AL., *supra* note 21, at 225.

Onsale's and eBay's privacy policies governing use of information about users.

a. Methods and Types of Online Advertising

There are two paradigms of Internet advertising: passive or "pull-based" advertising and active or "push-based" advertising.<sup>92</sup> Under the pull-based paradigm, the vendor uses advertising that pulls the target audience to its Web site and products. Such advertisements are placed where potential customers will perceive it during other online activities, such as searching for information, shopping, or recreational Web surfing.

Two types of pull-based advertising widely used on the Web are the Web site itself and "banners."<sup>93</sup> A Web site is considered an effective form of advertising because it seamlessly advertises its products and facilitates the transaction.<sup>94</sup> Banners are cyberspace's interactive billboards which a company uses to advertise on, and hypertext link to, "affinity" Web sites that host users with interests related to the original Web site's product.<sup>95</sup> A company's banner on the related site thus simultaneously provides both advertising of its Web site and the means by which to reach it.<sup>96</sup> Advertisers can also post banners on one or more of the thousands of online magazines whose audience meets the advertisers target market. Finally, advertisers can place their banners with ad networks that, for a fee, allow an advertiser to build a media plan covering many Web sites geared towards the advertiser's

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92. RAVI KALAKOTA & ANDREW B. WHINSTON, *FRONTIERS OF ELECTRONIC COMMERCE* 488 (1996).

93. ALLEN ET AL., *supra* note 21, at 241. "Banners" or "billboards" are small "rectangular graphical images that carry advertising or promotional messages that link to other Web sites or pages." *Id.*

94. *See, e.g., id.* at 240; KALAKOTA & WHINSTON, *supra* note 92, at 493.

95. USAWEB & BRUNER, *supra* note 18, at 170. Web sites charge vendors for advertising according to the historical use of the Web site. Sites with a significant number of links and a high "traffic" of users charge more for advertisements since those advertisements will be viewed by a significant number of viewers.

96. USAWEB & BRUNER, *supra* note 18, at 170. "By its very definition, the Web encourages sites about related interests to point to each other, and indeed most sites maintain a collection of recommended destinations." *Id.* Cherished are "uber-links" to certain affinity Web sites "that have become leading resources within their audience groups, whether that's lawyers or computer gamers or Star Trek fans. They're the sites that everyone else in the field invariably links to, and where every Web surfer searching the topic quickly ends up." *Id.* at 173.

target audience.<sup>97</sup> Banners are considered effective pull-advertising media.<sup>98</sup>

To further drive customers to their Web sites, companies also “list” their Web site with large, commercial Web “search engines” and “directories” like Yahoo! and Excite.<sup>99</sup> For example, a consumer interested in online auctions of computers might find Onsale by searching “+online +auction +computer” and retrieve “hits” of hypertext links to online auctions. To increase the likelihood of catching a searcher’s attention, a Web auction site may pay search sites like Yahoo! and Excite so that its banner ads appears when a searcher uses such words, thereby distinguishing the Web site from what may be a large number of “hits.”

Under the active or “push-based” paradigm of advertising, the advertiser actively pushes the advertising to the consumer without requiring the customer to visit the advertiser’s Web site to retrieve the information. Online push advertising can be solicited or unsolicited.<sup>100</sup> For solicited advertisement on the Internet, the customer requests and receives information on selected topics and categories, which may include Web sites and banners carrying such information.<sup>101</sup> Advertisers can send e-mail broadcasts to persons who have consented to their inclusion on the mailing list. In contrast, bulk online junk e-mail, also known as “spam,” can be sent to many people without their consent and is a common form of unsolicited advertising.<sup>102</sup>

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97. ALLEN ET AL., *supra* note 21, at 244.

98. Millward Brown, a 20-year-old international advertising group, concluded, after surveying nearly 17,000 Web surfers’ reactions to 12 real ad banners on 12 leading Web sites, that after one viewing of a banner ad, Web surfers were on average 5% more aware of the brand and 4% more likely to purchase the product over a competitor’s product. USAWEB & BRUNER, *supra* note 18, at 277. To view a copy of the Millward Brown study, see *MBInteractive: IAB Study* (visited Jan. 4, 2000) <<http://www.mbinteractive.com/site/iab/study.html>>.

99. There are also hundreds of “specialty directories” that index Web sites falling into a particular topic. The Internet Auction List, for example, lists online and real world auction sites. See *Internet Auction List* (visited May 14, 1999) <<http://www.internetauctionlist.com>>.

100. STERNE, *supra* note 13, at 135.

101. This type of solicited push technology has not been hugely successful with consumers, due in part to the lack of a standard software application. USAWEB & BRUNER, *supra* note 18, at 209.

102. ALLEN ET AL., *supra* note 21, at 53. Spam advertisers use targeted mailing lists to reach specialized audiences which they obtain through internal compilation, purchase, or use of a bulk e-mail company. KALAKOTA & WHINSTON, *supra* note 92, at 490.



Onsale uses both pull and push advertising. To advertise its Web site, strengthen its brand name, and increase customer traffic, Onsale by the end of 1997 had placed banners and other links on about 1,000 affinity sites.<sup>103</sup> As of the end of 1998, Onsale's "Steals & Deals" e-mail mailing list had 697,000 registered customers. Onsale sends these customers e-mail notice of products posted in upcoming auctions.<sup>104</sup> Users are automatically subscribed to the e-mail list, but may remove their names.<sup>105</sup> Further, with Onsale's "MyDeals" feature, users can create personal profiles of particular products in which they are interested, such as "Desktops," and "Printers," and Onsale will send "customized" e-mails announcing relevant auctions.<sup>106</sup>

Similarly, eBay uses pull and push advertising, including e-mail broadcasts to users delivering banner advertisements of upcoming auctions.<sup>107</sup> Users can opt-out of the mailing list.

#### b. Targeted Advertisements

Where the relevant online market segment is identifiable, "target marketing"<sup>108</sup> through these types of online advertising media is a powerful, efficient, and, in some respects, a unique means by which to reach just that

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103. 1997 Onsale Form 10-K, *supra* note 51, at 8.

104. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.com/click/ss.html>> (photocopy of Web page on file with author); *see also* Peter D. Henig, *Onsale Expands One Person at a Time* (visited Jan. 22, 2000) <<http://redherring.com/insider/1998/0917/onsl.html>>.

105. Jerry Kaplan, *Onsale Privacy Policy* (visited May 8, 1999) <<http://www.onsale.com/howto/privacy.html>> (photocopy of Web page on file with author); *see also* 1997 Onsale Form 10-K, *supra* note 34, at 8; Henig, *supra* note 104, at 1.

106. Jerry Kaplan, *Onsale* (visited May 8, 1999) <<http://www.onsale.m0.net/m/onsl/profile.asp.html>> (photocopy of Web page on file with author).

107. *eBay—Cookies (not the Chocolate Chip kind . . .)* (visited Jan. 4, 2000) <<http://www.pages.ebay.com/aw/cookies-reg.html>>. Such information allows eBay to: tailor advertising to suit your interest. Two ad serving companies that eBay employs, Link Exchange and DoubleClick, use cookies. These cookies help these companies limit how many times they serve you the same ad. And, while they don't know who you are (eBay does not provide any information about you as an individual to advertisers) they can measure what type of ads you tend to respond to, based on the cookie.

*Id.*

108. Target marketing is "[o]ne-to-many or one-to-few communications with specialization of message and medium for each identified segment of the whole market." ALLEN ET AL., *supra* note 21, at 234.

specific audience.<sup>109</sup> For example, through consensual e-mail broadcasts like Onsale's "Steals & Deals" and/or nonconsensual spam, advertisers can swiftly and cheaply contact literally thousands of people in a targeted market segment.<sup>110</sup> Well-placed banners on affinity sites populated with persons known to have an interest in the originating site's goods and services can also be effective.<sup>111</sup> Local geographical markets can even be targeted.<sup>112</sup> Comparing traditional types of advertising to online advertising, one online marketer explained "[t]elevision lets you advertise to tens of millions of people watching Seinfeld and Friends and ER. But magazines let you chase after a specific type of consumer, a specific type of prospect . . . . The targeting that magazines give you over television is nothing compared to the targeting the Web gives you over magazines."<sup>113</sup> Furthermore, whereas a newspaper advertisement, for example, may appear once or twice

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109. Online advertising offers direct marketers substantial advantages over traditional telemarketing and mailing campaigns, chiefly in terms of keen targeting and cost savings. [A direct marketer] can increasingly target banner ads to Web surfers by using the same demographic data used in traditional direct marketing—ZIP code, age, gender, income, and education, as well as shopping history and other known factors. [He] can further layer other targeting criteria on top of these demographics, such as editorial affiliation, time of day, and immediate user behaviors (for example, intercepting users as they search topical keywords or browse shopping directories).

USAWEB & BRUNER, *supra* note 18, at 283.

110. Very focused advertising is called "one-to-one marketing" which is defined as: [o]ne-to-few or one-to-one communications with individualized message and medium for each highly targeted market or individual customer. For example, a personalized e-mail advertising message with content geared to that individual's stated preferences, or by other targeting criteria such as browser type, computer type, geographic area, prior interactions or transactions, demographic data, or lifestyle data.

ALLEN ET AL., *supra* note 21, at 234. Online advertising is especially suited for one-to-one advertising. *Id.*

111. An example is Ford Motor Company's sport utility vehicle advertisement in *The Ladies Home Journal* with images and copy geared to women's needs for this type of vehicle. *Id.*

112. "Many marketers are realizing the World Wide Web can be used effectively for very local marketing. Local Web services . . . are a fast growing Web trend." USAWEB & BRUNER, *supra* note 18, at 323. Using the highly-specific demographic data generated by the interactive use of the Internet, companies can target users fitting the geographic demographics of a potential buyer, such as ZIP code. There is even an organization called *The Internet Local Advertising & Commerce Association*, see *The Kelsey Group* (visited Jan. 4, 2000) <<http://www.kelseygroup.com>>, that promotes and facilitates local Internet advertising. See also ALLEN ET AL., *supra* note 21, at 364.

113. STERNE, *supra* note 13, at 37.

in the morning edition of a local newspaper, online advertisements like banners exist twenty-four hours a day, seven days a week. By targeting the specific market segment and continuous delivery over the Internet, online advertising can efficiently reach the appropriate audience, "in sharp contrast to traditional mass marketing where the target audience is constantly exposed to advertisements in which they have no interest."<sup>114</sup>

Online advertising can, however, be used for "mass marketing" to a large, amorphous, non-segmented audience.<sup>115</sup> Where an advertiser wants to advertise a sale to such a group, the advertisement needs to have significant "reach."<sup>116</sup> Significant reach to a large number of unidentified online users can be achieved through placing online advertisements on popular Web sites that have heavy traffic such as Yahoo! and Playboy.<sup>117</sup> Further, newspapers, a traditional medium for mass advertising, are increasingly going online. Many local, regional, and national newspapers have created their own Web sites.<sup>118</sup>

What online audience will likely see Onsale's advertising? I will call the persons receiving Onsale's "Steals & Deals" and "MyDeals" e-mail push advertising "focused bidders." With respect to Onsale's pull advertising (Web page and banners), imagine two likely types of consumers. The first is a person not specifically looking for information about auctions generally or certain goods specifically. Rather, at any moment in time, this person may stumble across Onsale's Web site or banners while surfing the Internet for other purposes. Cyberspace culture encourages "surfing the Net" by exploring the cyberspace world with or without the motivation of buying a particular product.<sup>119</sup> Even the casual Internet surfer may come across an

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114. KALAKOTA & WHINSTON, *supra* note 92, at 492.

115. Mass marketing is "[o]ne-to-all or one-to-many communications without specialization of message or medium. For example, a company image advertisement in *Life* magazine." ALLEN ET AL., *supra* note 21, at 234.

116. Two basic measurements of an advertisement are its "reach" and its "frequency." "Reach is how many people see your ad and frequency is how often . . . 1,000 impressions to the same guy is very different from one impression to 1000 people." STERNE, *supra* note 13, at 173; *see also id.* at 272. "Impression" means "[t]he Opportunity To See (OTS) a banner by a surfer. When a page that includes a banner is viewed, it is considered an impression, much like a billboard on the highway." *Id.* at 408.

117. *Id.* at 233.

118. *Id.* at 201 ("Just about every newspaper in the world has . . . built some kind of Web site.").

119. On the Web, "there is a lot of aimless wandering going on . . . [Users] . . . may stumble upon your Web site (which happens a lot on the Web)." ALLEN ET AL., *supra* note 21, at 20.

online auction like Onsale and decide to bid or return at a later date.<sup>120</sup> The likelihood of this occurring would increase with the length of the auction's open period; the longer the period, the longer the window to serendipitously stumble in. I will call these persons "serendipitous bidders" because the serendipitous nature of this advertising is similar to traditional mass marketing advertising media, like local newspapers or billboards. In the real world, the casual newspaper reader or car driver will see or hear advertising for an auction without deliberately looking for the advertised sale and its goods.<sup>121</sup>

The second type of person who may respond to Onsale's pull advertising efforts is one deliberately searching for information about auctions and/or specific goods for sale. I will call this person a "deliberate bidder." Online, the deliberate bidder would use Excite, Yahoo!, or other search engines and directories to locate the desired information. In the real world, she would passively consume newspapers, radio, television, and the scenery (billboards), but would also take an active role in researching auctions and/or particular types of goods for sale. Thus, she probably would use more focused types of informational mediums such as trade journals or information brokers (e.g., stock or real estate brokers), depending on the nature of the good sought.

### c. Privacy

Both Onsale and eBay have privacy policies governing the use and disclosure of user information. With respect to its privacy practices for its Web site and e-mail system, Onsale states that users are identified online only by their initials, city, and state and that no "personal identifying information is displayed online or is accessible to the general public."<sup>122</sup> Onsale says that it does not reveal a user's e-mail address or other personal

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120. Testimonies from Onsale users suggest that stumbling onto Onsale's site does occur. "'I'm sure glad I stumbled onto your service. You saved me hundreds off retail prices! Thanks for the prompt service and low-low prices!'"—John Tomasetti, Japan." Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/aboutus/testimon.html>> (photocopy of Web page on file with author). "'Ever since I stumbled upon your site one day I have been totally hooked! I have bought a few things and find it to be some of the best deals on equipment that I have ever seen! Keep up the good work!'"—Derek Serianni, Ontario, Canada." *Id.* "'I am thankful that I stumbled onto this site. I saved hundreds in buying a laser printer to meet my needs.'"—Pete Majeranowski, New York." *Id.*

121. ZEFF & ARONSON, *supra* note 52, at 10-11.

122. Jerry Kaplan, *Onsale Privacy Policy* (visited May 8, 1999) <<http://www.onsale.com/howto/privacy.html>> (photocopy of Web page on file with author).

information, except to complete transactions with third party vendors or buyers/sellers. Nor does Onsale sell or rent its customer information to any "outside party."<sup>123</sup> With auctions involving third parties, Onsale says that it provides only the information required to complete the transaction and that the third party is contractually prohibited from selling, renting, or sharing this information.<sup>124</sup>

Onsale states that it discloses "aggregated" user information to advertisers. However, it does not disclose to "these entities" any personal information that could be used to personally identify a user, such as a user's name, customer number, password, credit card number, or transaction history. Also, Onsale posts on its Web site and discloses in its SEC documents certain user demographics and goods/price information and targets users on its "Steals & Deals" and "MyDeals" e-mail lists with advertisements of upcoming auctions.<sup>125</sup>

eBay also states that it does not sell or rent any "personally identifiable information" about users to any third party.<sup>126</sup> However, like Onsale, eBay aggregates personally identifiable information and discloses it in the aggregate to advertisers and for other marketing and promotional purposes. eBay says that it does not disclose to these entities any information that could be used to personally identify any particular user and certain information, such as passwords and credit card numbers, is not disclosed in the aggregate at all.<sup>127</sup> eBay also states that it internally uses personally identifiable information to improve its marketing and promotional efforts, to statistically analyze site usage, to improve its content and product offerings, and to customize its site's content and layout.<sup>128</sup> For example, eBay uses personally identifiable user information to deliver targeted banners and promotions to users that, in some cases, are tailored to the users' known interests. By accepting eBay's "User Agreement," users consent to such use and disclosure of their personally identifiable information.<sup>129</sup>

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123. *Id.*

124. *Id.*

125. *Id.*

126. *eBay—Privacy Policy* (visited May 12, 1999) <<http://www.pages.ebay.com/aw/privacy-policy-reg.html>> (photocopy of Web page on file with author).

127. *Id.*

128. *Id.*

129. *Id.*

## 5. Low Costs

Web communication (and other types of Internet communication) is relatively inexpensive compared to other forms of mass communication.<sup>130</sup> Electronic commerce between businesses is being driven by lower purchasing costs for services and materials, reductions in inventories and attendant operating costs, lower cycle times to build new products, more effective and efficient customer service (through online product descriptions, technical support, and order status information), lower sales and marketing costs, and new sales opportunities by operating world wide, twenty-four hours a day.<sup>131</sup> Virtual stores report lower operating costs than their real-world counterparts by limiting their operations to site content, marketing and advertising, creating relationships with manufacturers or distributors, accounting functions, and customer service. Without a physical store, there is no rent and depreciation, store employees, or utilities. Internet stores, including online auctions, may not even take possession of the merchandise being sold; leaving warehousing, payment, and distribution to third parties.<sup>132</sup>

eBay, for example, states that it is a cost-effective and convenient trading model.<sup>133</sup> eBay carries no inventory, and it allows sellers to bypass traditionally expensive, regionally fragmented intermediaries, thus permitting lower selling costs and increasing a seller's chances of finding a buyer.

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130. *ACLU v. Reno*, 929 F. Supp. 824, 843 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

Such diversity of content on the Internet is possible because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines.

*Id.*

131. *Digital Economy*, *supra* note 1, at 13-15, app. A3-1 to A3-6; *see also* USAWEB & BRUNER, *supra* note 18, at 283 (stating online direct marketing is less expensive than traditional direct marketing due to lower costs for acquiring a customer base and sending repeat e-mails).

132. *Digital Economy*, *supra* note 1, at app. A5-5. To the extent a secured party requires a third-party to store collateral after repossession and through its sale, an online auction lacking a physical warehouse would be unattractive. I do not discuss this issue further.

133. *SEC Prospectus*, *supra* note 52, at 41.

As a result, sellers for the first time can sell relatively inexpensive items which had previously been prohibitively expensive to list through traditional trading forums. By allowing sellers to conveniently reach a broad range of buyers, eBay also ameliorates the time-consuming, logistical inconvenience of individual selling. Buyers have access to a broad selection of items and avoid the need to pay expensive markups or commissions to intermediaries.<sup>134</sup>

### *E. Limitations to Selling Goods on the Internet*

There are a host of significant existing and potential inhibitors to the widespread growth of electronic commerce Web sites, including online auctions. This Article addresses the legal barriers Article 9 poses, but other significant ones exist.<sup>135</sup> There are technological limitations such as low amounts of bandwidth, slow modems, and relatively high PC prices; although these barriers are eroding as telephone companies, satellite companies, cable service providers, and others are building the Internet structure out and as PCs and software prices fall annually.<sup>136</sup> Electronic commerce also raises concerns about future taxation and the security and privacy of electronic credit card transactions and personal information transmitted over the Internet.<sup>137</sup> Consumer reluctance to provide credit card information, for example, is a known barrier to Internet retail sales. Also, privacy concerns over personal information is a significant reason consumers do not use the Internet.<sup>138</sup> Web prognosticators and retailers believe that, as people become more accustomed to buying online and using their credit cards to pay, these barriers will erode. Technological solutions

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134. *Id.*

135. With respect to online auctions, regulatory issues exist. Many states have statutes governing real-world auctions, requiring that auctioneers be licensed and the auction be licensed with local authorities. Online auctions may have to comply with these regulations, a potentially complicated and extensive problem because online bidders may reside in a multitude of different states with different regulations. *Digital Economy*, *supra* note 1, at app. A5 to A8.

136. *Id.* at 9-10, app. A2-12 to A2-16; *see also* MILLSTEIN ET AL., *supra* note 8, § 9.01, § 10.01.

137. *Digital Economy*, *supra* note 1, at 3, 37-39, app. A2-7 to A2-8, A5-7 to A5-8; *see also* MILLSTEIN ET AL., *supra* note 8, § 10.01.

138. *Digital Economy*, *supra* note 1, at 3, app. A2-7 to A2-8, A5-7 to A5-8; *see also* MILLSTEIN ET AL., *supra* note 8, § 10.01.

such as smart cards, digital cash, and encryption will also increase security.<sup>139</sup>

Consumer confidence in relying on “virtual” computer images and products’ descriptions to determine the quality of a product, as well as the process of returning defective or unwanted goods, pose additional serious business challenges.<sup>140</sup> Online fraud, in particular on cyberspace auctions, poses problems that online vendors like eBay are trying to solve through a variety of technological and legal methods.<sup>141</sup> Because these are all potential limitations to electronic commerce, they also raise concerns about the future of using online auctions to sell goods generally, and, thus, repossessed collateral specifically. While I shall periodically mention these and other limitations, each has complex technological, legal, and social origins and solutions, and their full treatment is beyond the scope of this Article.

## II. ARE ONLINE AUCTIONS PUBLIC OR PRIVATE SALES?

A secured lender and/or his debtor may want to sell repossessed collateral through a cyberspace auction because of the Web’s interactive, multimedia nature, its relatively low cost, and its tremendously large, worldwide consumer audience segmentable and targetable through online advertising. While no auction Web sites I reviewed appear to sell repossessed collateral, several sites do sell distressed goods.<sup>142</sup> This

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139. *Digital Economy*, *supra* note 1, at 3, app. A2-7 to A2-8, A5-7 to A5-8.

140. *Id.* at 37-39. At the end of 1998, Onsale stated that “critical issues concerning the commercial use of the Internet, such as ease of access, security, reliability, cost and quality of service, remain unresolved and may affect the growth of Internet use or the attractiveness of conducting commerce online.” *Onsale Form 10-K*, *supra* note 34, at 29. *See generally* “Risk Factors” in *id.* at 22-30.

141. *Bensinger*, *supra* note 2, at W1. eBay has created a “feedback forum” where each registered user has a public trading profile where other users can record positive or negative comments. Each registered user is thus rated according to this information. Users who develop positive reputations over time are given star symbols displayed next to their user name. Before bidding on, paying for, or sending an item, users can check the profile. Users with sufficiently negative net feedback are suspended from using eBay. *eBay Form 10-K*, *supra* note 26, at 9-10.

142. *See Spottrader.com* (visited Jan. 22, 2000) <<http://www.spottrader.com>> (“a New Business to Business Online Auction specializing in Grocery items. Sellers should include Manufacturers, Distributors and Wholesalers who have distressed merchandise which needs to be liquidated”); *USAuctions* (visited Jan. 22, 2000) <<http://www.usauctions.com>> (“a real time interactive online Auction house. Specializing in Liquidations and surplus computer equipment.”); *Auction.Net* (visited Jan. 22, 2000) <<http://www.auction.net/electronic>>



suggests that apart from Article 9's legal constraints, the sale of repossessed collateral could technologically and profitably occur through an online auction.

The balance of the Article explores Article 9's legal constraints to such online auctions. To ground the discussion, consider the following hypothetical to which we shall return throughout the Article. Big Bank has lawfully repossessed Debtor's inventory of five new computers and Debtor's company car, a 1989 Toyota MR2 (in good condition with 110,000 miles). Big Bank decides to use Onsale to sell the computers and the MR2.<sup>143</sup> Big Bank familiarizes itself with the Onsale process by visiting its Web site and decides to use fourteen-day Yankee Auctions with a minimum bid of \$1,000 for each of the computers and \$3,000 for the car.

Before opening auction merchandise pages for the collateral and thereby making it available for sale, Big Bank must provide the Debtor with the proper statutory notice of sale.<sup>144</sup> The contents of proper notice differ depending upon the characterization of the sale as "private" or "public;"<sup>145</sup> if a secured creditor mischaracterizes the sale and sends improper notice, the sale typically will be found commercially unreasonable, thus impairing the secured party's recovery of a deficiency judgment against the debtor.<sup>146</sup>

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("Marketplace for wholesale inventory"). Each of these sites can be accessed through hypertext links on *The Internet Auction List* (visited Jan. 22, 2000) <<http://www.internetauctionlist.com>>.

