

Selective liability, regulated digital commerce, and the subversion of product trading bans: the case of elephant ivory

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ABSTRACT

This paper outlines and applies the concept of