143. Professor Ronald Mann's empirical study indicates that automobiles and consumer goods are the most frequently repossessed goods. Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 227-30 (1997). Although the computers are "inventory" in the Debtor's hands, they are a good frequently sold online to consumers and, therefore, are a useful example.

144. Section 9-504(3) states, in relevant part:

unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale . . . .

U.C.C. § 9-504(3) (1995). Under Article 9's revisions, the notice provisions of section 9-504(3) in substance are being replaced by certain subsections of sections 9-611, 612, and 613. THE NEW ARTICLE 9, *supra* note 7, at 361.

145. U.C.C. § 9-504(3) (1995). "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts." *Id.*; see THE NEW ARTICLE 9, *supra* note 7, § 9-610(b).

146. See, e.g., *Ford Motor Credit Co. v. Solway*, 825 F.2d 1213, 1217-18 (7th. Cir. 1987); *General Elec. Credit Auto Lease, Inc. v. Paty*, 776 S.W.2d 829, 831 (Ark. Ct. App. 1989). A deficiency occurs where, after deducting reasonable sale expenses, the money

Thus, at the outset, Big Bank must know whether an Onsale auction is a public or private sale under Article 9.

Another significant reason that a secured party *ex ante* needs to accurately characterize the sale is that, at a public sale, she is free to purchase the collateral. In contrast, a secured party may purchase her collateral in a private sale *only* if it is of the type customarily sold on a recognized market or the type that is the subject of widely-distributed standard price quotations.<sup>147</sup> Professor Gilmore explained the reason for this difference: if a dishonest or aggressive secured creditor were allowed to purchase at a private sale, he could attempt to depress the collateral's selling price by manipulating the time and place of sale, and the number and quality of bidders.<sup>148</sup> Not only could this unscrupulous secured creditor purchase the collateral below its fair price, but he might also have the right to seek a deficiency judgment against the debtor! In Gilmore's words, such a creditor could abuse its "peculiar advantages over other possible purchasers."<sup>149</sup> In contrast, at a public sale to which the public is invited and at which the attendees enjoy the opportunity to bid competitively for the collateral, such abuses would be curtailed (or at least made less likely). The result should be a fair price for the collateral.<sup>150</sup> It is therefore extremely important that the

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received from the collateral's sale is not enough to cover the obligations owed by the debtor to the secured creditor. Debtors frequently argue that the deficiency occurred (or was greater than it otherwise would have been) because the sale was conducted in a commercially unreasonable manner, and thus the secured creditor should be barred from collecting the deficiency. The secured party's failure to execute a commercially reasonable disposition may, depending on the jurisdiction, impair or absolutely bar a deficiency judgment. *See, e.g.*, C.I.T. Corp. v. Anwright Corp., 191 Cal. App. 3d 1420, 1425 (1987) (employing absolute bar rule); Gulf Homes, Inc. v. Goubeaux, 664 P.2d 183, 186 (Ariz. 1983) (employing set-off rule); State Bank v. Hansen, 302 N.W.2d 760, 768 (N.D. 1981) (employing rebuttable presumption rule). The revised Article 9 codifies the rebuttable presumption rule for transactions other than consumer transactions. THE NEW ARTICLE 9, *supra* note 7, at 385, § 9-626(a).

147. U.C.C. § 9-504(3) (1995). *See* THE NEW ARTICLE 9, *supra* note 7, at 361, § 9-610(c).

148. 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.6, at 1241 (1965).

149. *Id.*

150. *See id.*; *see also infra* notes 161-63 and accompanying text. To be sure, Professor Gilmore rightly questioned the presumption that public auctions resulted in competitive bidding and fair prices. 2 GILMORE, *supra* note 148, § 44.6, at 1241. And in fact, many public auctions have miserable turn-outs and fetch below market values for the collateral. *See infra* notes 206-209 and accompanying text.

secured creditor be able to correctly characterize the sale as public or private.<sup>151</sup>

Unfortunately for Big Bank, the terms "public" and "private" sale are not defined in the Code, and the task has fallen to the courts.<sup>152</sup> Because the requirements for a public sale are more restrictive than those for a private sale, courts typically first make their determination as to whether a sale was public, and so shall I. Generally, the most salient criteria of a public sale are: (i) whether the sale offered the public the opportunity to competitively bid, a public auction being the desired, if not necessary, format for such an opportunity; (ii) whether there was notice and advertising prior to the sale notifying and inviting the relevant public of the sale and providing its time, place, and the collateral to be sold; and (iii) whether the public had access to the place of sale and the collateral.<sup>153</sup> Each of these criteria is necessary, but not sufficient, to effecting a proper public sale; all must be satisfied, or the sale will necessarily be deemed private.<sup>154</sup> Part II measures Onsale's auctions against the first criteria. I defer until Part III the subject of the

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151. A sale's characterization is also significant because depending on the nature and type of collateral, the public sale format may be more or less reasonable than a private sale format. The secured party's choice of format is subject to a "commercial reasonableness standard." See *infra* note 246 and accompanying text.

152. The Code does offer some inexact guidance. Comment 1 to section 9-504 cross-references section 2-706 for guidance in defining the nature of the sale. U.C.C. § 9-504 cmt. 1 (1972). Comment 4 to section 2-706 states that "[b]y 'public sale' is meant a sale by auction." *Id.* § 2-706 cmt. 4. Comment 4 further describes a private sale as one "effected by solicitation and negotiation conducted either directly or through a broker." *Id.* Additionally, the Official Comment 1 to section 9-504 speaks of "private sale through commercial channels." *Id.* § 9-504 cmt. 1.

153. See *Pioneer Dodge Ctr., Inc. v. Glaubensklee*, 649 P.2d 28, 31 (Utah 1982) (quoting *In re Webb*, 17 U.C.C. Rep. Serv. 627, 630 (S.D. Ohio 1975) ("A public sale has traditionally meant 'a sale in which the public, upon proper notice, is invited to participate and given full opportunity to bid upon a competitive basis for the property placed on sale, which is sold to the highest bidder.'")); see also *Lloyd's Plan, Inc. v. Brown*, 268 N.W. 2d 192, 195 (Iowa 1978); *Liberty Nat'l Bank v. Grenier*, 405 N.E.2d 317, 321 (Ohio Ct. App. 1978). Professor Gilmore's articulation: "Presumably the essence of a 'public sale' is that the relevant public is not only invited to attend but is also informed, by whatever means of publicity may be appropriate, when and where the sale is to be held." 2 GILMORE, *supra* note 148, § 44.6, at 1242. In contrast, "[a] private sale . . . is not open to the general public, usually does not occur at a pre-appointed time and place, and may or may not be generally advertised." JAMES S. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 25.10, at 922-23 (Hornbook series, 4th ed. 1995).

154. CHRISTINE A. FERRIS & BENNETT H. GOLDSTEIN, DISPOSITION OF REPOSSESSED COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE § 2.2, at 12 (1990) ("The private sale is defined, by default, as any sale other than a public auction.").

appropriateness or commercial reasonableness of online advertising generally and Onsale's advertising specifically. Although the third criteria may raise some interesting questions in cyberspace, I do not examine it further as Onsale, eBay, and Yahoo!Auctions, I believe, are sufficiently accessible.<sup>155</sup>

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155. The courts have applied the access requirement quite literally: no one can be excluded from a public sale; otherwise it is a private sale. *See, e.g.,* John Deery Motors, Inc. v. Steinbronn, 383 N.W.2d 553, 555 (Iowa 1986) (holding that the sale of a repossessed automobile at an auction at which there was competitive bidding but was open only to licensed automobile dealers constituted a private sale, reasoning that the dictionary defines a "public" sale as one that is accessible to, or shared by, all members of the community, while "private" refers to something intended for, or restricted to, the use of a particular person or group or class, and thus the dealers-only auction was not public in character since it was not open to the general public); *Garden Nat'l Bank v. Cada*, 738 P.2d 429, 432 (Kan. 1987); *Morrell Employees Credit Union v. Uselton*, 28 U.C.C. Rep. Serv. 269, 274 (Tenn. Ct. App. 1979). Online auctions, however, may be intentionally restricted to paying subscribers or accessible only to a closed set of people (e.g. dealers). In such cases, is the access requirement violated? What if the restricted group is AOL's 13 million subscribers? Can we say that the "public" does not have access? *See* WHITE & SUMMERS, *supra* note 153, at 435 ("Because we think a dealer's auction fulfills all of the purposes to be achieved by a 'public' sale, we believe it should be classified as public."). Are Article 9's purposes for requiring access to the general public (protection of the debtor from the unscrupulous secured party and realization of a high price for the collateral) not met by AOL's 13 million strong? I do not examine these questions further as Onsale, eBay, and Yahoo!Auctions do not impose subscription fees or otherwise intentionally restrict access. Online auctions may also raise unintentional restrictions to access. Most simply, not everyone has a PC with Internet capabilities. While the number of online users is steadily increasing, it is possible, if not likely, that many people interested in the collateral will not have easy Internet access and thus will not be able to "attend" the online auction. One of the Clinton Administration's goals is to facilitate universal Internet access by all segments of the population, including schools, public libraries, hospitals, and poor and rural areas. *Digital Economy*, *supra* note 1, at app. A2 to A10. More subtly, online auctions may be too technical and complicated for neophyte Internet users to understand or operate on a computer. This is what Ethan Katsh describes as "informational distance," where the medium people use to communicate, rather than the complexity of the information communicated, hinders that communication. M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 59 (1995). As explored in Part I, to participate in an online auction, a bidder must understand, at minimum, how to use the Internet. She must be familiar with the basic functions of a PC and a browser program, such as Netscape, to access the requisite online Web site. Moreover, the bidder must be able to interact with the particular procedures of the desired online auction. Onsale and eBay have tutorial programs that, in relatively simple terms, walk a new user through the registration and auction process. Further, Onsale's customer testimonies suggest that its online auction process is not inherently distancing. While perhaps not representative of the general public, these Onsale users refer to Onsale's auctions as "intuitive," "simple and straightforward," and "easy to access." *Onsale* (visited June 4, 1998) <<http://www.onsale.com/testimon.html>> (photocopy of Web page on file with

Although not specified in section 9-504(3), the Code drafters and most courts consider a public auction with an opportunity to bid competitively the preferred format for a public sale.<sup>156</sup> For example, in *Boatmen's National Bank v. Eidson*, the Missouri Court of Appeals of the Southern District found that a foreclosure sale of farm machinery was not an auction where it was made to the highest bidder under sealed bids solicited by newspaper advertisements that provided the address to which the written sealed bids were to be mailed.<sup>157</sup> The ads also provided the date and place the bids were to be opened. Eighty-two bids were received, and the highest bidder was awarded the sale. Citing the requirements of sections 9-504(3) and 2-706, the court stated that "[b]y 'public sale' is meant a sale by auction."<sup>158</sup> The court found that the sale was not an auction, reasoning that "[c]ompetitive bidding refers to the basic concept of an auction, that is, knowledge of the highest bid with an opportunity to bid higher."<sup>159</sup> The sale thus was not an auction because it was "effected by solicitation to the same extent as if offers to purchase had been made as the result of telephone solicitation or the items were sitting on [the secured party's] parking lot bearing a 'for sale' sign."<sup>160</sup>

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author). Even a "nervous" buyer successfully navigated the bidding process. *Id.* At least under Onsale's auction format and procedures, it appears that some users encounter little informational distance between themselves and the auction.

156. See *Beard v. Ford Motor Credit Co.*, 850 S.W.2d 23, 27 (Ark. Ct. App. 1993) (quoting 9 RONALD A. ANDERSON, UNIFORM COMM. CODE, § 9-504: 32, at 733 (3d ed. 1985)) (stating that "[a] sale of collateral is 'public' when it is publicly advertised, the sale is open to the public, and the sale is made, after competitive bidding, to the highest genuine bidder; as at an auction"); *Morrell Employees Credit Union*, 28 U.C.C. Rep. Serv. at 273 (quoting RESTATEMENT OF SECURITY § 48 cmt. c, at 139-40 (1941)) (stating that a public sale "is one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold."). Professor Hogan argues that a "'public sale' may be equated with a 'public auction.'" William E. Hogan, *The Secured Party and Default Proceedings Under the U.C.C.*, 47 MINN. L. REV. 205, 227 & n.104 (1962). Professor Gilmore suggests that although the drafters did not mean to make an auction the exclusive method of public sale, a secured party desiring the sale to be characterized as public should "observe auction formalities." 2 GILMORE, *supra* note 148, § 44.6, at 1242-43. Auctions with restricted access have been deemed private sales. See *supra* note 155.

157. See *Boatmen's Nat'l Bank v. Eidson*, 796 S.W.2d 920, 922-23 (Mo. Ct. App. 1990).

158. *Id.* at 923 (quoting U.C.C. § 2-706 cmt. 4).

159. *Id.* (citing *Shields v. Bobby Murray Chevrolet, Inc.*, 261 S.E.2d 238 (N.C. Ct. App. 1980)).

160. *Id.* at 923.

*Boatmen's* reveals a fundamental reason why the auction format is preferred for effecting a public sale: it fosters, or at least offers the opportunity for, competitive bidding.<sup>161</sup> As the *Boatmen's* court stated, a defining attribute of an Article 9 auction is that all participants know of the highest bid and are able to make a counter offer.<sup>162</sup> This, in turn, deters the unscrupulous secured creditor from abusing his "peculiar advantages" at the expense of the debtor and other bidders and allows unfettered competitive bidding. As Professor Gilmore suggested, by raising a "lively concourse of bidders," a well-publicized auction is the preferred format for a public sale because it is the forum best suited to guarantee competitive bidding.<sup>163</sup> Competitive bidding should then drive up the collateral's price to its fair market value.

As to the opportunity to bid requirement, whether cyberspace auctions constitute public sales raises the question of whether online auctions are acceptable "auctions" under Article 9. That is, are online auctions sufficiently similar in theory and procedure to acceptable real-world auctions that they may be characterized for purposes of the "public sale" requirement as "auctions," which provide an opportunity to engage in competitive bidding? I believe that Onsale's Yankee Auction format, in both

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161. See also *Beard*, 850 S.W.2d at 27 (quoting 9 ANDERSON, § 9-504: 32, at 723) ("[T]he opportunity to bid at the sale is the essential criterion that determines that the sale is a public sale.").

162. See *Boatmen's*, 796 S.W.2d at 923; see also *In re Bishop*, 11 U.C.C Rep. Serv. 1071, 1076 (Bankr. W.D. Va. 1972) (quoting BENDERS UNIF. COMM. CODE SERV., SECURED TRANSACTIONS § 8.04, at 884 n.5) ("The concept of 'public sale' may be equated with 'public auction' so that there may be a requirement that the prospective purchasers must know of other bids and be permitted to raise their bids."); RALPH CASSADY JR., AUCTIONS AND AUCTIONEERING 152 (1967) ("Knowledge of the bidding level is an integral part of the English auction system, and it is the auctioneer's function to announce each bid so that the assembled buyers can proceed from that point."). But see *Bank of America v. Lallana*, 960 P.2d 1133, 1140 (Cal. 1998) (arguing that the *Boatmen's* court "erred in stating that competitive bidding requires 'knowledge of the highest bid with an opportunity to bid higher.'" "The use of sealed bids, which are those submitted without knowledge of what others have bid, is a competitive process . . .") (citations omitted).

163. See 2 GILMORE, *supra* note 148, § 44.6, at 1242-43. Presumably, the "lively concourse of bidders" fetches a fair market price for the collateral. See, e.g., *Villella Enters., Inc. v. Young*, 766 P.2d 293, 297 (N.M. 1988) (quoting *Foster v. Knutson*, 527 P.2d 1108, 1114 (Wash. 1974) (en banc)) (publicity is to assure that "the collateral will bring the best possible price from competitive bidding of a strived-for lively concourse of bidders."); see also CASSADY, *supra* note 162, at 85 ("One of the most important tactical factors in the success of an auction sale is the development of lively bidding at the beginning of the sale.").

theory and practice, is an "auction" as traditionally defined and provides the requisite opportunity for competitive bidding.

Generally described, an auction "is a market institution with an explicit set of rules determining resource allocation and prices on the basis of bids from the market participants."<sup>164</sup> Three basic auction types are: English, Dutch, and "first-price sealed bid."<sup>165</sup> The English auction employs an ascending-bid selling scheme where the auctioneer seeks an initial bid from the group of potential buyers expecting that those bidders who are interested in the item for sale will bid competitively against each other until all but the highest bidder is eliminated.<sup>166</sup> Thus, the price of the auctioned item begins at a lowest acceptable price (the reserve price if one is made by the seller), and is raised in successive increments until one bidder remains.<sup>167</sup> Increments can be fixed in amount, vary according to price level, or be set by the auctioneer's discretion.<sup>168</sup> The initial bid and each successive bid is displayed for all participants to see.<sup>169</sup> The auctioneer may conduct the process of raising and displaying the bids by open-outcry by the bidders or through electronic means with the highest bid publicly displayed. In any event, all bidders are always aware of the highest existing bid and can update their bids in response.<sup>170</sup>

The English-type auction seems the paradigmatic Article 9 format because it provides bidders, with knowledge of the highest bid, the further opportunity to bid higher and fosters keen competition.<sup>171</sup> In fact, the

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164. R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LIT. 699, 701 (1987); see also CASSADY, *supra* note 162, at 8 ("Basically, auctioning is a unique system of allocating scarce chattels or other property based on price making by competition of buyers for the right to purchase."). Auction theory is a complex matter, and I offer only a superficial description of auction types and theory. For detailed examinations, see generally McAfee & McMillan, *supra*; Paul Milgrom, *Auctions and Bidding: A Primer*, 3 J. ECON. PERSP. 3 (1989).

165. McAfee & McMillan, *supra* note 164, at 702; Milgrom, *supra* note 164, at 10.

166. McAfee & McMillan, *supra* note 164, at 702.

167. CASSADY, *supra* note 162, at 59.

168. *Id.*

169. McAfee & McMillan, *supra* note 164, at 702; see also Milgrom, *supra* note 164, at 7; CASSADY, *supra* note 162, at 56-60.

170. *Id.*

171. CASSADY, *supra* note 162, at 59. "In the ascending-level auction, buyer competition is at its maximum intensity level . . . . The English-type auction is so structured that competition among individual buyers is more overt than in other auction systems, and the auctioneer has more opportunity to use manipulative tactics." *Id.*

English auction is the most commonly used auction type for selling goods,<sup>172</sup> including antiques and used automobiles.<sup>173</sup>

In contrast, in the Dutch auction, instead of beginning at a low price and ascending in increments until one bidder remains, a descending-price pattern is followed.<sup>174</sup> The auctioneer calls the auctioned item's initial high price and then successively decreases the price.<sup>175</sup> A bidder observes the called prices, determines whether a given price is accepted by another bidder, and then accepts the given price.<sup>176</sup>

Finally, in a first-price sealed-bid auction, the bidders submit sealed bids with the highest bidder taking the auctioned item.<sup>177</sup> Unlike the English auction, bidders are not aware of other bidders' bids, and do not have the opportunity to revise their bids in response to these other bids.<sup>178</sup> First-price sealed-bid auctions have been employed to sell art, mineral rights, real estate, and United States government contracts.<sup>179</sup>

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172. Milgrom, *supra* note 164, at 11; McAfee & McMillan, *supra* note 164, at 702; CARRIE BEAM ET AL., ELECTRONIC NEGOTIATION THROUGH INTERNET-BASED AUCTIONS 11 (Fisher Center for Info. Tech. & Mgmt., Walter A. Haas Sch. of Bus., U.C. Berkeley Working Paper No. 96-WP-1019, 1996). At least in 1967, the English-type auction was the most commonly used system in the world; an estimated 75% of all auctions were conducted on the ascending-bid basis. CASSADY, *supra* note 162, at 66.

173. BEAM ET AL., *supra* note 172, at 10. I could not, however, determine whether the predominant format employed for Article 9 foreclosure sales is the English auction. Few cases explicitly identify the auction's format, and no commentator of whom I am aware has done the empirical work necessary to analyze the matter. Ultimately, which auction type to employ would be subject to the commercial reasonableness standard and industry practice for selling the subject type of goods.

174. McAfee & McMillan, *supra* note 164, at 702; Milgrom, *supra* note 164, at 6; *see also* CASSADY, *supra* note 162, at 60-63.

175. *Id.*

176. *Id.* In theory, a Dutch auction format could be used for an Article 9 public sale because it provides bidders with knowledge of the highest bid and the opportunity to bid (or stop bidding) further. CASSADY, *supra* note 162, at 63.

177. McAfee & McMillan, *supra* note 164, at 702; *see also* CASSADY, *supra* note 162, at 60-63.

178. *Id.* Cassady suggests:

Some might characterize [a sealed-bid device] as an auction because it is intended to find the highest price by competitive means, but others might regard it as a tender scheme, to be distinguished from an auction by the considerable interval between the time the bids are registered and the time the ad is made.

CASSADY, *supra* note 162, at 12. Where sealed bids are used in an auction format, a court may find the sale public. *See, e.g.,* Bank of Am. v. Lallana, 960 P.2d 1133, 1140 (Cal. 1998). Hogan, however, argues that sealed bids are inappropriate for public sales. *See* Hogan, *supra* note 156, at 227.

179. McAfee & McMillan, *supra* note 164, at 702.



Each of these three basic types of auctions may be varied. A seller may or may not place a minimum or reserve price on the auctioned item. The period during which bidders may submit bids may be limited by the seller or the auctioneer. Finally, bidders may have to pay for the right to bid.<sup>180</sup>

In theory and procedure, Onsale's online auctions are "auctions" as traditionally defined and as conceived under Article 9, albeit effected through the new medium of the Web site.<sup>181</sup> The Yankee Auction format is a hybrid English/first-price format<sup>182</sup> and generally employs procedures similar to those in an ascending-bid English-type auction.<sup>183</sup> Onsale's

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180. *Id.* There are more variations.

181. Non-Code commentators treat Onsale's Yankee Auctions as auctions. See BEAM ET AL., *supra* note 172, at 11.

182.

It is a hybrid English/first-price format because during the first portion of each auction, it's an open, continuous, ascending auction in which each bidder may repeatedly gather information about others' bids and, if so desired, update his own. For the last few minutes, when the bidder cannot be sure his e-mail will be received and processed in time, the auction is a first-price sealed-bid auction.

BEAM ET AL., *supra* note 172, at 108.

183. In many respects, Onsale performs an auction house's key administrative/organizational functions. As described in Part I, Onsale's entire auction process, from the posting of the items through the auction closing, is automated using internally-developed "auction management" and "transaction processing" software. Onsale has detailed bidding rules and posts auction procedures and legal rules to which a seller offering merchandise for sale agrees. Generally, they cover issues of good title, ability to sell the item, risk, and liability arising from the offer for sale. See *Onsale Auction Process* (visited Sept 1, 1999) <<http://www.onsale.com/howto/process.html>> (photocopy of Web page on file with author); Jerry Kaplan, *Onsale Frequently Asked Questions* (visited Sept. 1, 1999) <<http://www.onsale.com/howto/faq.html>> (photocopy of Web page on file with author); Jerry Kaplan, *Onsale Policies* (visited Sept 1, 1999) <<http://www.onsale.com/howto/policies.html>> (photocopy of Web page on file with author). Compare these with the traditional rights and responsibilities of an auctioneer set forth in CASSADY, *supra* note 162, at 92-111; see also the "conditions for sale" listed in CASSADY, *supra* note 162, at 135. Auction procedures can properly and reasonably vary from auction to auction depending upon a number of factors including the auctioneer, the seller's instructions, the commercial practices of the industry for the collateral type, and the auction culture surrounding the auction's location. Additionally, most states by statute or common law prescribe some auction procedures. Onsale states that it is an auctioneer bonded by the State of California. *Onsale Policies* (visited Sept. 1, 1999) <<http://www.onsale.com/howto/policies.html>> (photocopy of Web page on file with author). With respect to the Code, Article 2, section 2-328 provides rules for when an auction is complete, states that auctions are with reserve unless specifically made otherwise, prohibits the withdrawal of an article from auctions without reserve unless no bid has been made within a reasonable time, and prohibits a seller's participation in his own auction without notice. U.C.C. § 2-328 (1995). Article 9 itself provides little procedural guidance beyond requiring

Yankee Auction format also clearly provides all bidders with real-time “knowledge of the highest bid with an opportunity to bid higher.”<sup>184</sup> Thus, it is unlikely that *ex ante* a Yankee Auction would not be characterized as an auction for purposes of the public sale requirement under Article 9.

One difference worth highlighting, however, is unlike real-world Article 9 foreclosure sales, Onsale prohibits sellers from bidding at their own sale.<sup>185</sup> The restriction’s intent is to guard against the seller’s manipulation of her merchandise’s price.<sup>186</sup> But under section 9-504(3), so long as the creditor is not bidding to manipulate the price, she may bid at her own auction.<sup>187</sup> Presumably, Onsale’s prohibition would preclude secured creditor bids. If so, secured creditors lose the significant benefit of bidding at their public sales. Lost also is a powerful inducement for secured creditors to use online auctions as public sales.

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proper notice and subjecting all aspects of the public sale to the commercial reasonableness standard. U.C.C. § 9-504. A few courts have provided piecemeal auction procedures under Article 9. For example, courts have condoned and castigated auctions with and without reserve (minimum) bids. *See, e.g.*, *Connex Press, Inc. v. International Airmotive, Inc.*, 436 F. Supp. 51, 56 (D.D.C. 1977); *In re Britt*, 5 U.C.C. Rep. Serv. 2d 1233, 1236 (Bankr. S.D. Ohio 1987); *Sly v. First Nat’l Bank*, 387 So. 2d 198, 200 (Ala. 1980); *Liberty Nat’l Bank v. Greiner*, 405 N.E.2d 317, 321 (Ohio Ct. App. 1978); *Northern Fin. Corp. v. Kesterson*, 287 N.E.2d 923, 926 (Ohio Ct. App. 1971). The secured party using an online auction should determine whether its auction complies with the procedural requirements mandated by the relevant jurisdiction and industry or risk it being deemed commercially unreasonable. Which jurisdiction’s auction rules govern a cyberspace transaction raises similar concerns to those discussed in Part III, section E of this Article.

184. *Boatmen’s Nat’l Bank v. Eidson*, 796 S.W.2d 920, 923 (Mo. Ct. App. 1990). (citing *Shields v. Bobby Murray Chevrolet, Inc.*, 261 S.E.2d 238 (N.C. Ct. App. 1980)).

185. *See* Jerry Kaplan, *Onsale Bidding Rules* (visited June 4, 1998) <<http://www.onsale.com/howto2.html>> (photocopy of Web page on file with author).

186. *Id.*

187. Under Article 2, the owner of property subject to the auction cannot bid, directly or indirectly, unless an express announcement is made disclosing the seller’s right to do so. U.C.C. § 2-328(c) (1995). The seller thus cannot make secret bids to “puff up” the price of his item. Despite this prohibition, a creditor will not be barred from bidding at his own sale where he does not make such an advance disclosure. *See Sly*, 387 So. 2d at 200 (stating that section 2-328 impliedly gives a foreclosing creditor the right to bid at the foreclosure sale without having to give any preliminary notice of his or her intent to do so); *Nevada Nat’l Leasing Co. v. Hereford*, 680 P.2d 1077, 1080 (Cal. 1984) (stating that a creditor may bid secretly at forced sale by auction without thereby making the auction a sham).

## III. COMMERCIALY REASONABLE DISPOSITIONS UNDER § 9-504

Under section 9-504(1) of the Code, a secured lender has the right, after taking possession of its collateral following default, to sell or “otherwise dispose” of it.<sup>188</sup> This disposition generally takes the form of a public or private sale. Whatever form, every aspect of the disposition must be commercially reasonable, including the method, manner, time, place, and terms of the sale. Beyond this mandate, “commercial reasonableness” is not defined in the Code,<sup>189</sup> although the Code provides some instruction in section 9-507(2).<sup>190</sup> One of the central goals of Article 9 is to provide a flexible framework by which the sale or other disposition of collateral fetches the highest price,<sup>191</sup> the secured party has much discretion under the commercially reasonable standard in conducting a foreclosure sale. With section 9-504(3) and the other disposition provisions, the Code’s drafters sought “to chart a path in the narrow area between policy positions—one a

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188. U.C.C. § 9-504(1) (1995). See THE NEW ARTICLE 9, *supra* note 7, at 361, § 9-610(a).

189. “The duty is a vague and fluctuating one, which cannot be meaningfully described except in terms of particular fact situations.” 2 GILMORE, *supra* note 148, § 44.5, at 1232.

190. Section 9-507(2) states, in part, “The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner . . . .” See THE NEW ARTICLE 9, *supra* note 7, at 389, § 9-627(a). Price as a factor of the sale’s commercial reasonableness is discussed *infra* at Part III.C. Section 9-507(2) also provides certain safe harbors, stating:

If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner . . . .

U.C.C. § 9-507(2) (1977); see also THE NEW ARTICLE 9, *supra* note 7, at 389, § 9-627(b). With respect to the two procedural safe harbors for a sale in a recognized market, I will assume that there is no recognized market for the goods being sold through Onsale or any other online auction service. This assumption may become increasingly inappropriate to the extent that online auction services for a particular type of good consolidate or become so uniform that they in effect function like such recognized markets as the New York Stock Exchange in setting prices. In any event, I shall not resolve this issue here. With respect to the procedural harbor regarding commercial practices among dealers, see *infra* Part III.E.

191. Hogan, *supra* note 156, at 219-20; see also *id.* at 205, 207.

desire to impede dishonest dispositions, and the other, a reluctance to strangle honest transactions with red tape.”<sup>192</sup>

As intended, this flexible standard allocates to the courts the job of defining the meaning of “commercially reasonable.” Judicial inquiry as to the commercial reasonableness of a secured party’s conduct is almost always a necessary question of fact and is conducted on a case-by-case basis.<sup>193</sup> Depending on whether the sale is public or private, courts typically review a number of factors when assessing whether all aspects of a sale were commercially reasonable.<sup>194</sup> Courts generally measure the commercial reasonableness of any of these factors against “the actual commercial practice relevant to the particular kind of collateral disposed of at the particular time and place of its disposition.”<sup>195</sup>

Looking at both public and private sales, I will discuss several factors that raise novel problems with respect to the commercial reasonableness of online auctions: (i) online advertising generally, and Onsale’s advertising specifically; (ii) the substitution of a virtual auctioneer for a live auctioneer; (iii) the price received from online auctions versus that received from real world auctions of the same goods; (iv) the location of the sale and the opportunity to inspect the collateral before its sale; and (v) the relevant online and/or real world commercial business practices against which to measure the online sale. For each of these problems, I will first discuss relevant Code sections and interpretative case law, setting forth an analytical framework. I will then apply this framework to online auctions, using, in particular, Onsale and the hypothetical sale of the computers and the MR2.

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192. *In re Zsa Zsa, Ltd.*, 352 F. Supp. 665, 671 (S.D.N.Y. 1972), *quoted in* Hogan, *supra* note 156, at 220.

193. *See* Westgate State Bank v. Clark, 642 P.2d 961 (Kan. 1982); Vilella Enters., Inc. v. Young, 766 P.2d 293 (N.M. 1988); Brigham Truck & Implement Co. v. Fridal, 746 P.2d 1172 (Utah 1987).

194. For public sales, factors affecting the determination of commercial reasonableness include: (1) the price obtained for the collateral, (2) whether the sale was wholesale or retail, (3) whether the collateral was sold as a unit or in parcels, (4) the place of the sale, (5) the advertising for the sale, (6) the number of bidders, (7) whether an appraisal was conducted, (8) whether the collateral was available for inspection, and (9) the use of a professional auctioneer. For a private sale, many of these factors may also be relevant, but also may include: (1) the secured party’s efforts to identify specific sale prospects and (2) the dealer selected to sell the collateral. Finally, even the choice to use a public or private sale format is subject to review. *See infra* note 246 and accompanying text.

195. FERRIS & GOLDSTEIN, *supra* note 154, § 1.3, at 3; *see also* Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698 (E.D. Pa. 1968); Ford Motor Co. v. Lyons, 405 N.W.2d 354, 376 (Wis. 1987).

### A. Advertising

Advertising for a public or private sale of repossessed collateral must be commercially reasonable. Traditional advertising is far more important for, and prevalent with, public sales than with private sales, and thus the most interesting issues surrounding online advertising are in the public sale context.<sup>196</sup> Consequently, I shall focus on advertising for a public sale. I first discuss the advertising requirement as developed by the courts, focusing on the need to attract the "relevant public" interested in the subject collateral with "appropriate advertising." I then examine some of the advantages online advertising has over traditional advertising media, such as newspapers, in the context of a public auction. In particular, I suggest that the Internet's ability to identify or even create market segments for collateral and target them precisely with online advertising may allow online auctions to alleviate the recurring problem of low-turnout/low-price public sales. I also examine certain Article 9 hurdles that may restrict online advertising and stifle a secured party's use of auctions like Onsale.

#### 1. Advertising Under the Code

Advertising for a public sale must be commercially reasonable. Furthermore, to characterize a foreclosure sale, such as an auction, as "public," the public must be informed of the sale and invited to attend.<sup>197</sup> This broad mandate is refined by two notions. First, that the public should be

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196. Not every private sale must be advertised. *See, e.g.*, *Gaynor v. Union Trust Co.*, 582 A.2d 190 (Conn. 1990). For private sales, the secured party or its agent (broker or dealer) must make reasonable efforts to identify and inform potential purchasers of the sale. These efforts may include traditional advertising media such as newspapers, flyers or radio, but they need not. So, for example, the private sale of inexpensive and widely-used collateral may need more traditional advertising to identify and inform potential purchasers. More expensive or unique collateral may need no traditional advertising; instead, it may be sufficient for the dealer to contact known or potential bidders directly. *See, e.g.*, *First Westside Bank v. For-Med, Inc.*, 529 N.W.2d 66 (Neb. 1995). To the extent that a private sale needs traditional advertising, my discussion of advertising for a public sale is relevant.

197. Lack of appropriate advertising to the relevant public can alone, or with other factors, render the sale "private" rather than "public." Professor Gilmore states, "If the sale has not been appropriately publicized, it would not be a public sale no matter where it was held or how it was conducted." 2 GILMORE, *supra* note 148, § 44.6, at 1242. Courts agree. *See, e.g.*, *In re Webb*, 17 U.C.C. Rep. Serv. 627, 630 (S.D. Ohio 1975) (finding that if a sale is not appropriately advertised, it is not a public sale no matter where or how it was conducted); *Pioneer Dodge Ctr., Inc. v. Glaubensklee*, 649 P.2d 28, 30 (Utah 1982) (recognizing that an invitation to the public is an essential requirement of a public sale).

the relevant subset of people in the general public that has an interest in the collateral and, second, that the most appropriate advertising media should be used to reach this relevant segment. “[T]he essence of a public sale is that the *relevant public* is not only invited to attend but is also informed, by whatever means of publicity may be *appropriate*, when and where the sale is to be held . . . .”<sup>198</sup> Indeed, these two factors are significant criteria by which courts measure the commercial reasonableness of a public sale’s advertising.<sup>199</sup>

Courts define the “relevant public” as people reasonably expected to have an interest in buying the particular type of collateral.<sup>200</sup> The nature and type of collateral being sold are the touchstones for identifying the relevant public. Advertising of the collateral’s public sale should reach the largest possible number of potential bidders likely interested in the collateral type so as to ensure attendance and competitive bidding. Furthermore, competitive bidding fostered by appropriate advertising helps prevent the secured party’s self-dealing at the sale and thus protects the debtor.<sup>201</sup> As one court observed:

[A]dvertising is sine qua non to attendance at an auction . . . . ‘Common sense tells us that the larger the attendance at a public sale of collateral, the more likely it is that there will be competitive bidding. Competitive bidding helps to assure that the purchase price approximates the fair market value of the property and also prevents a [secured party] from exaggerating his deficiency by underbidding.’ Hence, ‘[o]ne of the most important elements

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198. *In re Webb*, 17 U.C.C. Rep. Serv. at 631 (emphasis added); see also 2 GILMORE, *supra* note 148, § 44.6, at 1242.

199. FERRIS & GOLDSTEIN, *supra* note 154, § 6.10, at 171 (“public invitation is essential to the public sale, and its adequacy is one of the most important factors considered in evaluating the commercial reasonableness of a public sale.”).

200. For example, in *Wilkerson Motor Co. v. Johnson*, the court found that posting three public notices for the sale of an automobile was “woefully inadequate” advertising, in part, because it was not targeted at the relevant public reasonably expected to have an interest in the collateral. 580 P.2d 505, 509 (Okla. 1978). The court said, “The essence of any ‘public sale’ is that members of the potential class of purchasers have some meaningful opportunity to become apprised of the fact the goods are to be sold.” *Id.* (citing 2 GILMORE, *supra* note 148, § 44.6, at 1243).

201. See, e.g., *Boender v. Chicago N. Clubhouse Ass’n, Inc.*, 608 N.E.2d 207, 213 (Ill. App. Ct. 1992) (finding that the secured party had ensured an opportunity for self-dealing by failing to advertise in a manner that would engender competitive bidding).

of commercial reasonableness is the duty to surround the sale with publicity sufficient to attract a "lively concourse of bidders."<sup>202</sup>

Thus, the secured party or its agent (broker, dealer, or auctioneer) must take commercially reasonable efforts to determine who the relevant public is for the subject collateral.

Once the general public or a segment thereof has been identified as the relevant public, the secured party or its agent can select the "appropriate advertising" media to reach that audience. The secured party has a number of traditional advertising media with which to publicize the public sale, including local, regional, and national newspapers, magazines, journals, billboards, television, radio, and direct mail.<sup>203</sup> Generally, where the collateral consists of common, widely used, and/or inexpensive goods, advertising media such as billboards, local newspapers, radio, and television sent to the general public surrounding the sale site are "appropriate" for a public sale.<sup>204</sup> In advertising jargon, "mass marketing" is employed to reach this mass audience. In contrast, media with a geographically broad exposure such as newspapers with national circulation and media with defined audiences such as trade journals and mailing lists are "appropriate" for less common, unique, or more expensive goods for which there is a distinct,

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202. *Ford & Vlahos v. ITT Commercial Fin. Corp.*, 885 P.2d 877, 883 (Cal. 1994) (en banc) (quoting *Ford Motor Credit Co. v. Price*, 210 Cal. Rptr. 17, 21 (Cal. Ct. App. 1985), and *Westgate State Bank v. Clark*, 642 P.2d 961, 970 (Kan. 1984), respectively); see also *Villella Enters., Inc. v. Young*, 766 P.2d 293, 297 (N.M. 1988) (holding that advertising of a public sale should be "published in a manner reasonably calculated to assure such publicity that the collateral will bring the best possible price from competitive bidding of a strived-for lively concourse of bidders") (quoting *Foster v. Knutson*, 527 P.2d 1108, 1114 (Wash. 1974) (en banc)); 2 GILMORE, *supra* note 148, § 44.6, at 1245 ("As the best way to produce a fair price, the Code relies on the mechanism of a public sale, notification and publicity.").

203. "Depending on the targeted audience, the secured party can choose from among many advertising media . . . . The local newspaper is typically chosen for widely used items, but newspapers with national circulation, such as *The Wall Street Journal*, also are available to reach a broader audience. Radio and television spots can be purchased to publicize an auction of widespread local interest. Brochures or flyers mailed directly to potential bidders can be quite effective in reaching a targeted audience, as can publication in trade-specific periodicals such as *Trade-A-Plane* or the *Contractor's Hotline*." FERRIS & GOLDSTEIN, *supra* note 154, § 6.10, at 172-73.

204. "Collateral that is common, widely used, and relatively inexpensive, such as an automobile, can be advertised locally to the general public." FERRIS & GOLDSTEIN, *supra* note 154, § 6.10, at 172; see also *supra* note 203; *infra* notes 210-16 and accompanying text.

limited, and perhaps geographically dispersed audience.<sup>205</sup> “Targeted marketing” is used to reach this defined, targetable audience. Thus, as a general rule, as the collateral type becomes more expensive and unique, and its market segment becomes smaller and more geographically dispersed, more target marketing is appropriate.

## 2. Low-Turnout/Low-Price Public Sales and an Explanation

In theory, appropriate advertising to the relevant market segment will invite and attract potential bidders, who in turn will competitively bid for the collateral, and thus assure a good price. But reoccurring problems with public sales, which frequently result in litigation, are low bidder turnout, lack of competitive bidding, and low price. Professor Gilmore said:

At a ‘public sale,’ it may be hoped, there will be that lively concourse of bidders which will protect the secured party from his own weakness and drive the price up to those Himalayan peaks of fair value and true worth. It may be hoped but the hope will almost certainly be disappointed. The concourse of bidders at the typical foreclosure sale, be it ever so ‘public,’ is apt to be about as lively as a group of mourners at a funeral. Nevertheless, the Article 9 draftsmen, who showed themselves to be imaginative and resourceful in many situations, were tradition-bound in this one.<sup>206</sup>

But where low-turnout/low-price public sales are procedurally regular, courts in many jurisdictions will find them commercially reasonable.<sup>207</sup>

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205. “Large expensive, or specialty items can and should be advertised to a targeted group of likely bidders.” FERRIS & GOLDSTEIN, *supra* note 154, § 6.10, at 172; *see also supra* note 203; *infra* notes 217-18 and accompanying text.

206. 2 GILMORE, *supra* note 148, § 44.6, at 1242.

207. As one court stated:

A sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within a reasonable time of repossession, and under conditions reasonably calculated to bring a fair market price. Where an advertised sale is held as scheduled, and the proper notice is given, any person has a right to enter a competitive bid. The opportunity for competitive bidding is established and that is all that is required under the Uniform Commercial Code even if no third party bid at the sale.

Massey Ferguson Credit Corp. v. Bond, 335 S.E.2d 454, 454 (Ga. Ct. App. 1985) (quoting Hardin v. Norlin Music, Inc., 283 S.E.2d 21, 23 (Ga. Ct. App. 1981); *see also* Shields v. Bobby Murray Chevrolet, Inc., 261 S.E.2d 238, 240 (N.C. Ct. App. 1980); 9 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 9-507.8 (Callaghan) (“When low price is



Particularly nettlesome, where at such procedurally regular public sales the secured party purchases the collateral for a price below the debtor's outstanding obligation, he may sue the debtor for the deficiency.<sup>208</sup> The problem is so acute that the Article 9 revisions contain a new provision limiting the amount of the deficiency under these circumstances.<sup>209</sup>

To see how online auctions may reduce the occurrence of these "procedurally regular" low-turnout/low-price sales, the trick is to understand *why* the Code and courts allow the secured creditor to reasonably fail in attracting relevant bidders and securing a good price. To this end, let me build on the sliding scale that I introduced for identifying the relevant public and using mass or target advertising. At one end of the scale are common, widely used, or relatively inexpensive goods which I shall refer to as "general collateral." For general collateral, while courts articulate the principle that the relevant public is defined by those persons with an interest in the goods, they generally do not require that the secured party specifically identify such persons (or group of persons) and/or specifically target them with advertising of the sale. Rather, while courts do not articulate the premise, they equate the relevant public for general collateral with the *general public* surrounding the *sale site* and permit the secured creditor to use mass advertising media, such as local newspapers, to reach this

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present without any other factors of commercial unreasonableness . . . courts have generally upheld the reasonableness of the sale.").

208. See, e.g., *Brigham Truck & Implement Co. v. Fridal*, 746 P.2d 1171 (Utah 1987). Professor Gilmore noted that, absent fraud, the secured party's purchase of the collateral at less than its fair market value at a sale where there was no lively bidding but otherwise had proper notification, publicity, and other formalities would be "unassailable." 2 GILMORE, *supra* note 148, § 44.6, at 1245. For a critique of Gilmore's assertion, see Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491 (1997).

209. See THE NEW ARTICLE 9, *supra* note 7, at 373, § 9-615(f). Official Comment 6 states:

subsection (f) provides a special method for calculating a deficiency or surplus when the secured party, a person related to the secured party . . . , or a secondary obligor acquires collateral at a foreclosure disposition. It recognizes that when the foreclosing party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.

*Id.* at cmt. 6.

amorphous audience.<sup>210</sup> As a practical matter, sales of general collateral are limited to the general public in the geographic area surrounding the sale site receiving, and acting upon, such regional mass advertising. While the geographic region can shrink or expand from sale to sale (and the type of advertising media used can change), the focus is on the geography (the sale site) and the general public living in the geographic region.

In *Brigham Truck & Implement Co. v. Fridal*,<sup>211</sup> for example, the Supreme Court of Utah held that a public auction of a used John Deere tractor in Box Elder County, Utah was commercially reasonable where the secured creditor advertised the sale by way of twenty-five local radio

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210. See, e.g., *Pioneer Dodge Ctr., Inc. v. Glaubenslee*, 649 P.2d 28, 31 (Utah 1982) (holding that a public auction of a repossessed used Pioneer Dodge resulting in a deficiency was commercially unreasonable in part because the only advertising “efforts to obtain buyers consisted of taking the truck to a few lots and obtaining oral bids of undisclosed amounts; placing the truck on the sales lot for a few days; and announcing the sale over [a] loudspeaker immediately prior thereto.”) This, the court concluded, did not “give reasonable notice to that part of the public which would likely be interested in the sale.” *Id.* Citing several supporting cases, the court stated that “in general an automobile dealer should advertise a repossessed car in a newspaper of general circulation for a reasonable period of time and in a manner consistent with the manner by which other used cars are advertised.” *Id.* Yet the court failed to require that the secured party consider whether “the newspaper of general circulation” served a geographic area with a sufficiently large and diverse population to contain the relevant public as defined by an interest in the collateral. *Id.*; see also *Van Dorn Retail Mgmt., Inc. v. Jim’s Oxford Shop, Inc.*, 874 F. Supp. 476, 485 (D.N.H. 1994), *aff’d*, 45 F.3d 424 (1st Cir. 1995) (finding advertising for a private sale of retail apparel inventory commercially reasonable where the sale was “regularly advertised” in the *Manchester Union Leader*, the “principal newspaper for the city of Manchester and the state of New Hampshire”); *Credit Alliance Corp. v. David O. Crump Sand & Fill Co.*, 470 F. Supp. 489 (S.D.N.Y. 1979) (advertising for public sale of trucks was commercially reasonable where ads were placed in three local newspapers); *Savage Constr., Inc. v. Challenge-Cook Bros., Inc.*, 714 P.2d 573, 576 (Nev. 1986) (“When a [public] sale is being advertised to an open but unknown market, then the normal minimum legal requirements for commercial reasonableness of an auction may be sufficient.”); *First Nat’l Bank v. Rikki Tikki Tavi, Inc.*, 445 So. 2d 889, 890 (Ala. 1984) (finding advertising for restaurant equipment in local newspaper was commercially reasonable); *Massey Ferguson Credit Corp. v. Bond*, 335 S.E.2d 454, 455 (Ga. Ct. App. 1985) (holding that advertising for an auction of farm equipment was commercially reasonable where notices were posted at the county clerk’s office, courthouse, and sale site, local newspaper ads were published, and local dealers were contacted); *But see Villella Enters., Inc. v. Young*, 766 P.2d 293, 297 (N.M. 1988) (finding commercially unreasonable advertising for the sale of a bar’s assets where the only ads placed were in a weekly legal periodical two weeks prior to the sale and where there was no evidence showing that the periodical was the type of publication that would reach prospective buyers for such assets).

211. 746 P.2d 1171, 1173 (Utah 1987) (per curiam).

broadcasts, two ads in *The Box Elder News and Journal* in Brigham City, and two ads in *The Leader*, a Tremonton newspaper. The secured party bought the tractor at the auction and sued the debtor for a \$19,089.95 deficiency.<sup>212</sup> The debtor argued that the secured party was not entitled to the deficiency because the public auction's advertising was commercially unreasonable. The court disagreed.<sup>213</sup> Articulating the principal that "[o]f primary importance are the secured party's attempts to obtain a fair price for the collateral by advertising the collateral or otherwise notifying potential buyers that the collateral is for sale," the court held that the public had been given proper notice and was invited to participate in the sale in a commercially reasonable manner.<sup>214</sup> Thus, the advertising was reasonable, and the debtor was held to the deficiency.<sup>215</sup>

By only requiring that local newspapers and radio be used, the *Brigham Truck* court equated the general public surrounding the sale site (those potentially reading the newspapers and hearing the radio ads) as the relevant public. Analytically lazy and silent on the issue, the court, like many other courts, did not acknowledge or explain why it was using the geography surrounding the sale site and its attendant population as the proxy for the relevant public in the context of the general collateral sale. Rare is the court reviewing a sale of general collateral that questions whether the secured party analyzed either the readership of the mass advertising media selected or the population surrounding the sale site in order to determine whether interested potential buyers exist.<sup>216</sup>

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212. *Id.* at 1171.

213. *Id.*

214. *Id.* at 1172-73.

215. *Id.* at 1173.

216. In *First Bank & Trust Co. v. Mitchell*, 473 N.Y.S.2d 697 (N.Y. Sup. Ct. 1984), for example, the court attempted to articulate the impropriety of relying on geography rather than interest in the collateral to determine the relevant public, but lapsed into analytical laziness obscuring the extent to which it used geography and its attendant population as the proxy for the relevant public. *Id.* at 702. In *First Bank*, the secured party repossessed the inventory and equipment of a Kawasaki motorcycle dealer in Ithaca, New York, and sold the collateral at public auction. *Id.* at 699. A deficiency resulted, which the secured party sought from the debtor. *Id.* The debtor argued that the sale was commercially unreasonable, including its advertising. *Id.* The court agreed. The secured party had placed three advertisements of the sale in the *Ithaca Journal* and the *Elmira Star Gazette & Sunday Telegram*, both local newspapers. *Id.* at 702-03. The secured party argued that this was sufficient because of the "number of persons and businesses which attended." *Id.* at 703. The court disagreed, observing that most of the persons attending the sale were from Ithaca, Elmira, or communities surrounding those cities. *Id.* The court reasoned, "it seems entirely credible that advertising elsewhere, such as Syracuse and Binghamton, would have

On the other end of the scale, for collateral that is large, expensive, or unique, the pool of potential buyers becomes quite small, geographically dispersed, and homogeneous. Thus, the relevant public is a relatively small subset of the general public. In part because the size is small, geographically dispersed, and homogeneous, courts place significant weight on the secured party's efforts to identify this market segment and target it with appropriate advertising.<sup>217</sup> Instead of using the general public living in the geographic area of the sale site as a proxy for the relevant public, for large, expensive, or unique collateral, the secured party must make efforts reasonably calculated to identify people interested in such collateral and reach them with targeted advertising media, such as trade magazines and mailing lists, rather than regional newspapers.<sup>218</sup> I shall refer to such collateral as "specific collateral."

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drawn additional bidders to the sale." *Id.* While this may have been true, the court made no effort to understand the tastes and preferences of those persons living in the additional geographic regions. The court did, however, seem to recognize the importance of targeting persons interested in the collateral. The court stated:

Moreover, it appears that *beyond the three advertisements* and perhaps a phone call or two . . . no effort was made to inform those persons or businesses in central New York engaged in business similar to that of Kawasaki, which persons would be the most likely to be interested in the items to be sold.

*Id.* at 703 (emphasis added). Notice several problems even with this statement. First, by saying "beyond the three advertisements," the court suggested that those three advertisements were in fact an effort to inform persons in similar businesses interested in the collateral. However, no analysis was given as to the readership of the newspapers or persons within the geographic area; the court assumed that these geographic areas had similar businesses and that they read such newspapers. Further, the court limited the increased geographic area requiring advertising to "central New York." Again, the court assumed that this area contained a sufficient number of similar businesses interested in the collateral to attract the "relevant public" to the sale.

217. See, e.g., *General Elec. Credit Corp. v. Durante Bros. & Sons, Inc.*, 433 N.Y.S.2d 574, 576 (N.Y. App. Div. 1980) (finding that the newspaper selected for advertising the sale of a 1975 model back-hoe, a piece of heavy construction equipment, to be "clearly not the most appropriate one for reaching the intended market."); *Davidson v. First Bank & Trust Co.*, 609 P.2d 1259, 1260 (Okla. 1976) (affirming punitive damages for conversion resulting from a commercially unreasonable private sale of collateral where "[a]lthough the secured items were unique and there was no ready market for marble making equipment in Yale, Bank posted only three notices of sale in Yale," and thus, did not "pursue a likely market for sale of the equipment").

218. See, e.g., *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832, 834 (D.R.I. 1978) (finding that a public auction of unique radio station equipment required advertising to specialized buyers both within and outside the state and that advertising solely in a newspaper of general circulation within the state, rather than with trade journals or mailing lists of interested buyers, was commercially unreasonable); *Clark Equip. Credit Corp.*

The need to identify specific collateral's relevant market and use the appropriate advertising media to reach that audience is poignantly illustrated in the California Supreme Court's opinion in *Ford & Vlahos*.<sup>219</sup> In *Vlahos*, the secured party sold at public auction a repossessed cargo plane for which it had advertised the time and place of the sale in the *Arizona Republic* seven days before the sale and the *Phoenix Gazette* one day prior to the sale.<sup>220</sup> Both papers were generally circulated in Maricopa County, Arizona, the county in which the plane was located and the sale was to be held.<sup>221</sup>

At the public auction, the only bidder was the secured party, who purchased the plane for \$1 million, far less than its \$3.8 million fair market value recognized by the trial court.<sup>222</sup> The debtor challenged the sale, arguing that in addition to the advertising in the *Arizona Republic*, the secured party should have advertised in trade journals for used planes or notified prospective bidders who had responded to previous advertisements for an aborted auction.<sup>223</sup> The appellate court disagreed, finding that the publicity conducted had literally complied with California's non-uniform section 9-504(3) which specifically required that notice of a public sale "be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held."<sup>224</sup> The court reasoned that the California legislature had created the bright-line rule to prevent disputes over the reasonableness of pre-sale publicity, and therefore, section 9-504(3) conclusively defined the requirements for pre-public sale advertising.<sup>225</sup>

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v. Ernest, No. 88CA38, 1989 WL 28734, at \*2 (Ohio Ct. App. 1989) (unpublished) (finding that given the size and cost of the collateral (farming equipment), it was necessary to advertise its public sale in a very large area and state-wide publication such as the *Ohio Farmer* and *Farm and Dairy* along with publications from neighboring states such as the *Illinois Farmer*, and thus, holding commercially unreasonable the mere posting of sale notices and local newspaper ads because such efforts were not reasonably calculated to reach a reasonable number of bidders or potential purchasers in the appropriate market); Maury B. Poscover, *A Commercially Reasonable Sale Under Article 9: Commercial, Reasonable, and Fair to All Involved*, 28 LOY. L.A. L. REV. 235, 247 (1994) ("In the case of large items such as airplanes or other expensive pieces of equipment, locating and attracting bidders is more difficult. The secured lender must make extensive efforts to insure a 'good' sale."); see also *supra* note 205 and accompanying text.

219. *Ford & Vlahos v. ITT Commercial Fin. Corp.*, 885 P.2d 877 (Cal. 1994).

220. *Id.* at 879.

221. *Id.*

222. *Id.* at 879-80.

223. *Id.* at 879.

224. *Id.* at 881.

225. *Id.* at 880.

The California Supreme Court reversed the appellate court, finding that sections 9-504(3) and 9-507(2),<sup>226</sup> when read together, “cast considerable doubt” on the appellate court’s view that the statutory notice requirements of 9-504(3) were in effect a safe-harbor for a secured party’s advertising efforts.<sup>227</sup> Focusing on the relevant market for a cargo plane and the advertising media reasonably calculated to reach that market segment, the Court stated, “A dealer in the type of property repossessed here—a valuable airplane—surely would advertise its auction in the relevant market by, for example, informing brokers, placing reasonably prominent announcements in recognized trade journals, or contacting individuals or entities known to be seeking an airplane of the type for sale.”<sup>228</sup> Citing *Villella Enterprises, Inc. v. Young*<sup>229</sup> with approval, the Court found,

Notice of sale should be given to a ‘public’ reasonably expected to have an interest in the collateral and should be ‘published in a manner reasonably calculated to assure such publicity that the collateral will bring the best possible price from competitive bidding of a strived-for lively concourse of bidders.’<sup>230</sup>

The secured party, in fact, had done little to reach the relevant market segment for the cargo plane beyond the two regional newspaper advertisements. The trial court had found that the secured party “had available to it the resources of an aircraft broker . . . who knew potential aircraft buyers and the means of publicity to announce aircraft auctions,”<sup>231</sup> but instead used publications not “circulated among or read by potential purchasers of this Aircraft.”<sup>232</sup> Moved by these findings, the Supreme Court stated that “substantial evidence supported the trial court’s conclusion that the Phoenix newspapers, with their limited circulation, did not provide a forum likely to bring bidders and a fair price for the foreclosed aircraft, and the sale hence was commercially unreasonable.”<sup>233</sup> Thus, the Court said:

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226. Section 9-507(2), in relevant part, provides that property sold by methods a that responsible dealer would utilize is sold in a commercially reasonable manner.

227. *Vlahos*, 885 P.2d at 882.

228. *Id.*

229. 766 P.2d 293 (N.M. 1988).

230. *Vlahos*, 885 P.2d at 883 (quoting *Villella Enters., Inc. v. Young*, 766 P.2d 293, 297 (N.M. 1988)).

231. *Id.* at 880.

232. *Id.* at 879.

233. *Id.* at 886.

We cannot conclude that the Legislature meant to provide that a sale's advertising is commercially reasonable as long as the bare requirements of formal notice are met, even if, to sell the type of collateral involved, a responsible dealer would employ more extensive advertising than placing a legal notice in agate type in an obscure newspaper. Publicity is much too important to a proper sale of foreclosed collateral for such a hypothesis to be commercially viable.<sup>234</sup>

*Vlahos* is particularly instructive because it illustrates the grave risk of both using geography rather than people's preferences and interests in the subject collateral as the means of identifying the relevant market, and employing the wrong advertising media. In effect, by proscribing the use of newspapers of general circulation in the county of the sale's location for *all* public sales, the California Legislature made geography the defining characteristic for the relevant public for *all* types of collateral. That is, the relevant market for the collateral, regardless of collateral type, effectively became the local or regional population surrounding the sale's location. But where the collateral is specific, the potential market segment is typically small, discernible, and geographically disbursed. The people who might be interested in such collateral may not be informed because they do not reside within the region serviced by the local newspapers. Rather, people with little or no interest are given what, to them, is useless information. Advertising a \$3.8 million cargo plane to the local "general public" of Maricopa County, Arizona not surprisingly resulted in no bidders except the secured party and a very low sale price. And while *Vlahos* involved an expensive piece of collateral, its lesson remains true for all types of collateral, general and specific.

I believe that some "procedurally regular" low-turnout/low-bid sales, especially of general collateral, occur because courts permit the secured party to use the general public surrounding the sale site as the proxy for the relevant public interested in the collateral. Arguably, assuming the collateral has value, where nobody shows up for an advertised sale, the "right" people did not receive the advertising. Mass marketing is an advertising paradigm "where the target audience is constantly exposed to advertisements in which they have no interest."<sup>235</sup> Although I can not prove it absent empirical data, it seems sensible to hypothesize that in many procedurally regular low-turnout/low-price public sales of general collateral, the local population

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234. *Id.* at 883.

235. KALAKOTA & WHINSTON, *supra* note 92, at 492.

surrounding the sale site and receiving mass advertising did not contain a significant number of persons with an interest in the collateral. But auction theory and common sense tell us that essential to a successful auction with competitive bidding are at least several people having an interest in the collateral.<sup>236</sup> That is, the amorphous group of people living around the sale site may not be comprised of sufficiently heterogeneous profiles, interests, and preferences such that the group contains persons with an interest in the collateral who will learn of and attend the sale and then bid competitively against each other. Alternatively, where there are such interested (relevant) people, they may not have received or consumed the mass advertising at all or simply did not act on it if consumed. Furthermore, limiting advertising to the population living in the geographic proximity of the sale site excludes interested persons residing outside this territory. The imprecise nature of inviting the amorphous general public without reference to tastes, interests, or other profile and/or demographic characteristics is one reason I believe that public sales of general collateral are a hit-or-miss endeavor.

Why then for a sale of general collateral would a court allow a secured party to use mass media to advertise to the general public surrounding the sale site? One reason surely rests on the costs of identifying and segregating the relevant public from the general public. Although generally not articulated by the courts, relative to the value of inexpensive, widely used, or common collateral, it would be prohibitively expensive to require that a secured party specifically identify people with an interest in such collateral. So, for example, it would make little sense to require Big Bank to spend \$10,000 to specifically identify interested (relevant) persons living in the geographic area surrounding the sale site of a real world public auction of the computers each with an appraised value of \$1,000, and the MR2 with a

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236. Cassady states:

Perhaps the most significant aspect of demand at auction sales is the existence of separate demands for each of the items making up the total stock. Of 150 persons, say, at an auction, probably only a few are interested in any one item. Thus the auction is really a series of sales in which limited numbers of bidders—two, at a minimum—want to buy each item. A large number of people in attendance is significant only to the extent that it increases the chances that there will be two or more individuals to bid on each item.

CASSADY, *supra* note 162, at 48. Onsale acknowledges the relationship between the number of bidders and price. "Generally speaking, the more bidders in an auction, the higher the resulting price." *Onsale* (visited June 4, 1998) <<http://www.onsale.com/sell.html>> (photocopy of Web page on file with author).



*Kelley Bluebook* wholesale value of \$,3150 and retail value of \$5,350.<sup>237</sup> The problem may be compounded by the lack of advertising media like trade magazines for particular types of goods. There simply may not be trade magazines devoted to, for example, used computers serving the geographic area of the sale.

Another reason focuses on the geography of the sale site. For general collateral, it would be relatively costly (and commercially unreasonable) to require the secured party to advertise in a geographic area beyond which potential bidders would likely be willing to travel. For common and inexpensive collateral, one can reasonably expect only those persons living within a relatively short distance from the auction's location to incur the expenses and time to travel to the sale site. Indeed, courts hold that the place chosen for a public sale must be commercially reasonable, which includes convenience of reaching the sale site.<sup>238</sup> It would make little sense for Big Bank to advertise a real world public auction of the MR2 located in Palo Alto, California, to residents of New York.

In contrast, for collateral that is large, expensive, or unique, relative to its value, the cost of identifying the relevant market segment is not prohibitive. This is more true where special advertising media like trade journals (such as *Trade-A-Plane*) and mailing lists created by auction houses and dealers both identify and target specific market segments for different types of unique or expensive collateral. Furthermore, potential bidders distant from the sale site will incur the relatively insubstantial transaction costs of attending the sale.

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237. KELLEY BLUEBOOK: OFFICIAL GUIDE FOR OLDER CARS, 1978-1991 CAR AND TRUCK VALUES 300 (Western ed. Sept.-Dec. 1998). I selected the values associated with the most expensive model, the Supercharged CPA 2D. For one court that explicitly recognized the prohibitive transaction costs of identifying the relevant public for relatively inexpensive although unique collateral, and thus limited the due diligence and advertising media that the secured creditor needed to use, see *In re Hogland Construction, Inc.*, 37 U.C.C. Rep. Serv. (CBC) 1411 (Bankr. D. Idaho 1984), finding that public auction of logging equipment was properly advertised by placing ads in local newspapers constituting the largest papers of daily circulation in the trade area for the equipment, and that it was not an unreasonable business decision not to incur additional expenses to advertise in trade publications given the poor state of the market for such equipment.

238. Article 9 permits a sale "at any . . . place" but the "place must be commercially reasonable." U.C.C. § 9-504(3) (1995). Location of the sale vis-à-vis potential bidders is a factor determining the commercial reasonableness of the place of sale. See, e.g., *Connex Press, Inc. v. International Airmotive, Inc.*, 436 F. Supp. 51, 57 (D.D.C. 1977) (finding the sale of a plane at a small, out-of-the-way airport unreasonable); *In re Bishop*, 11 U.C.C. Rep. Serv. (CBC) 1071, 1076 (Bankr. W.D. Va. 1972) (finding the sale of boat and boat trailer at a used car lot in the "outskirts" of town unreasonable).

Finally, for the secured creditor selling general collateral, traditional advertising media has not changed significantly for a considerable time. Newspapers, posters, billboards, and radio are still largely used by creditors and routinely condoned by many courts for sales of general collateral. After forty years of litigation over the use of mass advertising media, like newspapers, for the sale of general collateral, a sort of unquestioned consensus of the reasonableness of such advertising efforts flows through the courts and their opinions with respect to general collateral sales. Edifices of precedents are built, and I suspect courts have become analytically lazy, rarely carefully scrutinizing the traditional advertising media employed in general collateral sales and probably not even realizing their use of geography and the population surrounding the sale site as the proxy for the relevant public. The heritage of traditional advertising media is rooted deeply in Article 9 jurisprudence; the risk is that the law may lag behind the new Internet technology.

The limitations of traditional advertising technology, expense, and geography are no longer reasonable in the Internet age. I propose in the next section that the Internet's increasingly powerful tools for obtaining profile, demographic, and goods/price data of online consumers, and the self-segmentation of online users into virtual communities may reconstitute the "relevant public" by refining the composition of, or in some cases *becoming*, the relevant markets for the subject collateral. Moreover, online advertising of Web sites like online auctions allow sellers to specifically target these market segments. For the secured creditor advertising a sale, cyberspace auctions like Onsale, eBay, and Yahoo!Auctions may very well contain a defined and targetable market audience where none existed before for the collateral and provide the means to invite that audience to the bidding table. Because online auctions allow persons distant from the collateral's location to view and bid on the collateral in the comfort of their homes, online auctions will lower the transaction costs of advertising and attending remote sales. Especially for inexpensive and common goods, this will free auctions from the geographical restraints limiting the relevant public to the local population. Held to the standard of surrounding a public sale with appropriate publicity aimed at the relevant market, a secured party may have to consider whether online advertising and online auctions have become the best media and sale forum for his type of collateral. The result may be the reduction of low-turnout/low-price foreclosure sales.

### 3. Applying the Advertising Requirement in Cyberspace

To publicize auctions, online auctions like Onsale use their Web site, banners and other links to affinity Web sites, and e-mail broadcasts to mailing lists of registered users. Onsale, like many other leading Web sites, also compliments these online ads with traditional media, like print and radio.<sup>239</sup> But judged against the traditional, non-cyberspace advertising media historically used for public sales, Onsale's advertising efforts may seem inappropriate, and thus courts might consider its auctions private sales or commercially unreasonable. The simple fix, of course, would be to have the secured party advertise its online auction in newspapers or other traditional media. But which newspapers? Those local to the auction site? But there is no geographical "place" of an online auction. Perhaps the location of the collateral? But requiring such traditional advertising would greatly undermine one of the great advantages of online auctions: cyberspace frees people from geographic distances, allowing for a far greater number of potential bidders over national, if not global, boundaries. Onsale's advertising efforts generally fulfill the purpose of inviting and attracting a large number of potential interested bidders so that there will be competitive bidding to ensure a fair market price. As discussed in Part III, section A.4., many of Onsale's auctions have lively bidding, thus suggesting that the relevant public is invited and attends. These observations should make us pause before reflexively concluding that online advertising generally, or Onsale's mixed advertising efforts in particular, are inappropriate under Article 9.

To explore these and other problems, I discuss two general questions. First, who is the "relevant public" in cyberspace that should receive online advertising of an online auction Web site like Onsale? This question reviews the advantages of, and limitations to, identifying the relevant public in cyberspace. Second, is online advertising reasonably reaching and attracting the relevant public to the Web site like Onsale? This question reviews the advantages of, and limitations to, using online advertising to publicize online auctions of repossessed collateral. These questions are important because, to the extent an online auction's advertising surrounds the sale with publicity sufficient to attract a large group of potential bidders with a particular interest in the type of collateral, there is a good argument that

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239. Onsale conducts a public relations campaign for its Web site that includes television and print coverage. *Onsale Form 10-K*, *supra* note 34, at 5-6. My focus, however, is on online advertising under Article 9.

such advertising satisfies the public sale publicity requirement and the commercial reasonableness test under section 9-504(3).

a. Reconstituting the “Relevant Public” in Cyberspace

For cyberspace auctions, the touchstone for determining the relevant public would remain the collateral type. The secured creditor would continue to take reasonable efforts to identify the relevant online public interested in the collateral type so as to realize the highest price possible. This task may be significantly easier and cheaper in cyberspace, especially for general collateral. As discussed in Part I, online data-gathering techniques and the growth of virtual communities<sup>240</sup> defined not by geography but by a shared interest, should significantly improve a secured party’s ability to economically identify the relevant public for tangible goods. Indeed, cyberspace auctions may very well contain (or create) a defined and targetable market audience where none previously existed for a secured creditor’s type of collateral and provide the creditor with the means to invite that audience.

As discussed in Part I, eBay has 2.1 million registered users and Onsale has over 1.1 million registered users. These online auctions gather user profile, demographic and goods/price information, and certain of such information may be available publicly or by purchase. Through such communities and their users’ profile/purchase data, a secured creditor can select an online auction site most appropriate for reaching the relevant public for its collateral type. The secured party should select an online auction that has an appropriately large registered user base that regularly buys the type of good that the secured party is selling. An online auction with an appropriate user base would be reasonably calculated to reach an

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240. As Hagel and Armstrong argue, virtual communities will expand markets for goods and services by *becoming* the markets themselves. If Hagel and Armstrong are correct, the rapid growth of virtual communities may profoundly affect foreclosure sales. But a cautionary note is appropriate here. Hagel and Armstrong’s virtual community business model does not describe the majority of existing Web sites today. For example, AOL is not a virtual community as defined by Hagel and Armstrong because it is “not distinguished by a distinctive focus in terms of the members or content [AOL is] . . . seeking to aggregate.” HAGEL & ARMSTRONG, *supra* note 78, at 39. To the extent development of virtual communities moves as they predict, then much of what is discussed here may materialize. But the Internet, the Web, and the surrounding technology is rapidly changing, and it is difficult to predict with any certainty what the future holds. Today at least, companies do use as a marketing tool watered-down versions of the Hagel and Armstrong virtual community. See *supra* Part I.D.

interested public and result in competitive bidding.<sup>241</sup> Returning to the sale of the computers and the MR2, does Onsale generally sell computers or used cars to its registered user base? The publicly available information discussed in Part I on Onsale indicates that it sells a large volume of computer hardware and software, suggesting that people interested in these types of goods attend and bid at Onsale. In contrast, Onsale does not sell automobiles routinely, and therefore the secured creditor would not be acting reasonably if he used the Web site to auction the MR2. More appropriate would be Yahoo!Auctions which routinely hosts used automobile auctions, as discussed further in Part III, section C.

Indeed, theoretically, the targeting process can be more refined. As discussed in Part I, online technology allows Web sites like eBay to track not only what users bought, but what they were interested in but did not buy. For example, for an eBay auction of a computer, the Web site will track when, and how long, a potential bidder looked at the merchandise auction page, but did not bid. And where a bidder is outbid and loses the auction, the Web site will know how much the losing bidder was willing to bid for that type of item. While neither Onsale nor eBay discloses users' personally identifiable information to third parties, in theory users' aggregate purchasing habits are, or could be, available without violating these Web sites' respective privacy policies. Imagine an online auction like eBay being able to tell Big Bank that one percent of eBay's registered users (210,000) looked (or bid and lost) for a computer in the last six months. Thus, at least 210,000 people have an identified interest in this type of collateral, and, as discussed in Part I and further discussed below, eBay can target this subset of users with e-mails announcing upcoming computer auctions.

Finally, because online auctions allow persons distant from the location of the goods to view and bid, the relevant public for collateral need not reside in the same geographical location as the sale or collateral. Especially for general collateral, online foreclosure auctions expand the potential pool of interested bidders beyond the local population. Testimonials of Onsale bidders indicate that they hail from locations distant from one another (Canada, Florida, New York) and yet bid for items ranging in price from \$25 to \$3,000.<sup>242</sup>

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241. For certain expensive or unique goods sold online, there may a small, but appropriately small, user base of interested buyers. *The Meteorite Exchange Auction Page*, (visited May 19, 1999) <<http://www.meteorite.com>> (photocopy of Web page on file with author), for example, has online auctions of meteorites.

242. *Onsale* (visited June 4, 1998) <<http://www.onsale.com/testimon.html>> (photocopy of Web page on file with author).

With the tremendous power of Internet technology to identify potential bidders even for general collateral, what is currently considered in the real world as general collateral for which the relevant public is indiscernible may now have a relevant online auction community (or subset thereof) with a known interest in the collateral type. Even where the collateral is specific, specialized online auctions may have a defined audience that a secured party could target, much like the subscribers to specialty or trade magazines, like *Trade-A-Plane*.<sup>243</sup> Their aggregation of people with similar geographic, demographic, or topological backgrounds makes them powerful tools to efficiently put the collateral before the right people at the right time.

#### b. Limitations to Identifying the Online Relevant Public

What are the potential limitations raised by the relevant public requirement when applied to cyberspace auctions? First, the cost of obtaining information that allows the secured creditor to select an online auction with the largest possible virtual community of interested bidders may be prohibitively expensive for sales of general collateral. This seems less likely for Onsale, eBay, and Yahoo!Auctions, for which there is a significant amount of published data, including on the Web sites themselves and in SEC documents. Relatedly, using this information, whether publicly gathered or purchased from the Web sites or online marketers, may raise privacy concerns.<sup>244</sup> But, as discussed in Part I, both Onsale's and eBay's privacy policies prohibit the disclosure of personally-identifiable user information, while allowing the sale of aggregated user information to third parties. Further, for internal marketing purposes, both Web sites use personal user information. And, given the robust commercial success of both auctions, the cultures of both Web sites' communities apparently tolerate this level of privacy intrusion.<sup>245</sup>

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243. Hagel and Armstrong state: Through their distinctive focus, virtual communities thus serve as magnets, conjoining customers who share common purchase profiles and who collectively represent a disproportionate amount of the purchase activity in specific transaction categories. In isolation, this defining characteristic of a virtual community would be interesting in the same way that specialty magazines provide a similar aggregation of audiences for advertisers to reach.

HAGEL & ARMSTRONG, *supra* note 78, at 27.

244. See *supra* Parts I.D.4.c., I.E.

245. I leave to others the normative question concerning what should be the "proper amount" of disclosure of user information in any given cyberspace community.

A third problem is that an online auction's virtual community—while creating a good market for commonly auctioned items that users have purchased and future users are likely to purchase—may have limited use for other types of goods. As discussed, Onsale's virtual community would be less useful for items such as used cars since that community, comprised mainly of past users, will not necessarily contain people interested in used car auctions. Rather, the secured party should try to select an online auction site like Yahoo!Auctions that normally sells used cars.<sup>246</sup>

Another distinct limitation to identifying, locating, and ultimately advertising to the relevant market for a particular type of collateral is that cyberspace's online population at large is not as heterogeneous as the real world's, and may not contain the diversity of races, gender, ages, incomes, educational levels, geographic locations, tastes, and preferences necessary to assure that the relevant public is present.<sup>247</sup> The Internet's population is on average richer, more educated, younger, and more male-oriented than the general population.<sup>248</sup> Where the type of collateral is not, generally

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246. Selecting an online auction site that maximizes the collateral's exposure to interested bidders can be analogized to the requirement that the secured party choose the proper forum for its sale. Section 9-504(3) requires that a secured party dispose of collateral using a commercially reasonable "method and manner." U.C.C. § 9-504(3). Although section 9-504(3) does not define the terms "method" and "manner," courts generally find that the choice of method and manner of sale must be "in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances." *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698, 712 (E.D. Pa. 1968), *aff'd*, 398 F.2d 310 (3d Cir. 1968). Courts will frequently consider the secured party's efforts to investigate and determine the most commercially reasonable forum, including their consultation with industry experts. *See, e.g., In re Frazier*, 93 B.R. 366, 368 (Bankr. M.D. Tenn. 1988).

247. With respect to gender, age, income, and educational characteristics of online users, the following statistics suggest that the Internet does not yet reflect the population as a whole: (a) 40% of online users are women, 60% men; (b) 23% of online users are between 40 and 49 years old, 18% between 30 and 39, 14% between 18 and 24, 14% between 25 and 29, 14% between 50 and 64, and 5% over 65 years old; (c) 21% of online users have annual incomes in excess of \$75,000, 20% with incomes between \$35,000 and \$50,000, 12% with incomes between \$50,000 and \$75,000, 12% with incomes between \$25,000 and \$35,000, 12% with incomes below \$15,000, 6% with incomes between \$15,000 and \$25,000; and (d) 27% of online users have some college education, 23% have a high school education or less, 23% have a college diploma, and 18% have post-graduate education. ALLEN ET AL., *supra* note 21, at 232-33. Greater than 80% of PC owners have one college degree, and the average household income of this group is above \$50,000, considerably higher than the \$35,000 U.S. household average. USAWEB & BRUNER, *supra* note 18, at 15.

248. USAWEB & BRUNER, *supra* note 18, at 282.

The latest data from the Web's largest demographic survey, conducted by the Georgia Institute of Technology, indicates that as more of the general population

speaking, that which an affluent, educated online population would normally buy, then it may literally be impossible for an online auction to invite the relevant public *because the relevant public is not in cyberspace*. Thus, for example, online public sales of repossessed grain may yield few or no bidders if cyberspace has few or no online communities or individuals interested in buying grain. As discussed in Part I, as the cost of accessing the Internet falls, technology improves, and potential users' privacy and security concerns diminish, the online population should continue to grow and become more heterogeneous.

Even where the demographics suggest that online buyers may be interested in a type of good, where that type of good is not customarily sold online, there may be little *online* demand for these goods. As discussed in Part I, Internet sales of tangible goods are dominated by particular types of goods, such as software, CDs and tapes, women's apparel, men's apparel, sporting goods, toys, electronics, jewelry, and computers. And as discussed more fully in Part III, section E, there may not be a sufficiently developed online commercial channel for selling a certain type of good to justify using an online auction rather than its real world counterpart. To the extent that a secured party has repossessed collateral that is not commonly sold online, there may be *ex ante* little online interest, and no amount of online advertising will result in competitive bidding or a fair price.<sup>249</sup>

Finally, it may not be enough for a secured party to rely solely on the Web site's registered user base as the "relevant public;" some effort to identify and invite non-registered but potential bidders may be required. Besides selecting the proper online auction with an identified and relevant registered user base, the secured party may also have to perform some level of due diligence to see exactly what type of Web or real world advertising the online auction actually uses to create, maintain, and expand this user base, and advertise specific auctions. The next section discusses this problem in the context of the appropriateness of online advertising.

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comes online, the average user's income and education levels are coming down while the average age goes up. But it's still the upper end of society leading the way .... The point as regards branding is clear: Although companies may not yet be able to reach the majority of their consumer audience online, they can reach the potentially most lucrative segment of that audience.

*Id.*

249. On the other hand, for certain expensive or unique goods that are not commonly sold online, there may, nevertheless, be Web sites selling, and online users interested in, such categories of goods. *The Intermodal Exchange*, (visited Jan. 5, 2000) <<http://www.intermodalex.com>>, for example, auctions used shipping cargo containers.



### c. Appropriate Online Advertising

For cyberspace auctions, a secured creditor will also have to use appropriate advertising to invite the relevant online public. Essentially, this means that the secured creditor will need to assess the effectiveness of the Web site's online advertising efforts. As discussed in Part I, Onsale's online advertising efforts consist of its Web site, banner links and URL listings with over 1,000 affinity sites, and "Steals & Deals" and "MyDeals" broadcast e-mails to its registered user base (focused bidders). As also discussed in Part I, these online advertising methods have many advantages over traditional mass market and target media.

The assessment of these advertising efforts' effectiveness should focus on both the registered user base and those potential non-registered bidders. Some registered users surf online auctions like Onsale and eBay regularly and require the least need for advertising of the secured party's sale. More problematic are registered users who do not surf frequently and/or have opted out of Onsale's e-mail broadcast list. For this category, the target e-mails will be ineffective. The larger the percentage of the Web's site's registered user base this constitutes, the more problematic it becomes for the secured party. Consequently, the secured party may need to determine whether the online auction it uses engages in online advertising efforts to attract opted-out users and non-registered online buyers who may be potential (relevant) online bidders for the secured party's collateral. Not doing so raises the possibility that the online auction will be characterized as "private" and/or will be found commercially unreasonable.

Are online advertising media generally, and Onsale's advertising efforts specifically, "appropriate" to reach this non-registered and opted-out group? Using the categories that I described in Part I, will serendipitous and/or deliberate bidders likely see Onsale's advertising? Will they be pulled to Onsale's Web site? Will they find the computer and MR2 auctions? For even if there exists such a relevant online market segment for a particular type of collateral, it may be that Onsale's advertising efforts do not, or cannot, reach and influence this audience. Several problems present themselves.

First, with the rapid proliferation of Web sites and the increasing vastness of cyberspace, locating a Web site and banner ad by casual surfing or a deliberate search will become increasingly difficult.<sup>250</sup> Courts are

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250. Hagel and Armstrong argue:

The on-line world is still chaotic: there are thousands of sites and therefore thousands of "brands," and people browsing do not have the structure they find in their local

skeptical of advertising that is placed in places where the relevant public will not likely perceive it, especially where the relevant public is the general public surrounding a sale site.<sup>251</sup> Thus, for purposes of appropriate advertising under Article 9, a secured creditor will be held accountable for where Onsale places its banners and other links and whether such placement is reasonably calculated to maximize the Web site's exposure to the relevant target market for the collateral.

Second, judged against traditional advertising media employed in appropriately advertised real world public sales, using the Web site itself to publicize a sale of collateral may seem odd to the courts. The normal dichotomy between the advertising and the thing advertised does not necessarily exist with respect to Web sites, or at least the relationship has been changed significantly. For a real world public sale, traditional advertising in a print or broadcast medium publicizing the time and place of the sale along with a description of the collateral is distinct from the auction itself. Yet in cyberspace, the online auction Web site is both the advertisement of, and the vehicle for, the auction of the goods.<sup>252</sup> There is a "tight linkage in on-line environments between an advertisement and a purchase. When advertisements allow a viewer to purchase a product or service by pressing on an icon in the ad itself, the distinction between ads and purchases becomes blurred."<sup>253</sup> The Internet permits real-time, immediate interactive communication. Print, radio, and television do not

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retail store to guide them to the brands they feel comfortable with. Even the strongest off-line brands can get lost on the Internet at least for now.

HAGEL & ARMSTRONG, *supra* note 78, at 129. Relatedly, the deliberate bidder's search of "+online +auction +computer" will retrieve numerous "hits" of various Web sites. Will the deliberate bidder even see the Onsale hit? If so, faced with multiple choices, will the deliberate bidder click the Onsale hit? In marketing terms, the stronger a site's "brand" recognition, the more likely that a surfer will visit the site to fulfill a particular need. See ZEFF & ARONSON, *supra* note 52, at 148-49.

251. See *infra* note 259 and accompanying text.

252. Online auctions have differing time periods. The longer the period, the more powerful the argument that the act of running the online auction amounts to both its advertising and the thing advertised.

253. HAGEL & ARMSTRONG, *supra* note 78, at 46. The authors further state: On-line, a person can see an advertisement, click on it to obtain more information, and either ask for material to be sent to their e-mail box or, in many cases, order it immediately on-line. Add in what's particular to a [virtual] community—namely that people . . . are discussing products with each other—and the result is an environment in which the gap between advertising and selling can be minimized and the transition from ad to sale accelerated . . . .

*Id.* at 194.

permit interactive communication—each is a one-way medium of information transfer. And each ad placed in a newspaper or on the radio is necessarily a one-shot event; it must be repeated in later publications or broadcasts to effect continuity. In contrast, because Onsale's auctions are open twenty-four hours a day and span one to fourteen days, the merchandise auction page as advertising is continuously and repeatedly published for that time period. As such, courts ought not *ex ante* find online auctions using their Web sites as an advertising medium commercially unreasonable.

Third, a temporal problem arises with respect to using the Web auction site as advertising for a public sale. With traditional linear, non-interactive advertising media, publicity for a public sale necessarily *precedes* the sale to allow potential bidders to investigate the collateral and arrange to be present at the sale.<sup>254</sup> Under the Code, the time period between the advertising and the sale must be reasonable and accordingly varies from several days to months depending on such factors as the nature of the parties, collateral type, and industry practice.<sup>255</sup> For general collateral like computers and used cars sold in a real world public auction, most courts would find ten days prior advertising to be commercially reasonable. How does this requirement work with respect to an online auction where the auction *is* the advertising? Perhaps we can artificially segregate the ad from the auction for the purposes of the temporally linear analysis. For the hypothetical computer auctions, recall that Big Bank selected a fourteen-day period. If we view the first ten days as advertising and the last four days as the auction, then there may be no timing problem. Under this analysis, the online auction should be

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254. The advertising requirement is distinct from the secured party's notice requirement under section 9-504(3). The secured party must provide the debtor and certain secured parties with reasonable notification of a public sale's time and place. § 9-504(3). *See, e.g., Ford & Vlahos v. ITT Commercial Fin. Corp.*, 885 P.2d 877, 883 (Cal. 1994) (en banc); *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 243 N.W.2d 745, 748 (Neb. 1976). Notice to the debtor also allows him to bid at the sale and protect himself from an inadequate price. *See John Deery Motors, Inc. v. Steinbronn*, 383 N.W.2d 553, 555 (Iowa 1986). My inquiry is limited to the advertising meant to alert the public of the sale.

255. *See, e.g., United States v. Conrad Publ'g Co.*, 589 F.2d 949, 954 (8th Cir. 1978) (holding that more lead time was required for a large, expensive item so that potential bidders could attend the sale); *Credit Alliance Corp. v. B&P Excavating, Inc.*, 31 U.C.C. Rep. Serv. (CBC) 1784 (S.D.N.Y. 1981) (holding that advertising for a public sale of collateral for which there was primarily local interest was best conducted shortly before the sale). California's non-uniform version of section 9-501(3) requires a minimum of five days notice prior to a public sale. Under section 9-501(3), parties to a security agreement can set the time period for pre-sale advertising so long as it is not "manifestly unreasonable."

open for a period that is the sum of the traditional time requirement and several more days.

But even with a fourteen-day online auction of the computer, there may be bidding in the first several days, thus falling inside the ten-day "advertising" period. One easy solution to the timing problem now used by one online auction site is to allow five days of advertising before the auction opens.<sup>256</sup> Otherwise, the secured creditor will be left with the more difficult argument that the lack of prior advertising did not undermine the twin goals of bidders' opportunity to investigate the collateral prior to the sale and time to arrange to be present at the sale. For a fourteen-day auction, the argument may be that early bidders had the opportunity to investigate the collateral but chose not to and had simply bid early, and obviously they were present at the sale.<sup>257</sup> Furthermore, early bidders could still investigate the collateral and then bid again, assuming they have been outbid.

Fourth, a potentially significant advertising content problem arises with Onsale's Web site when viewed as advertising. Courts generally agree that a commercially reasonable advertisement must contain the time and place of the sale and provide a collateral description.<sup>258</sup> Such advertising should be placed where the relevant audience will see, hear, or otherwise perceive it. Where advertising is too remote from the sale site or too inconspicuous to reasonably notify potential bidders, courts frequently find such advertising commercially unreasonable.<sup>259</sup> Judged by the content requirements, only

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256. See *USAuctions.com: How To* (visited Jan. 5, 2000) <[http://216.235.106.69/how\\_to\\_index.shtml](http://216.235.106.69/how_to_index.shtml)>. With e-mail broadcasts to registered users announcing a particular auction, the secured party could request that such broadcasts reasonably precede the sale.

257. The argument would be increasingly difficult the shorter the auction's length as there would be less time to investigate and arrange to be present once the auction opened.

258. See, e.g., *First Bank v. Harberer Dairy & Farm Equip., Inc.*, 412 N.W.2d 866 (S.D. 1987).

259. For example, in *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978), Wilkerson sued to recover a deficiency judgment from Johnson after a public sale of an automobile. Wilkerson advertised the sale by posting three notices in public places: a telephone poll, a utility pole, and the wall of a building. *Id.* at 505. No purchasers attended the sale, and Wilkerson bought the car for less than its appraised value. *Id.* at 509. Johnson claimed that the sale was executed in a commercially unreasonable manner. *Id.* The court agreed, finding that the public sale did not conform to commercially reasonable practices because the "woefully inadequate" advertising was not timely given, was not targeted at the relevant public reasonably expected to have an interest in the collateral, and was not done in a manner reasonably calculated to realize the best price from competitive bidding of a lively concourse of bidders. *Id.* While indicating that it was not holding that posting of notices as a means of advertising was per se commercially unreasonable, the court stated:

Onsale's merchandise auction pages arguably have sufficient time, place, and collateral description content. But a potential user, especially one new to Onsale, will first access Onsale's introductory pages, including its homepage, "How To Shop" page, and categorized merchandise listings in each department store, which do not provide sufficient content for any *particular* auction. The legally-conforming merchandise auction pages are secondary, if not tertiary, page levels in the Onsale auction process. It is possible that courts may find this advertising too remote or buried. Especially with a serendipitous bidder who has accidentally stumbled upon Onsale, the viewer may not delve deeply enough into the Web site to find the secured party's merchandise auction page.

A similar content problem arises where Onsale's banners and other links also are considered as the auction's advertising. When a serendipitous or deliberate bidder sees this advertising, what exactly is it advertising for? Onsale's site as a whole? Each auction? The MR2? All of these things? Onsale's banners and other links do not have sufficient time, place, and collateral description content either. An Onsale link with an affinity site may simply read "ONSALE." And such links typically do not appear until the user has clicked through several primary pages on the affinity site.

The unique interconnectedness of the Web through hypertext linking may help somewhat to overcome these buried content problems.<sup>260</sup> Banners and other links connect to Onsale's Web site, which in turn may lead to a merchandise auction page if the viewer so surfs. Viewed not in isolation, but

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Circumstances can be envisioned where notice posted in a conspicuous manner at a location where significant numbers of potentially interested purchasers might congregate or pass would suffice as adequate notice of the sale. In those circumstances, the question of commercially reasonable notice of public sale would be an issue of fact for the jury.

*Id.*

260. Professor Hardy argues:  
One of the astonishing features of the World Wide Web is [its] ability to use hypertext links to generate the appearance of a single document from widely geographically dispersed component parts. This 'document' might contain ambiguous borders because of multiple constituent parts, each of which might reside on different computers in different places . . . .

But this apparent ambiguity is imaginary. To say that information borders for hypertext are ill-defined would be to confuse the viewpoint of the viewer with that of the underlying software. The human viewer might not know which piece of information came from where, but the software pulling all the pieces together would (or could) know.

Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 244 (1996).

as one interactive whole, Onsale's Web site, its merchandise auction pages, its banners, and other links would have sufficient content. As discussed in Part I, one of the revolutionary attributes of Web interactive communication is the ability to seamlessly link pages of information that can be viewed quickly, easily, and cheaply through hypertext travel.<sup>261</sup> The Web's hypertext links "from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique."<sup>262</sup> Hyperlinks "allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world."<sup>263</sup> Further, Onsale recently introduced banner ads on Yahoo!, CNET, Infoseek, and HotBot that display live auction bids for a number of products.<sup>264</sup> To the extent that these live, dynamic banners or the traditional interlinking of "regular" banners, the Web site, and its merchandise auction pages invite the relevant public by providing them with relevant information, then courts *ex ante* should not conclude that the banners' (and other links') content is unreasonable.

Finally, a significant problem for achieving commercially reasonable online advertising is the Internet's lingering disdain for commercial advertising. The Internet was spawned in a non-commercial environment, and the public has exhibited, until recently, a distinct distaste for the Internet's commercialization and online advertising.<sup>265</sup> In its infancy, the Internet was exclusively a research network, where access was free, unrestricted and "unpolluted" by advertisements and commercial activity. The Internet's recent development as a commercial marketplace has met resistance from an online culture that wants to preserve the Internet's

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261. The Web provides "the seamless and rapid availability of information." O'Rourke, *supra* note 1, at 652 (citations omitted). Furthermore, the Web is a distributed system that is interconnected through hypertext links. "From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point." *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

262. *ACLU v. Reno*, 929 F. Supp. at 836-37.

263. *Id.* at 836.

264. *Onsale Debuts Breakthrough In Online Advertising* (Press Release, Mar. 24, 1999) <<http://www.onsale.com/aboutus/ir/pr/pr032499.html>> (photocopy of Web site on file with author).

265. KALAKOTA & WHINSTON, *supra* note 92, at 485-86; HAGEL & ARMSTRONG, *supra* note 78, at ix (stating that in the late 1980s, there was a "strong anticommerce culture on the on-line world and particularly on the Internet"). The Internet was opened to commercial traffic in 1991. *Id.*

historical non-commercial use.<sup>266</sup> While resistance to online advertising has softened, invasive push-based advertising such as "spam" remains highly controversial in the Internet's current culture and in the courts.<sup>267</sup> In many virtual communities, spam ads are viewed with the same displeasure as regular junk mail and are tossed in the cyberdump as readily as junk mail is tossed into the garbage can. Consumers angered by junk e-mail retaliate in a variety of ways, from "flaming" the advertisers with hate mail, to more extreme measures of deliberately overloading the company's Internet server with so much hate mail that it crashes.<sup>268</sup> Additionally, a company using spam may lose its Internet connection by being dropped by its ISP.<sup>269</sup> Companies, newsgroups, or other online communities that want to restrict junk e-mail can also erect software barriers using such software as WebFilter to block unsolicited advertising.<sup>270</sup> Indeed, there is even an online Blacklist of Internet Advertisers which was started in an effort to curb inappropriate junk e-mail advertising.<sup>271</sup> Relatedly, online data collection technologies and intrusive online advertising may be hampered by privacy concerns.<sup>272</sup> Many online marketing consultants advise that push advertisers

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266. See O'Rourke, *supra* note 1, at 624-625.

267. Bulk e-mail companies like Cyber Promotions that broadcast unsolicited e-mails to thousands of online users have been sued by their ISPs for spamming. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996); *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F. Supp. 456 (E.D. Pa. 1996). Criticism of mass, unsolicited junk e-mail ranges from the "harvesting" techniques bulk e-mail companies employ to obtain e-mail addresses from newsgroups and Web sites without the knowledge or consent of the addressees, to unhappy recipients of e-mail who blame not only the e-mail companies, but the advertising company and the ISPs serving the bulk e-mail companies. ALLEN ET AL., *supra* note 21, at 52.

268. USAWEB & BRUNER, *supra* note 18, at 152. A "flame" is a "vituperative e-mail or newsgroup posting of an especially acrimonious nature. Emotional, as homonym, and usually way out of line." STERNE, *supra* note 13, at 407.

269. USAWEB & BRUNER, *supra* note 18, at 152.

270. STERNE, *supra* note 13, at 103.

271. Axel Boldt, *Blacklist of Internet Advertisers* (visited Jan 9, 2000) <<http://math-www.uni-paderborn.de/~axel/BL/#what>>.

272. ALLEN ET AL., *supra* note 21, at 113, 229-230, ch. 11. "[O]nline privacy is a bomb waiting to explode, so handle it with extreme care. Several studies show that the online public, fueled in part by alarmist press reports, feels strongly about privacy and security." USAWEB & BRUNER, *supra* note 18, at 44. Commentators have voiced concern for the serious privacy problems raised by Internet communication. See, e.g., Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998); Barbara S. Wellbery, *Privacy Protection on the Information Superhighway*, 11 ST. JOHN'S J. LEGAL COMMENT 659 (1996).

adhere to “netiquette” guidelines and the internal rules of the constituent group, or face punishment.<sup>273</sup>

The secured party using online advertising directly, or indirectly through its use of an online auction site like Onsale that itself employs online advertising, must be aware that these advertising efforts may be inappropriate and commercially unreasonable where they breach Internet or virtual community norms and netiquette rules, or raise privacy concerns. As discussed in Part I, Onsale and eBay use broadcast e-mails to registered users, but also allow users to opt out of the mailing lists. Further, neither Web site releases users’ personally-identifying information, only aggregated data. Each of these Web sites’ virtual communities seem to accept the current level of push advertising and privacy intrusion.

#### 4. Competitive Bidding

As discussed in Part I, Onsale and eBay enjoy a significant number of visitors, registered users, and competitive bidding. To the extent that there are technical infirmities under Article 9 with their respective types and methods of online advertising, a healthy turnout with competitive bidding may rehabilitate their auctions. “[O]ne of the best measures of the adequacy of the publicity is one taken after the fact. If attendance at the auction is good and bidding vigorous, then the advertising effort was probably quite reasonable.”<sup>274</sup> Thus, for example, the “limitations” of Onsale’s advertising may in fact have little legal consequence under Article 9’s advertising requirement where an auction is well-attended, with vigorous bidding. But Onsale’s and eBay’s publicly-available data only goes so far. It does not tell

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273. “Netiquette means [t]he cultural and social rules on the Internet. Ignoring them may result in being flamed or castigated in public.” STERNE, *supra* note 13, at 409; *see also id.* at 44 (discussing the “critical rules of newsgroup advertising and the penalties for spamming”). Further, “[m]any newsgroups are closeknit communities where an outsider with the best of intentions can unwittingly breach established codes of conduct and get flamed in response.” USAWEB & BRUNER, *supra* note 18, at 149-50. Mailing lists “are much like newsgroups in their sense of community and devotion to a single topic. [Advertisers] need to be even more cautious when promoting on mailing lists, however, to avoid upsetting list members.” *Id.* at 160.

274. FERRIS & GOLDSTEIN, *supra* note 154, at § 6.10, at 177-78. *See, e.g.*, C.I.T. Corp. v. Duncan Grading & Constr., Inc., 739 F.2d 359, 361 (8th Cir. 1984); Personal Jet, Inc. v. Callihan, 624 F.2d 562, 568-69 (5th Cir. 1980); Lowden Inv. Co. v. General Elec. Credit Co., 741 P.2d 806, 808 (Nev. 1987); Bailey v. Navistar Fin. Corp., 709 S.W.2d 841, 842-43 (Ky. Ct. App. 1986); Masey Ferguson Credit Corp. v. Bond, 335 S.E.2d 454, 455-56 (Ga. Ct. App. 1985); Karlstad State Bank v. Fritsche, 374 N.W.2d 177, 181-82 (Minn. Ct. App. 1985); School Supply Co. v. First Nat’l Bank, 685 S.W.2d 200, 203-04 (Ky. Ct. App. 1984).



us the likely level of attendance and/or competitive bidding for any *particular* auction or type of good (collateral). To this end, empirical work is needed, and the secured creditor should not dismiss lightly any technical infirmities under Article 9.

In summary, for goods like computers that are commonly sold through Onsale and eBay, a secured creditor selling such goods (especially where general collateral) may enjoy a far greater attendance and competitive bidding than with a real world auction. As Internet technology and virtual communities allow Web sites like Onsale and eBay to refine market segmentation or even define markets where definition was once impossible or prohibitively expensive, what was once general collateral that was "appropriately" advertised to the general public surrounding the sale site increasingly will become specific collateral with a geographically diverse, yet highly defined and targetable, online market segment with a known interest in the type of collateral. And even with currently specific collateral, defined online markets may be another valuable source of potential purchasers. As a matter of appropriate advertising and commercial reasonableness, the secured party selling goods for which there is an online auction with a relevant market segment targetable through online advertising will need to think seriously about using the Web site. The result may be the reduction of poorly-attended/low-price public foreclosure sales.<sup>275</sup>

### B. *Virtual Auctioneer*

While neither the Code nor the courts mandate that a professional auctioneer be used for a public or private auction of repossessed collateral, and a sale otherwise commercially reasonable will not necessarily be unreasonable for lack of a professional auctioneer, employing an experienced, professional auctioneer can be an important factor in

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275. There may even be an increase of foreclosure sales. Professor Mann argues that forced liquidation through Article 9 remedies is generally rare and that highly liquid goods, such as automobiles and consumer goods, for which the debtor-creditor relationship is frequently a one-shot deal and for which the costs of negotiating an alternative solution with an unsophisticated debtor are relatively high, have the highest incidence of repossession. Mann, *supra* note 143, at 227-30. A reasonable question is whether the growth of defined and targetable online market segments reached through online auctions (or other shopping Web sites) will increase the liquidity of certain types of goods (collateral) and thus increase the likelihood of their repossession and sale. This question ranges beyond the scope of this Article, and I do not address it further.

determining the commercial reasonableness of the sale.<sup>276</sup> Using an experienced auctioneer is particularly important where the collateral is unique and/or expensive and where such use is the industry custom.<sup>277</sup> Auction theory places great importance on the functions of an auctioneer in ascending-bid auction formats like English auctions or Onsale's Yankee Auctions.<sup>278</sup> Employing a professional or experienced auctioneer helps protect debtors from poorly run auctions that result in low prices and deficiencies.<sup>279</sup>

Onsale's auctions are not run by a live (human), professional auctioneer. Rather, they are conducted by a virtual auctioneer: sophisticated and complex "auction management technology" consisting of proprietary and licensed computer software and hardware.<sup>280</sup> Does Onsale's virtual auctioneer meet the traditional definition of, and adequately perform the functions of, a live, professional auctioneer? If it does not, can online auctions employing a virtual auctioneer ever be characterized as "auctions" for purposes of the public sale requirement under Article 9? Furthermore, if Onsale's virtual auctioneer cannot adequately perform the same tasks and functions of a live auctioneer, the price realized on the collateral may be

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276. See, e.g., *United States v. Conrad Publ'g Co.*, 589 F.2d 949, 952 (8th Cir. 1978) (finding inexperience of auctioneer a contributing factor commercial unreasonableness of sale); *In re Auer*, 103 B.R. 700, 703 (W.D. Pa. 1989); *Huntington Nat'l Bank v. Elkins*, 559 N.E.2d 456, 458 (Ohio 1990); *American State Bank v. Hewson*, 411 N.W.2d 57, 64 (N.D. 1987). Cf. *Wainright Bank & Trust Co. v. Railroadmen Fed. Sav. & Loan Ass'n*, 806 F.2d 146, 152 (7th Cir. 1986) (finding that the failure to use a professional auctioneer in a real estate foreclosure sale was insufficient to overcome the totality of circumstances of an otherwise commercially reasonable sale).

277. See, e.g., *Personal Jet, Inc. v. Callihan*, 624 F.2d 562, 569 (5th Cir. 1980).

278. "The key functionary in auction sales is the auctioneer." CASSADY, *supra* note 162, at 92.

279. Ferris and Goldstein state:

The professional auctioneer or auction company can be of considerable help to the secured party simply because of their experience in conducting public sales of distressed goods. It is not uncommon for the auction company to take over most of the mechanics of the sale, including conducting the inventory of the collateral for display, distributing brochures or other information at the same time of the sale, and advising the creditor generally in planning the sale. An experienced auctioneer also can later provide valuable testimony about customary industry practices, the expected return, the sale method and other aspects of the sale.

FERRIS & GOLDSTEIN, *supra* note 154, § 6.13, at 182.

280. See *supra* note 51. Onsale does employ real human beings in its customer support staff who handle customer inquiries about the bidding process, track shipments, investigate problems with merchandise, and act as intermediaries between vendors and buyers. *Onsale Form 10-K*, *supra* note 34, at 11.

adversely affected and Onsale's auctions may be otherwise incapable of satisfying the commercial reasonableness requirement under section 9-504(3). Thus, we must explore the definition and functions of an auctioneer in theory and under Article 9 and measure Onsale's virtual auctioneer against them.

Auctioneer has been defined as "one who sells property, or offers it for sale, by a system of increasing or decreasing bids, or by any other competitive method, or who has on his premises any notice, or wording, indicating that he is an auctioneer."<sup>281</sup> Furthermore, recall that an "auction" is defined as "a market institution with an explicit set of rules determining resource allocation and prices on the basis of bids from the market participants."<sup>282</sup> Should it matter that the "one" running the "market institution" is software? If we free ourselves from the notion that an auctioneer must by definition be a live person, then Onsale's virtual auctioneer generally meets these definitions: it does in fact "sell property" "by a system of increasing . . . bids" in accordance with "an explicit set of rules."

These broad definitions, however, obscure more significant problems with Onsale's virtual auctioneer and its ability to perform the traditional functions of an auctioneer. To understand these functions, we must refine the definition of "auctioneer." In a broad sense, the auctioneer is the auction house itself. Alternatively, the term auctioneer can be narrowly construed to designate only the salesperson who sells the goods in a particular auction.<sup>283</sup> The distinction is important because the broader definition carries with it more responsibilities and functions.<sup>284</sup> Distinguishing Onsale, the auction house, from Onsale, the virtual auctioneer, would be a difficult and somewhat arbitrary task given the complexity of the software and hardware

281. CASSADY, *supra* note 162, at 92.

282. McAfee & McMillan, *supra* note 164, at 701.

283. CASSADY, *supra* note 162, at 93.

More often than not . . . the functions of the auctioneer, refers to the broader concept. Sometimes, in practice, the two are identical because the actual sale is conducted by the owner of the auction house, or as a Sotheby's or Christie's, but individuals who have a part interest in the auction firm.

*Id.*

284. *Id.* at 95.

From a broad viewpoint, the functions of an auctioneer include many activities that are performed behind the scenes in organizing and preparing for the sale. If the narrow viewpoint is taken, the job of auctioneer is largely selling, or at least arranging for transfer of title to goods that are sold.

*Id.*

used by Onsale and its interaction with Onsale employees. Thus, I shall use the term auctioneer in the broadest sense to include all of the functions associated with an auction house.

Broadly speaking, auctioneers have two overlapping sets of functions: administrative and salesperson. Generally, with respect to an auctioneer's administrative functions, the auctioneer is responsible for setting the procedures and rules of the auction,<sup>285</sup> and has great latitude in organizing and conducting the sale.<sup>286</sup> In this way, the auctioneer also plays a heavy organizational role in conducting the auction. In many respects, Onsale's online auctions perform these key administrative/organizational functions.<sup>287</sup> As described in Part I, Onsale's entire auction process, from the posting of the items through the auction closing, is automated using internally-developed "auction management" and "transaction processing" software.<sup>288</sup>

But an auctioneer's administrative functions run beyond simply conducting the sale itself, and may range to advisory tasks as well. For a secured creditor's foreclosure sale, these "behind the scenes" tasks can be numerous, especially if the creditor uses a professional auctioneer to whom he defers greatly in conducting the sale, and may include advertising of the collateral, taking inventory and preparing the collateral for sale, appraising the collateral's value, and selecting the best auction method for achieving the highest price.<sup>289</sup> Because auctioneers frequently perform significant advisory functions, selecting the proper auctioneer is important.

Onsale's limited advisory role is troubling. Onsale's generic "tips" to sellers and buyers may be commercially reasonable only for a limited category of commonly sold and inexpensive goods. But where the collateral is unique or expensive, and/or where industry practice for selling a certain type of goods demands the use of an experienced, professional auctioneer,

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285. The seller typically has the right to set, within certain limits, the manner, conditions and terms of sale that the auctioneer typically announces prior to the sale. See CASSADY, *supra* note 162, at 128-32 (listing "conditions for sale"). Onsale dictates most of the policies and procedures of its auctions, although sellers make certain choices, including a minimum bid and the auction's length.

286. CASSADY, *supra* note 162, at 93-95; 7 Am. Jur. 2d *Auctions and Auctioneers* § 35 (1997).

287. See *supra* notes 42-51, 183 and accompanying text.

288. See *supra* note 51, and accompanying text.

289. FERRIS & GOLDSTEIN, *supra* note 154, § 6.13, at 182; see also *Personal Jet, Inc. v. Callihan*, 624 F.2d 562, 569 (5th Cir. 1980) (holding that a public auction of repossessed airplanes was commercially reasonable where "a professional appraiser and auctioneer was retained to inventory, advertise and display the collateral before the sale at a public auction").

Onsale's limited advice may fall short. To the extent such limited advice results on-average-over-time in lower prices than would be realized for the collateral at a real world sale with an experienced auctioneer, Onsale's limited advisory function *ex ante* may make its auctions commercially unreasonable.<sup>290</sup>

Even more profound and perhaps intractable problems are raised with respect to the fulfillment by Onsale's virtual software auctioneer of the important salesperson function. An auctioneer plays a distinct and crucial sales role in auctions, especially ascending-bid auctions like Onsale's Yankee Auctions that are characterized by competitive bidding.

[A]n auctioneer can exert considerable influence on the price achieved [in an English-type auction], possibly more than any other type of auction . . . . The auctioneer's influence depends in part on his personality, his voice, and his imperturbability, but he must also know values, must be skillful in stimulating competition, and must be able to accelerate the selling price when the occasion requires it.<sup>291</sup>

Auctions have a rhythm and a pace, and the skillful auctioneer controls his auction with various psychological strategies and tactics in an attempt to produce a brisk market with attentive bidders.<sup>292</sup> To keep buyers alert and bidding, a good auctioneer may manipulate the order in which items are sold, "accidentally" break an item for sale, or even employ humor.<sup>293</sup> During the bidding process, the auctioneer "points out the merits of the merchandise and cajoles, persuades, exhorts, and otherwise promotes sales in an attempt to elicit a higher bid."<sup>294</sup> Skilled auctioneers literally forge emotional bonds with their audience, which they then exploit to stimulate bidding. "Good auction salesman differ tremendously from one another, except perhaps in the magical ability of establishing rapport with would-be

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290. For a discussion of price as a factor of commercial reasonableness and the limitations of comparing the price received in real world auctions and online auctions, see *infra* Part III.C.

291. CASSADY, *supra* note 162, at 59-60.

292. *Id.* at 169. Cassady states:

In ascending-price system the auctioneer has considerable opportunity to promote the sale of the property he is handling. He may describe the item as he puts it up for sale, and may even pause in the midst of the bidding to point out any outstanding qualities he believes the buyers may have overlooked.

*Id.* at 100.

293. *Id.* at 165.

294. *Id.* at 14, 115.

buyers.”<sup>295</sup> An auctioneer may know the buyers personally “and literally looks to those he expects will bid on certain items.”<sup>296</sup>

Indeed, much of what makes a successful auctioneer are uniquely human traits:

Ideally, the qualities needed by an auctioneer include a good voice, a pleasing personality, good character, the ability to hold and interest an audience, confidence in himself, the ability to judge the value of the items being auctioned, honesty, poise, enthusiasm, and vitality . . . . Thus an effective auctioneer may induce some people to bid who might otherwise have not done so.<sup>297</sup>

How closely can a virtual auctioneer created with software and hardware mimic these human qualities? Can it establish a rapport and emotional bonds with potential bidders?<sup>298</sup> If it cannot, can it fulfill the salesperson function of a live auctioneer?<sup>299</sup> Onsale itself states that one of the benefits of online auctions is that bidders can post their bids “in an unintimidating atmosphere and without the pressure of salespeople or auctioneers.”<sup>300</sup>

295. *Id.* at 104.

296. *Id.* at 103.

297. *Id.* at 102-03. “The auctioneer’s appearance, voice, rhythm of patter, good nature, imperturbability, and storytelling ability may have an effect on bidding activity, thus enhancing prices . . . . Knowledge of practical psychology is another valuable factor; successful auctioneers have flexible minds and are constantly on the lookout for opportunities to practice their art.” *Id.* at 165.

298. See also ALLEN ET AL., *supra* note 21, at 84.

According to the 1997 Cybercitizen Report by Yankelovich Partners <<http://www.yankelovich.com>>, the key to the success of online commerce in the future is the user’s ability to personally interact with a Web site. The study revealed that more than two-thirds of respondents prefer more human-like transactions when they shop online. Users want timely answers, product recommendations based on their tastes and preferences, and personalized interaction.

*Id.* Some cyberspace commentators believe that people can develop emotional relationships through online communication. See, e.g., Brittany Chenault, *Developing Personal and Emotional Relationships Via Computer-Mediated Communication*, CMC MAGAZINE (May 1998) (visited Jan. 9, 2000) <<http://www.december.com/cmc/mag/1998/may/chenaull.html>>.

299. “There are many customer interactions that cannot be replaced by automated Web site personalization systems. There are times when marketing, sales and service interactions with customers require a *real live* human involved in the dialog with customers.” ALLEN ET AL., *supra* note 21, at 107.

300. *Onsale Form 10-K*, *supra* note 34, at 3. Similarly, one Web marketing commentator, touting the benefits of online automobile shopping, said, “Car buyers who are intimidated by salesmen can effectively make their purchasing decisions in the comfort of

There is a more fundamental limitation on Onsale's ability to produce this human bond and competitive excitement: online auctions occur in cyberspace rather than any real world "place." The metaphor of "place" is now regularly used to describe the medium of electronic communication over the Internet.<sup>301</sup> But as Professor Hardy points out, "Cyberspace is not a real 'place,' of course, and tangible objects do not exist 'there.'"<sup>302</sup> In fact, all that really exists "there" is digital information.<sup>303</sup> To be sure, digital information is extraordinarily flexible; text, pictures, video, and audio can be digitized and sent over the Internet. This is fine if the meaning or significance of digital information existing in cyberspace does not depend on physical space, as is true for computer software, novels, and credit-card numbers.<sup>304</sup> But divorcing some types of digital information from the physical, real world places in which it is created or manifested may not be fine under Article 9.

Take, for example, a real world sale of tangible goods, whether between a small group of persons in a private forum or amongst many persons in a public auction. Start by imagining the type of information that can be digitized: the digital representation of the final written terms of the transaction, including the goods' price, any representations, warranties, covenants, etc. The process of these terms' creation involves face-to-face (or phone-to-phone) interaction (negotiation) between humans. This also is information. Face-to-face (or phone-to-phone) interaction, the emotional and physical rhythm and flow of spoken communication, the essence of human communion itself, are real world predicated "information" subsets inherent in, and intrinsic to, the written contract's terms. This real-world-human-interaction information is inseparable, it seems to me, from the "information" it manifests (the final contract terms). One begets the other and, in doing so, becomes part of that end result. In this sense, these terms

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their living rooms, print out site-generated financing terms, and walk into their nearest dealer with the confidence of knowing exactly what they want." USAWEB & BRUNER, *supra* note 18, at 47-48.

301. For a discussion of the Internet as a "place," see *infra* notes 359, 387-88, and accompanying text.

302. Hardy, *supra* note 260, at 217; see Robert C. Cumbow, *Cyberspace Must Exceed its Grasp, or What's a Metaphor? Tropes, Trips and Stumbles on the Info Highway*, 20 SEATTLE U. L. REV. 665 (1997) (arguing that the metaphoric use of "place" for the Internet is inappropriate with respect to copyright law).

303. In explaining why he chose to talk of "property" in "cyberspace," Professor Hardy observes that "in cyberspace we primarily care about digital information." Hardy, *supra* note 260, at 219.

304. *Id.* at 217.

are necessarily contingent upon the real world experience of their creation. If this is true, where online sales transactions like Onsale's auctions are substituted for their real world counterparts, to some extent this real-world-predicated information is absent (or separated) from the price and delivery terms. Cyberspace reality and experience is substituted for real-world interaction; something unique is lost. It is the loss of this something that worries me. Can people sitting passively in their armchairs and participating in an online auction really experience the human interaction that is inseparably part of the negotiation (or bidding) process in the real world? Does it matter to the sale's outcome? One British auctioneer commented about American real world auctions that they "remind him 'of evangelical meetings with the congregation being worked up into a frenzy.'"<sup>305</sup> Said an American attorney about real world auctions, "on more than one occasion, I witnessed experienced dealers getting caught up in the fervor of the moment and bidding more than what they could buy or sell the collateral for at wholesale prices."<sup>306</sup> By being created in cyberspace rather than real space, the sales information manifested as digital bits may amount to nothing more than Plato's shadow on the cave wall—a bland, two-dimensional image of the real thing. To the extent that the outcome of a transaction is dependent upon the full richness of the real world interaction, a medium of digital information may never achieve the same results.

Onsale's virtual auctioneer's debilities as a salesperson have uncertain implications for online auctions. All other things being equal, using a virtual auctioneer may result on-average-over-time in a lower price for the same goods sold in real world auctions. Except for a crude study that I conducted with used cars, discussed in Part III, section C, I have no empirical data to support this suggestion, but it would not surprise me if the loss of both the human auctioneer and real world predicated "information" lowered the average price results of an online foreclosure sale. One the other hand, online auctions are lively and have vigorous competitive bidding, and thus prices may, in fact, increase on average for certain goods. Various cyberspace prognosticators argue that as electronic commerce technology becomes more sophisticated and accepted into *la vie quotidienne*, users' interactive online behavior and experiences will more closely resemble the real world's.<sup>307</sup> Yet others are dubious of the ability of cyberspace

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305. CASSADY, *supra* note 162, at 117.

306. Poscover, *supra* note 218, at 243-44.

307. See Anthony L. Clapes, *Proceed With Caution—Information Superhighway Under Construction: Selecting the Proper Intellectual Property Rights Paradigm to Apply to Passengers on the Interim-Net*, 11 ST. JOHN'S J. LEGAL COMMENT. 621, 622 (1996).



communication to recreate its real world counterpart.<sup>308</sup> The growing use of real-time video may also go a long way to remedy these problems, although its current use on the Web is limited because of limited bandwidth that slows information flow. So for today at least, we cannot digitize certain "information;" we need a "place" in the real world. Thus, there is a very real risk that, without software that can match the salesperson function of a live auctioneer and without the emotional bonds forged between auctioneer and audience in the real world, an online auction does not adhere to proper "auction formalities" for the purposes of Article 9 and will never be able to fetch the highest reasonable price possible for the collateral. As such, *ex ante* online auctions might be considered commercially unreasonable.

All may not be lost, however. Under certain circumstances, focusing too deeply on the technological future, the psychology of online emotional bonding, and the salesperson function is misplaced when assessing the efficacy of Onsale's virtual auctioneer. To the extent that live or virtual auctions have lively, competitive bidding for reasons other than the auctioneer's promotional sales efforts, whether an auctioneer fulfills his/its sales function may be irrelevant. "Much of the sales promotional effort would be unnecessary if sales were very brisk, with numerous individuals bidding rapidly. Then there would be no dead spots [in the bidding process] to cover, the bids would come spontaneously without promotional prodding . . ." <sup>309</sup> As discussed, Onsale enjoys a significant registered user base and competitive bidding. Why does such competitive bidding take place online absent a live auctioneer? Let us explore several reasons why such bidders experience bidding zeal in the online auction environment.

Interactive Web communication appears to be an inherently engrossing medium.<sup>310</sup> As discussed in Part I, the Web's interactive, multimedia nature

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308. Claire Moore Dickerson, *Serial Killings of Communications; Dumbing-Down of Information Analysis: The Internet and its Larger Impact*, 11 ST. JOHN'S J. LEGAL COMMENT. 739, 740-41 (1996) (arguing that Internet communication creates detachment because it does not provide the subtleties and rhythms of face-to-face or telephonic communication).

309. CASSADY, *supra* note 162, at 115. Even live auctioneers take different strategies to promote the sale of an item, but "[w]hatever the strategem employed, it is designed to maintain, or enhance the interest of would-be buyers and thus enliven the bidding activity." *Id.*

310. In explaining why one study concluded that online advertising effectively influenced viewers, one commentator stated that "[t]he most salient argument in favor of the Web's branding power . . . is that Web users are deeply engrossed in the medium and sit only inches from the monitor, unlike TV viewers who lounge halfway across the room and take bathroom breaks and snack during most commercials." USAWEB & BRUNER, *supra* note 18, at 280. Onsale believes:

allows users to communicate dynamically with each other. Further, for many of these people, as with real world auctions, the online auction process is addictive and exciting.<sup>311</sup> Despite the lack of an auctioneer's cajoling, Onsale's bidders seem to be emotionally engaged in a competitive bidding environment. Their testimonials indicate that for some bidders Onsale is a vibrant online auction experience. For example: "'I've only got praise for you!!! This has got to be the most fun and exciting way to shop online!!! Thanks a million and please keep up the great work!!!'—Philippe Coicou, New York."<sup>312</sup> To be sure, Onsale places these favorable testimonials on its site. While admittedly anecdotal and incomplete evidence, these testimonials at least suggest that *ex ante* we cannot say that online auction environment precludes Professor Gilmore's strived for lively concourse of bidders.

Beyond the Web's interactive and engrossing nature, Onsale uses a number of applications to create a "compelling," "interactive" auction environment between bidders and between bidders and their sellers.<sup>313</sup> An

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[O]nline auctions represent an exciting sales format that leverages the unique characteristics of the Internet, such as interactivity and the sense of community built by customers competitively bidding in an auction environment . . . . The difference of opinion among potential purchasers regarding the value of such goods encourages the spirited bidding of the interactive auction process.

1997 *Onsale Form 10-K*, *supra* note 51, at 3.

311. See also Bensinger, *supra* note 2, at W12 ("Like the 'auction fever' that famously infects people at live auctions, there seems to be an addictive quality to online bidding."). Onsale states:

The Company's auctions are designed to be fun and exciting, adding the 'lure of the bargain' and the 'thrill of the hunt' to the retailing experience. The Company's customers do not simply purchase merchandise—they 'win' it. Competition and gamesmanship are inherent in the Company's auction format, which the Company believes enables it to attract and maintain a large and loyal customer base.

1997 *Onsale Form 10-K*, *supra* note 51, at 4.

312. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/testimon.html>> (photocopy of web page on file with author). "'BTW, I love \*your\* auctions. I'm a real *Onsale* junkie. It's a great concept . . . keep 'em coming.'—Fred Olmstead, New York." *Id.* "'In any case, *Onsale* is a great idea and watching the bids progress has become a (sick) sort of entertainment in the Psychology Department.'—Bill Gabrenya, Florida." *Id.* Finally, "'It's a great service. The prices are really good, and the bidding aspect of it adds a flavor of excitement. I find myself checking *Onsale* first when I look for a good price, and thereafter I check it about every 20 minutes to see where I still stand! Good Job!!'—Ian Turner, California." *Id.*

313. 1997 *Onsale Form 10-K*, *supra* note 51, at 4.

example is Onsale's "going, going, gone (G3)" rule.<sup>314</sup> Onsale's auctions close at the later of (a) at the posted closing time if there has been no bidding activity for five minutes before the posted closing time or (b) five minutes after the last bid is received.<sup>315</sup> Thus, auctions can and do remain open after the posted closing time during the G3 period while bidders submit bids after the posted closing time but within five minutes after the last bid.<sup>316</sup> Because many bidders wait until the end of an auction to bid, "in the G3 period the bidding can get very fast paced."<sup>317</sup>

One online auction feature that may dampen this effect is the automatic proxy bidding mechanism, dubbed by Onsale as its "Bid Maker" feature.<sup>318</sup> eBay also employs a similar automatic proxy bidding feature.<sup>319</sup> While Onsale allows bidders the option of using the feature, eBay requires all bidders to use it.<sup>320</sup> Under the feature, a bidder does not need to actually monitor the bidding after his initial bid in order to make a subsequent

314. Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/howto2.html>> (photocopy of Web page on file with author).

315. *Id.*

316. *Id.*

317. *Id.* In several other important ways, Onsale's auctions are "interactive" between bidders. As discussed in Part I, potential bidders can actively monitor an auction through its auction page which displays information about the merchandise and the status of the auction, including the current winning bids. In response, a bidder in real-time can submit her own higher bid and will immediately see the results of the bid posted on the auction page. Additionally, bidders can attach brief messages to their bids that are also posted on the auction page's list of winning bids. Onsale states that bidders "use these comments to communicate with other bidders in attempts to 'psyche out' or cooperate with other bidders. These comments, which generally are humorous, good-natured and in the spirit of competition, build a sense of community. This interactive shopping medium creates a sense of being 'where the action is.'" *Onsale Form 10-K*, *supra* note 34, at 5. Onsale's auctions are also "interactive" between bidders and their respective sellers. In perhaps a concession to the current limitation of online communication to create real-world relationships, eBay advises its winning bidders to talk with the seller on the phone. "E-mail communication is sometimes awkward, and it may be difficult to judge another person's personality, honesty, etc., without having an actual conversation person-to-person." *eBay Tips for Buyers* (visited Jan. 9, 2000) <<http://www.pages.ebay.com/aw/tips-buy.html>>.

318. Jerry Kaplan, *Onsale* (visited Sept. 1, 1999) <<http://www.onsale.com/tools/bidmaker.html>> (photocopy of Web page on file with author). Onsale's "Bid Maker" feature is optional and employed only if the bidder chooses. Onsale does not indicate whether the individuals making the recounted testimonials participated actively in their online bidding or used the Bid Maker feature. *Id.*

319. *eBay Proxy Bidding* (visited Jan. 9, 2000) <<http://www.pages.ebay.com/aw/proxy-bidding.html>>.

320. *Id.*

bid.<sup>321</sup> Rather, the bidder submits a secret maximum bid for the auctioned item, and the automatic proxy bidding mechanism monitors the bidding and automatically places winning bids for the bidder up to his stated maximum price.<sup>322</sup> This feature resembles the real world auction practice of “book bids.” Under a book bid, a bidder who does not attend an auction may in advance submit his maximum bid by mail to the auctioneer. Up to this maximum, the auctioneer will automatically increase the book bidder’s bid above the current bid by the standard increment of the particular auction. The book bid system broadens the geographical market for the item since the bidder need not attend the auction.<sup>323</sup> Under traditional auctions, bidders have the option to use book bids.

Especially on online auctions like eBay that require use of the automatic proxy bid feature, the feature may undermine the creation of an emotionally-involved online auction environment by removing human beings altogether. Commenting on the benefits of its automatic proxy bidding feature, eBay says “[y]ou’ve faced a fierce bidding war, and come out victorious, without even batting an eyelid or breaking a sweat!”<sup>324</sup> But eBay’s characterization of “you” winning the bidder war seems misplaced: the bidder does not bat an eyelid or break a sweat precisely because “you,” the bidder, have become superfluous. In real world auctions, this absence of human decision-making and active participation is not retarded through book bids. The auctioneer holding an absent bidder’s book bid acts as his agent and actually may use the book bid to enhance the bidding activity.<sup>325</sup> But online auctions have no live auctioneer, only the virtual software auctioneer that runs the auction process. Thus, eBay’s mandatory use of the automatic proxy bidding feature creates an almost purely virtual auction driven by software. In this sense, humans are no longer present; software on computers makes the incremental bids, albeit based on the initial maximum bid provided by its human counterpart.<sup>326</sup>

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321. *Id.*

322. *Id.*

323. CASSADY, *supra* note 162, at 152.

324. *eBay Proxy Bidding* (visited Jan. 9, 2000)

<<http://www.pages.ebay.com/aw/proxy-bidding.html>>.

325. CASSADY, *supra* note 162, at 165-166.

326. The net effect of the automatic bid feature is uncertain since I do not have data comparing the price results of online auctions using and not using the feature for the same or similar items.

*C. Price*

Realizing the highest price reasonably possible is one of the Code's paramount concerns and can be an important factor in determining the "commercial reasonableness" of a sale.<sup>327</sup> Yet, section 9-507(2) provides, "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."<sup>328</sup> Thus, a tension exists between the Code's policy of securing the highest price and section 9-507(2)'s tempering "gloss" over this goal.<sup>329</sup> This tension is further complicated by the different emphasis that courts in various jurisdictions place on a low price when assessing a sale's commercial reasonableness.<sup>330</sup> But in any jurisdiction, a low purchase price in conjunction with other infirmities puts the sale at significant risk of being found commercially unreasonable.<sup>331</sup>

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327. See, e.g., *Farmers Bank v. Hubbard*, 276 S.E.2d 622 (Ga. 1981); *Ford Motor Credit Co. v. Devalk Lincoln-Mercury, Inc.*, 600 F. Supp. 1547 (N.D. Ill. 1985); *Commercial Credit Equip. Corp. v. Parsons*, 820 S.W.2d 315 (Mo. Ct. App. 1991).

328. U.C.C. § 9-507(2) (1995).

329. Professor Gilmore termed section 9-507(2)'s price language "gloss on the meaning of 'commercially reasonable.'" 2 GILMORE, *supra* note 148, § 44.5, at 1237. Yet Gilmore took a less dismissive posture with section 9-507(2)'s rule when he added that "[t]he secured party is not required to be a seer or a prophet. He is not required to anticipate the course of the market. He is required to act with due diligence, to use his best efforts, to have a 'reasonable regard for the debtor's interest.'" *Id.*

330. This tension has produced at least two tests used in different jurisdictions to measure a sale's commercial reasonableness, including the collateral's price realized from the sale: the procedures test and the proceeds test. Courts using the procedures test review the procedures that the secured party undertook to dispose of the collateral (such as advertising, sale format, and use of auctioneer), rather than focusing mainly on the price. In contrast, under the proceeds test, the price realized for the collateral is the most important factor. FERRIS & GOLDSTEIN, *supra* note 154, § 6.3, at 151-54. Without discussing these tests further, most courts consider a low price as only one of the factors, although a significant one, in determining commercial reasonableness.

[A] low price, coupled with other factors of commercial reasonableness . . . will usually result in a finding of commercial unreasonableness. When low price is present without any other factors of commercial unreasonableness, however, courts have generally upheld the reasonableness of the sale.

9 WILLIAM D. HAWKLAND, UNIFORM COMM. CODE SERIES § 9-507:8, at §§ 9-835 to -836 (1997).

331. See, e.g., *Hubbard*, 276 S.E.2d at 623; *Parsons*, 820 S.W.2d at 317; *Georgia-Pacific Corp. v. First Wis. Fin. Corp.*, 805 F. Supp. 610 (N.D. Ill. 1992); see also 9 WILLIAM D. HAWKLAND, UNIFORM COMM. CODE SERIES § 9-507:8 (1997).

Online auctions raise some interesting questions concerning price.<sup>332</sup> In particular, for a given type of collateral, could a better price have been obtained using a real world method of disposition such as a live auction? The question is important because if online auctions on-average-over-time realize significantly less than their real world counterparts for the same type of collateral, the secured party will find it difficult to show that its choice of an online auction was reasonably calculated to realize a high price.

On the one hand, some general pieces of evidence suggest that online auctions are places to get goods at reduced prices. Onsale touts itself as providing “the opportunity for exceptional deals”<sup>333</sup> and “potential bargain prices.”<sup>334</sup> Onsale customers testify that they do indeed find bargains, getting “the best deals,” prices “too good to be true,” prices lower than at “discount stores,” and “sav[ing] hundreds off retail prices.”<sup>335</sup> While certainly anecdotal, these testimonies suggest that Onsale’s auctions may not

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332. For example, could a better price have been obtained using another online auction site altogether? To the extent one online auction better fulfills the factors of commercial reasonableness discussed in this Article, then presumably it is more likely to realize a better price. As I also suggested earlier, a prudent secured party, to the extent possible, should make a goods/price data comparison between online auctions.

333. *Onsale Form 10-K*, *supra* note 34, at 5.

334. *Id.*

335. For example: “I’m sure glad I stumbled onto your service. You saved me hundreds off retail prices! Thanks for the prompt service and low-low prices!”—John Tomasetti, Japan.” Jerry Kaplan, *Onsale* (visited June 4, 1998) <<http://www.onsale.com/testimon.html>> (photocopy of Web page on file with author). ““Ever since I stumbled upon your site one day I have been totally hooked! I have bought a few things and find it to be some of the best deals on equipment that I have ever seen! Keep up the good work!”—Derek Serianni, Ontario, Canada.” *Id.*

“I recently purchased a multimedia kit offered by Computer Geeks for a too good to be true price. I figured I’d get a second rate kit but for the price I had to give it a try. I am very impressed! I will definitely come back to Onsale often. Keep up the good work!”—Michael Koratich, Massachusetts.

*Id.* And

“Since I first found Onsale, I have been coming back time and time again. I now have a GREAT Lexmark laser printer at a price I could afford (This would not have been possible if I would have had to pay the price at the local discount store.) Also my CD-ROM and several other pieces of my system all came from great deals I got on Onsale. I’ll keep coming back and bidding. It’s fun and it really saves me money.”—Scott W. Smith, California.

*Id.* Also, ““I’ve purchased over \$2,000 worth of goods from Onsale in the past year . . . . For my purchases, at least, I’ve done extensive price comparison and figure I’ve saved about 20% versus the best deal I could find at any traditional retail or mail order outlets.”—Paul Tarlow, Maryland.” *Id.* In many cases, it is not clear whether the comparisons were to wholesale or retail prices in the real world.

realize comparatively similar prices to real world channels for the same types of goods. Further, Hagel and Armstrong posit that virtual communities may reduce the price of goods by making markets more efficient.<sup>336</sup>

On the other hand, online auction buyers may be willing to pay "inflated prices" for certain types of goods to which buyers may not otherwise have easy access.<sup>337</sup> Indeed, some sellers find that they can sell inventory through the Web that would not sell in the real world.<sup>338</sup> Furthermore, one study concluded that the English/first-price hybrid format of Onsale's Yankee Auctions was the best format "for the seller interested in raising the expected sale price."<sup>339</sup> Finally, even where online sellers realize comparatively less for goods than they might in real world sales, the lower selling and operating costs of cyberspace auctions described in Part I may offset the difference. Thus, for a given type of good, it is not clear whether online auctions result in better or worse prices on-average-over-time.

The answer rests ultimately upon an empirical analysis which I do not possess. I found no studies comparing the price received for identical or similar goods in real world versus online auctions, and therefore cannot determine whether the price received in online auctions is on-average-over-time greater than or lesser than that received in the real world. Further, there is little empirical data on the price and deficiency results of real world Article 9 sales against which to compare online results. One exception is foreclosure sales of automobiles. Summarizing various empirical studies, Gail Hillebrand observed that "creditors disposed of automobile collateral for only 71% to 81% of its wholesale value."<sup>340</sup> Two of the studies

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336. Hagel and Armstrong argue:

Electronic commerce in general may lead markets to become more efficient as community members track down the cheapest prices offered by vendors or put software tools to work to do this for them and put their orders out to bid . . . . Customers will begin to capture some of the economic surplus that suppliers have traditionally been able to claim because of customers' lack of perfect product and pricing information in most markets. Virtual communities make pricing more efficient, as members of consumer or business communities tell each other about excellent deals on offer from a particular supplier.

HAGEL & ARMSTRONG, *supra* note 78, at 196.

337. Bensing, *supra* note 2, at W12.

338. *Id.* Onsale also believes that because its online auction service is a rapid means by which sellers can dispose of excess inventory; "vendors are able to avoid some of the inventory price erosion and obsolescence that are typical in other channels and to obtain attractive prices for their products." *Onsale Form 10-K*, *supra* note 34, at 5.

339. BEAM ET AL., *supra* note 172, at 26.

340. Gail Hillebrand, *The Redrafting of U.C.C. Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 202 (1994). The studies that Ms. Hillebrand

indicated that on a second (non-Article 9) sale, the same cars brought, respectively, 92% and 110% of retail value.<sup>341</sup> Compare this empirical data with the admittedly unscientific and crude review that I conducted of the sale of used automobiles on Yahoo!Auctions.<sup>342</sup>

Yahoo!Auctions auctions a variety of goods and services, including automobiles. Under a separate category entitled "vehicles," all of the current auctions are listed, along with a brief description of the automobiles. A hypertext link brings the viewer to the respective merchandise auction pages for each vehicle. On February 16, 1999, 127 "vehicles" were listed. On February 19, 134 were listed, adding a few more new vehicles, and losing a few due to the scheduled closings of some auctions. The auctions ranged from two days to two weeks. Sellers could establish a minimum price below which they would not sell the vehicle.

Tracking as best I could auctions from each of these lists,<sup>343</sup> I found that for most automobile auctions, there were either no bidders or no bids above the minimum price.<sup>344</sup> Thus, these autos were not sold. The most tantalizing results were for auctions where the current high bid (I was not able to observe winning bids) was close to or exceeded 71% of the vehicles' wholesale values. For example, a 1992 Nissan Maxima GXE had a high bid

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reviewed included: Ellen Barrie Corenswet, Note, *I Can Get it For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081, 1085 (1975); John C. Firmin & Robert Simpson, Comment, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511, 516-21 (1971); Philip Shuchman, *Condition and Value of Repossessed Automobiles*, 21 WM. & MARY L. REV. 15, 26 (1979); Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969); Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850 (1985); Martin B. White, *Consumer Repossessions and Deficiencies: New Perspectives from New Data*, 23 B.C. L. REV. 385 (1982).

341. Hillebrand, *supra* note 340, at 206.

342. Yahoo! (visited Feb. 16, 1999) <<http://auctions.yahoo.com/26318-category.html>> (photocopy of Web page on file with author).

343. Tracking was difficult because once an auction reached its designated closing time (measured by the minute, such as auction closes February 18, 1999 at 17:39 PDT), I could no longer access it to see the results, such as winner or winning price. Thus, I attempted to view auctions as close to their designated closing time as possible. With my data, there is a risk that an intervening bidder made a higher bid than that which I observed. See Yahoo! (visited Feb. 19, 1999) <<http://auctions.yahoo.com/26318-category.html>> (photocopy of Web page on file with author).

344. For example, a 1996 Nissan Quest Van with a minimum bid of \$12,500 had no bidders. See Yahoo! (visited Feb. 19, 1999) <<http://auctions.yahoo.com/26360-category-leaf.html>> (photocopy of Web page on file with author).



of \$8,000 one day before its scheduled closing on February 21, 1999.<sup>345</sup> The *Kelley Bluebook* wholesale value on the closing date was \$6,675, the retail value \$9,775.<sup>346</sup> A 1989 Toyota Corolla had a high bid of \$2,520 one day before its scheduled closing.<sup>347</sup> The *Kelley Bluebook* wholesale value was \$3200, the retail value \$5,425.<sup>348</sup> A 1989 Toyota MR2 had a high bid eight days before its scheduled closing of \$3,020.<sup>349</sup> The *Kelley Bluebook* wholesale value was \$3,150, the retail value \$5,350.<sup>350</sup>

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345. *Yahoo!* (visited Feb. 20, 1999) <<http://auctions.yahoo.com/2874128.html>> (photocopy of Web page on file with author).

346. KELLEY BLUEBOOK: OFFICIAL GUIDE FOR OLDER CARS, 1979-1992 CAR & TRUCK VALUES 219 (Western ed. Jan.-Apr. 1999). The description of the Maxima was insufficient to allow me to identify the model. Therefore, I selected the values associated with the most expensive model, the Sedan 4D.

347. *Yahoo!* (visited Feb. 16, 1999) <<http://auctions.yahoo.com/2730013.html>> (photocopy of Web page on file with author).

348. KELLEY BLUEBOOK: OFFICIAL GUIDE FOR OLDER CARS, 1979-1992 CAR & TRUCK VALUES 304 (Western ed. Jan.-Apr. 1999). The description of the Corolla was insufficient to allow identification of the model. Therefore, I selected the values associated with the most expensive model, the Dlx A1-Trac Sedan 5D.

349. *Yahoo!* (visited Nov. 14, 1998) <<http://auctions.yahoo.com/auctions/8/1/5/1295118-item.html>> (photocopy of Web page on file with author).

350. KELLEY BLUEBOOK: OFFICIAL GUIDE FOR OLDER CARS, 1978-1991 CAR & TRUCK VALUES 300 (Western ed. Sept.-Dec. 1998). The description of the MR2 was insufficient to allow identification of the model. Therefore, I selected the values associated with the most expensive model, the Supercharged CPE 2D. A 1991 Honda Accord Sedan Ex had a high bid of \$5,300 three days prior to its scheduled closing. *Yahoo!* (visited Nov. 14, 1998) <<http://auctions.yahoo.com/auctions/8/1/5/1295118-item.html>> (photocopy of Web page on file with author). Bluebook wholesale value was \$7,175, retail value \$10,500. KELLEY BLUEBOOK: OFFICIAL GUIDE FOR OLDER CARS, 1978-1991 CAR & TRUCK VALUES 150 (Western ed. Sept.-Dec. 1998). A 1994 Chevrolet Beretta Z-26 Coupe 2D had a high bid of \$3,030 two days prior to its scheduled closing. *Yahoo!* (visited Nov. 14, 1998) <<http://auctions.yahoo.com/auctions/8/1/5/1295118-item.html>> (photocopy of Web page on file with author). Bluebook wholesale value was \$5,700, retail value was \$8,325. KELLEY BLUEBOOK: OFFICIAL GUIDE 1992-1998 USED CAR VALUES 52 (Western ed. Nov.-Dec. 1998). A 1993 Nissan Maxima Sport GXE Sedan 4D had a high bid of \$6,020 three days prior to its scheduled closing. *Yahoo!* (visited Nov. 14, 1998) <<http://auctions.yahoo.com/auctions/8/1/5/1295118-item.html>> (photocopy of Web page on file with author). Bluebook wholesale value was \$8,000, retail value was \$11,300. KELLEY BLUEBOOK: OFFICIAL GUIDE 1992-1998 USED CAR VALUES 132 (Western ed. Nov.-Dec. 1998).

Several observations are noteworthy. First, people are actually auctioning used cars on the Internet!<sup>351</sup> Second, although a minority of auctions were observed, several auctions had prices equal to or above the 71%-81% range observed in Article 9 foreclosure sales. To be sure, the online sales observed were not Article 9 dispositions. For a variety of reasons, repossession sales realize less than non-repossession sales for the same type of collateral.<sup>352</sup> Thus, the two studies Gail Hillebrand cites finding that repossessed automobiles sold a second time at a non-Article 9 sale brought 92% and 110% of retail value<sup>353</sup> may be better benchmarks. If so, then online auctions of *repossessed* autos may realize worse results than their real-world counterparts, indicating that it would be more reasonable for the secured party to use the latter.

#### *D. Place of Sale/Inspection of Collateral*

Under Article 9 and its current jurisprudence, axiomatic to any sale, public or private, is that there be physical space. Section 9-504(3) permits a sale "at any . . . place," such as the court house steps, an auction house, the debtor's place of business, or an attorney's office.<sup>354</sup> Also, notification to the debtor for a public sale should include reference to the "time and place" of the sale.<sup>355</sup> For a public sale to be characterized as both public and commercially reasonable, the relevant public must receive advertising

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351. On May 12, 1999, under eBay's category "Miscellaneous: Automotive: Vehicles: Cars," 742 cars were listed for auction. *eBay* (visited May 28, 1999) <<http://listings.ebay.com/aw/listings/list/category1257/index.html>> (photocopy of Web page on file with author).

352. For example, Gail Hillebrand gives several reasons for the low values on automobile disposition sales. First, a car financier selling the repossessed car may have arranged with the auto dealers from whom he purchased the note for compensation for deficiencies, thus insulating him from the low price dispositions. Hillebrand, *supra* note 340, at 204-05. Furthermore, such financiers may have business reasons to sell promptly. *Id.* Second, Hillebrand noted that one study she reviewed had found that auto dealers paid "significantly less than individuals when buying at disposition sales." *Id.* at 205. Hillebrand argues, "There could also be an unreasonably low value at a sale simply because a custom and practice now exists in which everyone knows that dealers will be bidding. Therefore, it is not necessary to approach the full wholesale value in order to buy the car at such a sale." *Id.* at 207; *see also* Mann, *supra* note 143, at 221-233 (arguing that high transaction costs of seizing and selling the collateral deters repossession and foreclosure sales); Rapson, *supra* note 208, at 521.

353. *See supra* note 341.

354. U.C.C. § 9-504(3) (1995).

355. *Id.*

describing the “place of sale,” and the advertising must be posted in a “public place.”<sup>356</sup> Those invited must have access to the “place of sale,” and the collateral must also be in a “place” where prospective buyers have an opportunity to inspect it prior to sale.<sup>357</sup> Many of the rules governing foreclosure sales thus run inexorably along geographical boundaries of space and distance.

Legal rules predicated on the existence of physical space may not correspond well to cyberspace transactions.<sup>358</sup> Metaphors and frames of reference to the physical world can be misleading.<sup>359</sup> As discussed in Part I, through its integrated computer networks tying hundreds of thousands of computer networks together, the Internet, and the Web in particular, removes the constraints of space and distance. Applying Article 9’s foreclosure rules and metaphors based on physical place to cyberspace auctions may be inappropriate.

For certain Article 9 requirements, the problem may be more illusory than real if we free ourselves from the traditional metaphors of physical space. For example, under section 9-504(3), the secured party must provide the debtor with “reasonable notification of the time and place of any public sale.”<sup>360</sup> The meaning of “place” here is arguably the address of the sale, which in the real world corresponds to a physical location.<sup>361</sup> For cyberspace sales, with respect to notifying the debtor of the sale’s address, a

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356. See *supra* note 259 and accompanying text.

357. See *supra* notes 153 and 155 and accompanying text; see also *infra* note 363 and accompanying text.

358. Johnson and Post’s thesis is that, because cyberspace does not have physical borders, rules based on physical boundaries may not be appropriate for regulating cyberspace transactions. Johnson & Post, *supra* note 60, at 1377-78.

359. KATSH, *supra* note 155, at 106. Katsh notes, for example, that using the print-related metaphor of calling a cybertext a “document” is inept in explaining the dynamic interaction that occurs in cyberspace. Other commentators have questioned the distinction between a public and private forum in cyberspace in the context of free speech under the First Amendment. See David Goldstone, *A Funny Thing Happened on the Way to the Cyberspace Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1 (1998); Edward Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L. J. 409 (1992). Courts, too, have considered the question of whether there is a public/private forum distinction in cyberspace. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *CompuServe, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996).

360. U.C.C. § 9-504(3) (1995).

361. See, e.g., *C.I.T. Corp. v. Anwright Corp.*, 237 Cal. Rptr. 108, 110 (Ct. App. 1987) (finding that the word “place” as used in the notice provisions of section 9-504(3) is not vague and should be interpreted as meaning the “address” of the sale).

Web site's URL should be considered the functional equivalent of its address.<sup>362</sup> Providing the debtor with Onsale's URL would allow him to find the sale's online "location" or "place" of sale.

Before we altogether shed earthly boundaries for the freedom of cyberspace, for certain Article 9 requirements governing the sale of tangible collateral, physical space is not so easily dismissed. I have in mind the requirement that bidders at a public sale have the opportunity to inspect the collateral at or before its sale. In many jurisdictions, the collateral must be displayed and available for inspection *at the sale site*.<sup>363</sup> In other jurisdictions, courts hold that, depending on industry custom, while inspection of the collateral must be available prior to the sale, the collateral need not be present at the sale site if the sale's notice provided the collateral's location and informed prospective buyers of their opportunity to inspect. However, the location of the collateral cannot be an unreasonable distance from the sale site.<sup>364</sup> In *Gulf Homes, Inc. v. Goubeaux*,<sup>365</sup> for example, the court held that a public sale of a mobile home was commercially unreasonable where the home was located a substantial distance (125 miles) from the place of sale in Tuscon, and where such distance was not consistent with reasonable commercial practices of mobile home dealers.<sup>366</sup> The sale should have been advertised, noticed, and sold in Tuscon, where the mobile home was available for inspection.<sup>367</sup> The

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362. Arguably:

If the three most important rules of retail are location, location, location, the online equivalent is domain, domain, domain . . . . A site's *domain* is a cross between a name and an address. It serves as both an identifiable brand name and a pointer to a site's location. It's the *uniform resource locator*, better known as the URL.

USAWEB & BRUNER, *supra* note 18, at 87. An interesting question is whether notification before disposition could be sent electronically via e-mail, under new section 9-611 of the revised Article 9. Bankruptcy notices are being posted on a Web site called *Legallink*. (visited Jan. 9, 2000) <<http://www.legallink.com>>; see Daylene Crudo, *Beyond the Quill, Noticing via Internet: Broadening the Scope of Bankruptcy Notification*, 14 AM. BANKR. INST. J. 12 (1995).

363. See, e.g., *Westgate State Bank v. Clark*, 642 P.2d 961, 970 (Kan. 1982) (stating that where the collateral is equipment, individual consumer goods, or farm products, the secured party must provide prospective purchasers the opportunity to inspect the collateral and that failure to do so may result in the sale being deemed commercially unreasonable).

364. FERRIS & GOLDSTEIN, *supra* note 154, § 5.6, at 132.

365. 602 P.2d 810 (Ariz. 1979).

366. *Id.* at 814; see also *Poling v. Morgan*, 829 F.2d 882, 887 (1987) (finding that the public sale of a mobile home was commercially unreasonable where the notice of sale stated that the collateral could be viewed in Phoenix when it was actually located 150 miles away).

367. *Id.*

collateral's physical location at or near the geographic place of sale is, therefore, paramount.

The inspection requirement's main objective is to realize the highest possible price for the collateral. Proper presentation of the collateral and/or the opportunity to inspect it at or prior to sale can affect the collateral's marketability and the price realized. Courts will quickly find a sale commercially unreasonable where the presentation is poor and/or the inspection process was deficient.<sup>368</sup>

Let us explore several problems that arise with the inspection requirement as applied to cyberspace auctions of tangible collateral. Imagine a New York bidder winning one of Big Bank's computers at an Onsale auction where the computer is physically located in California. Does it make sense to speak of the collateral being at or near the "place" of sale? There is no physical place in cyberspace. How does one, then, implement the rule that the collateral must be available for inspection at or near the sale site? Furthermore, assuming the secured party made the computer available for physical inspection in California prior to and during the online auction, is it reasonable to have expected the New Yorker to cross the country and inspect the goods before bidding? The answer is no. Only where the collateral is expensive or unique can it be reasonably expected that buyers will incur the costs of traveling to a geographically remote sale. Nevertheless, remote online buyers clearly exist; in fact, this is one of the great advantages of electronic commerce discussed in Part I.

We are now faced with a dilemma. We want to maintain the dual benefits of expanding the pool of potential bidders beyond the geography of the sale site and reducing the costs of attracting remote buyers. However, we must still worry about the risks of diminished marketability, secured party self-dealing, and poor purchase price that loom absent a reasonable opportunity to inspect the collateral. A limited solution would be to permit "cyberspace" inspections of tangible collateral using Web technology. As discussed in Part I, Web sites can provide multimedia, interactive Web

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368. FERRIS & GOLDSTEIN, *supra* note 154, § 5.6, at 131. Where the display or inspection process is impaired but there is no evidence that the collateral's price suffered, a few courts have blessed the sale. *See, e.g.*, C.I.T. Corp. v. Lee Pontiac, Inc., 513 F.2d 207, 210 (9th Cir. 1975) (finding that sale of airplane was commercially reasonable where it was not available for inspection at the sale location, the secured party was not responsible for its absence, sufficient notice and lead time was given to prospective buyers, no prospective purchasers questioned the plane's absence or asked for inspection, and a fair price was secured). How a court will implement the inspection requirement also depends on the industry custom for the type of collateral being sold. FERRIS & GOLDSTEIN, *supra* note 154, § 5.6, at 132.

communication through text, sound, pictures, and video. For collateral that can reasonably be evaluated through such inspection, these risks should diminish. The computers, for example, are fungible and commonly known. Thus, Onsale's detailed textual descriptions and photographs may provide sufficient information to potential buyers to mitigate these risks.

In contrast, the online auction of the used MR2 seems more problematic. Although my empirical study of car sales through Yahoo!Auctions suggests that buyers are willing to purchase used cars online, these "successful" auctions do not appear to be typical. This suggests that people are either generally unwilling to purchase used cars online, or will discount their value below the reserve price. While some of this reluctance and discounting may be due to lack of security or other reasons discussed in Part I, it remains possible that the current means of online inspection may also be culpable. People may literally want to "kick the tires" before they buy.<sup>369</sup> For such collateral, online inspection would be unreasonable, although the empirical findings in this Article suggest that a court should review the particulars of each online sale.

As electronic commerce and online shopping become more prevalent in our culture, the sale of various goods and services may very well be conducted entirely on the Internet without the need for a physical space. People may grow comfortable with online inspection, and warranties and other legal devices may be used to protect buyers from defective products. Technological changes and better electronic commerce security and privacy protection applications may create a vast online commercial population at ease with cyberspace commerce.<sup>370</sup> As online market places continue to

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369. For other goods, physical inspection seems equally important. "[M]any collectibles are nearly impossible to value without an up-close examination . . . . For example, the value of mass-produced items such as baseball cards depends heavily on their condition, but that's awfully hard to assess on a computer screen. Same with autographs, which are sometimes faked." Bensinger, *supra* note 2, at W12.

370. More sophisticated inspection technology is currently available online. On the Ford Motor Company's Web site:

The star attraction . . . is the virtual showroom. With intuitive navigation and a simple design, Ford presents seemingly limitless details about dozens of models of cars from several brands . . . . For every model, the site offers exterior and interior photos, detailed technical and feature specifications, and even short video presentations. All of these pages also point to a dealer directory, pricing information, and a calculator for leasing and financing options.

USAWEB & BRUNER, *supra* note 18, at 47.

Even more fantastic are the "virtual" shopping experiences promised by Web designers using such software as Virtual Reality Modeling Language ("VRML"), whereby consumers can "touch" and otherwise interact with the goods. For example, VRML can create three-

develop, commercial customs and practices for selling goods will change to require less reliance on physical places and physical inspection in order to sell goods.

*E. Reasonable Commercial Practices of Relevant Market*

When reviewing the commercial reasonableness of a sale, courts measure relevant factors such as advertising and use of a professional auctioneer against "the actual commercial practice relevant to the particular kind of collateral disposed of at the particular time and place of its disposition."<sup>371</sup> The Code's underlying presumption is that if the secured party conforms to these reasonable commercial practices, then he will realize the important Code objective of maximizing the potential recovery of the collateral.<sup>372</sup> Indeed, the Code drafters' "task was to lay down rules

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dimensional representations on the Web. In such a "virtual world," online users can stroll through rooms, handle objects, and manipulate angles and perspectives. However, VRML usage is not yet widespread due to limited bandwidth. MILLSTEIN ET AL., *supra* note 8, § 1.08(2). Very recently, new devices called "haptic interfaces" are allowing computer users to feel with their hands the physical properties of objects displayed on their screens.

371. FERRIS & GOLDSTEIN, *supra* note 154, § 1.3, at 3; *see* *Bankers Trust Co. v. Dowler & Co.*, 390 N.E.2d 766, 769 (N.Y. 1979). In *Bankers Trust*, the court stated:

[T]he virtue of [the commercial reasonableness standard's] lack of further particularization is that it invites consideration of accepted business practices as a guide to what is most likely to protect both debtor and creditor . . . Customs and usages that actually govern the members of a business calling day-in and day-out not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience.

*Bankers Trust*, 390 N.E.2d at 769; *see, e.g., Wilkerson Motor Co. v. Johnson*, 580 P.2d 505, 509 (Okla. 1978) (stating that "[g]enerally, the secured party acts in a commercially reasonable manner when in the process of disposing of repossessed security he acts in good faith and in accordance with commonly accepted commercial practices which afford all parties fair treatment"); *Investors Acceptance Co. v. James Talcott, Inc.*, 454 S.W.2d 130, 137-38 (Tenn. Ct. App. 1969) (stating that "[t]he requirement that the property be disposed of in a 'commercially reasonable' manner seems to us to signify that the disposition shall be made in keeping with the prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business"). In assessing the commercial reasonableness of a sale under Article 9, a court may look to both the "reasonable commercial practices among dealers" provision in section 9-507(2) and the "relevant trade practices and usages" provision under section 2-207's Official Comment 4 for guidance. *See, e.g., Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698 (E.D. Pa. 1968).

372. *Old Colony*, 280 F. Supp. at 712; *see also* *United States v. Willis*, 593 F.2d 247 (6th Cir. 1979) (finding that the secured party has a good faith duty to maximize the proceeds of the sale); *In re Excello Press., Inc.*, 890 F.2d 896 (7th Cir. 1989); U.C.C. §§ 9-507, 9-509, 9-843 (1995).

which would promote the highest possible yield on disposition of the collateral, allowing the secured party all freedom of action consistent with protection of the interests of the debtor and his other creditors.”<sup>373</sup> Thus, as a policy matter, courts assessing the commercial reasonableness of an online auction of repossessed collateral must take into account the commercial practices for selling the subject collateral.

There are several problems with respect to assessing an online auction’s commercial reasonableness against the reasonable commercial practices for selling the subject collateral. Because electronic commerce is new, developing and changing rapidly, online business practices for selling a particular type of good may not yet exist or may be insufficiently established to serve as a benchmark for commercially reasonable sales. Even if there are customary online commercial practices, what does one do if these conflict with their real world counterparts? How do we decide which governs? Also, if it is determined that only *online* business practices are the proper benchmark, what if there exist conflicting cyberspace business practices for selling the same type of goods? How do we choose the “right” ones? These are tremendously complex issues, and their full treatment would be complicated and long. For that, this Article limits its treatment to identifying the problems from the author’s perspective, but leaving their full resolution to another day.

### 1. Absence of Well-Founded Online Business Practices

Electronic commerce is new, developing and changing rapidly. As discussed in Part I, for certain goods like computer hardware and software, there are arguably established, customary online selling channels and practices. However, for most types of goods and services, online auctions and other models of electronic commerce have not yet become standard commercial marketing channels. Onsale, for example, recognizes the current cultural, business, and technological challenges (discussed in Part I) facing the establishment of Internet electronic commerce and online auctions as an accepted marketing channel.<sup>374</sup>

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373. 2 GILMORE, *supra* note 148, § 43.1, at 1182.

374. At the end of 1998, Onsale stated:

The market for the sale of goods over the Internet, particularly through online auctions, is still in a development stage and is rapidly changing. Demand and market acceptance for recently introduced services and products over the Internet are subject to a high level of uncertainty and there exist few proven services and products . . . . Moreover, the success of our auctions will depend upon continued growth of the Internet as a medium for commerce by a broad base of consumers and vendors.



The absence altogether of, or the nascent development of, standard or customary online business practices poses significant difficulties for courts assessing the commercial reasonableness of an online foreclosure sale. Most obviously, where a type of repossessed good is not commonly sold online or for which the online marketing channels are poorly developed, there simply may be little "customary" practice for disposing of the collateral type. Between the secured party and the debtor, who should bear the risk of using, and in some cases thereby creating, the commercial practices of an infant online marketing channel for a given industry? Given the Code's policy of protecting the debtor from overreaching secured parties, there is little doubt that a secured party using an online auction will need to show that its behavior was not so risky as to be unreasonable under the circumstances. To this end, collateral falling into a category of goods commonly sold online may have more established online markets and methods of online sale. Furthermore, successful online auction sites like Onsale and eBay with large, registered userbases and a high degree of competitive bidding will be far less risky in the evolving online auction market than a less established service.

## 2. Conflicting Real World and Online Business Practices

Another interesting dilemma arises from the existence or non-existence of "customary" online business practices for any given industry. For goods like computers that arguably have established, customary online selling practices, what happens if these practices differ from their real world counterparts? Professor Hardy writes:

[C]ustoms are developing in cyberspace as they might in any community, and rapid growth in computer communications suggests that there may be a great many such customs before long. Many of these customs conflict with "real" space customs . . . a court might be persuaded to recognize a cyberspace industry custom as legally enforceable even though it differed from the rule applicable in real space.<sup>375</sup>

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*Onsale Form 10-K*, *supra* note 34, at 29.

375. Trotter Hardy, *The Proper Legal Regime For Cyberspace*, 55 U. PITT. L. REV. 993, 1010 (1994). Similarly, Johnson and Post ask:

[W]hat should happen when conflicts arise between the local territorial law (applicable to persons or entities by virtue of their location in a particular area of physical space) and the law applicable to particular activities on the Net? The

On the other hand, it is equally plausible that a court would find the cyberspace industry custom unreasonable and unenforceable. Take, for example, the choice of using an English or Dutch auction format for selling goods online. Generally speaking, in the real world, the English auction is the type most commonly used to sell goods.<sup>376</sup> In contrast, the oral form of the Dutch auction is mainly used to sell “nonstandardized items where quality differences require flexibility,”<sup>377</sup> which includes items such as cut flowers in the Netherlands, fish in Israel, and tobacco in Canada.<sup>378</sup> What should happen if the commercial norm in cyberspace evolves to one where the Dutch auction format is used to sell goods normally sold by English auction?<sup>379</sup> Should courts recognize the real world practice of using English auctions as “correct” and the online practice of using Dutch auctions as “incorrect” (commercially unreasonable) or vice-versa?

### 3. Conflicting Real World Business Practices

Now imagine a secured party selling collateral online for which there is no online customary business practice. With no customary online business practice against which to measure the commercial reasonableness of the online sale, a court may turn to the real world counterpart. What if there are different real world practices for selling the same type of good depending on geographic region? As discussed in Part I, cyberspace is free of geographical constraints. Unlike the real world, in cyberspace there are no natural, physical distances separating local business practices and minimizing conflict.<sup>380</sup> But without a geographical place of sale to fix the relevant

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doctrine of “comity,” as well as principles applied when delegating authority to self-regulatory organizations, provide us with guidance for reconciling such disputes.

Johnson & Post, *supra* note 60, at 1391.

376. Milgrom, *supra* note 164, at 11; McAfee & McMillan, *supra* note 164, at 702.

377. CASSADY, *supra* note 162, at 63.

378. McAfee & McMillan, *supra* note 164, at 702.

379. Going against the normal employment of a Dutch auction for nonstandardized items, eBay indicates that a Dutch auction format is used where a seller has multiple identical items to sell. *eBay Community Values* (visited Jan. 9, 2000) <<http://www.pages.ebay.com/aw/rules.html>> (photocopy of Web page on file with author). At least one online auction that I found exclusively uses the Dutch auction format for all types of goods, including electronics. See *Klik-Klok On-line Dutch Auctions* (visited Jan. 9, 2000) <<http://www.klik-klok.com/auction.html>> (photocopy of Web page on file with author).

380. “[I]t is meaningless to speak of a French or Armenian portion of Cyberspace, because the physical borders dividing French or Armenian territory from their neighbors cannot generally be mapped onto the flow of information in Cyberspace . . . .” Johnson & Post, *supra* note 60, at 1395-96.

selling practices for a particular type of good, how do we choose the “right” real world commercial practices? To which geographical location and attendant business practices should a court defer—the ones in which the collateral is located, the ones in which the buyer is located, or the ones in which the seller is located? In cyberspace auctions, these might be three different places.

#### 4. Conflicting Online Business Practices

Cyberspace’s slipping of geographical boundaries also raises the vexing possibility that online commercial practices for selling a particular type of goods may conflict with other online commercial practices for selling the same goods.<sup>381</sup> For the computer sale through Onsale, where the secured party, the debtor, and the computer are physically located in California, but the purchaser is in New York, what happens if the commercial practices employed by other online auctions differ from those used by Onsale? For example, what if other online auctions use a Dutch auction format rather than a Yankee Auction format? Which is the commercially reasonable business practice?<sup>382</sup> Both? One solution to this problem and the conflicts raised in the preceding sections may be to use a “choice of norms” provision specifically enumerating the real world or online business practices and norms governing the sale. Already, registered users of eBay, Onsale, and other commercial Web sites must “sign” online agreements with a choice of law provision. To the extent enforceable, these “clickwrap” contracts with choice of law provisions may alleviate these problems.<sup>383</sup> Absent such a

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381. Johnson and Post add:

But we hasten to add that Cyberspace is not a homogeneous or uniform territory behind that border, where information flows without further impediment . . . the Net has other kinds of internal borders delineating many distinct internal locations that slow or block the flow of information . . . .

The separation of subsidiary “territories” or spheres of activity within Cyberspace and the barriers to exchanging information across these internal borders allow for the development of distinct rule sets and for the divergence of those rule sets over time.

*Id.*

382. The Klik-Klok Dutch Auction Website uses the Dutch auction format for all types of goods, including electronics. *Klik-Klok On-line Dutch Auctions* (visited Jan. 9, 2000) <<http://www.klik-klok.com/auction.html>> (photocopy of Web page on file with author).

383. Before being allowed to use a commercial Web site, users may be required to assent to certain terms such as choice of law by clicking an “I agree” link. Whether so-called “clickwrap” contracts are unenforceable as contracts of adhesion is unsettled. See Stephen Y. Chow, *Contracting in Cyberspace: The Triumph of Forms?*, 41 B.B.J. 16 (1997); Zachary M. Harrison, *Just Click Here: Article 2B’s Failure to Guarantee Adequate Manifestation of*

provision, courts should look to the Code's policy of maximizing "the highest possible yield on disposition of the collateral, allowing the secured party all freedom of action consistent with protection of the interests of the debtor and his other creditors."<sup>384</sup>

In the broader context of cyberspace activity, there is a growing body of court opinions and commentary on similar problems. Examples of these are ones addressing which jurisdiction's "community standards" should be used for determining whether pornographic material available through the Internet is obscene under the First Amendment,<sup>385</sup> and whether a court has personal jurisdiction over a person who has had limited electronic contacts to a state.<sup>386</sup> Addressing this and other problems brought about by the Internet's defiance of geographical boundaries, Johnson and Post propose that cyberspace should be considered a "place" where new legal rules and social norms are allowed to develop which would be applicable only to cyberspace transactions.<sup>387</sup> Other commentators have suggested recourse to

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*Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907 (1998). Further, it is not clear whether a standard choice of law provision would cover the norms and practices of selling the repossessed goods or whether an additional provision specifically enumerating the relevant norms must also be included in the contract.

384. 2 GILMORE, *supra* note 148, § 43.1, at 1182. Relying on expert testimony, a court could determine which auction format would maximize the recovery, a task also fraught with uncertainties where the online commercial practices are new and evolving.

385. For example, pornographic material may be uploaded on the Internet in California and viewed by a person in another state (or country). If a viewer in Tennessee accesses this pornographic material, what is the relevant community against which to measure its obscenity: Tennessee or California? While the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), held in a non-cyberspace context that "community" is defined by geography (such as states or counties), it has not squarely addressed this issue. The closest a court has come is *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996); see also Erik G. Swenson, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 885 (1998).

386. Courts use the "minimum contacts" test to determine which state's law should apply for suits brought over Internet transgressions. See, e.g., *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997); *IDS Life Ins. Co. v. Sun-America, Inc.* 958 F. Supp. 1258, 1268 (N.D. Ill. 1997); see also Henry H. Perritt, *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996); Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997); Mathew Burnstein, Note, *Conflicts on the Net-Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 80, 101 (1997).

387. Johnson and Post argue:

Many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of

"national" Internet standards of behavior exclusively for Internet users, thereby removing the focus on local norms and practices.<sup>388</sup> Whether these and other proposals are efficient, culturally acceptable, and technologically possible raise complex questions that will occupy many courts and academics.

#### IV. CONCLUSION

The Code is flexible, organic, living; it evolves with, through, and for the commercial community for which it was created. In his memoriam to Karl Llewellyn, Professor Gilmore wrote:

His instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law. He clearly had in mind the idea of a case-law Code: one that would furnish guidelines for a fresh start, would accommodate itself to changing circumstances, would not so much contain the law as free it for a new growth.<sup>389</sup>

Electronic commerce will put Llewellyn's vision to the test. One court has already observed, "As the Internet grows in prominence as a venue for business, the courts will be called upon to apply traditional legal principles to new avenues of business."<sup>390</sup>

While there are no reported cases of a secured creditor using an online auction to dispose of repossessed collateral, surely it will take place and be challenged by a disgruntled debtor. Courts will face significant doctrinal and policy questions as they attempt to fit existing rules governing commercially

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Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the real world. Using this new approach, we would no longer ask the unanswerable question 'where' in the geographical world a Net-based transaction occurred. Instead, the more salient questions become: What procedures are best suited to the often unique characteristics of this new place and the expectations of those who are engaged in various activities there? What mechanisms exist or need to be developed to determine the content of those rules and the mechanisms by which they can be enforced?

Johnson & Post, *supra* note 60, at 1378-79.

388. See John S. Zanghi, "Community Standards" in *Cyberspace*, 21 U. DAYTON L. REV. 95, 114 (1995) (arguing for use of "contemporary standards" of "society at large" in the context of online pornography and conflicting community standards).

389. Gilmore, *supra* note 4, at 814.

390. *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1229 (N.D. Ill. 1996).

reasonable sales to their reviews of online auctions. They should do so in the spirit of Llewellyn's vision. As the barriers to electronic commerce fall, and vendors and consumers alike increasingly embrace online selling of tangible goods, the advantages of online auctions should be compelling for secured creditors, debtors, and courts alike. The existing thicket of Article 9's judicially created rules for commercially reasonable sales should not unduly impede new legal growth sown by the Internet.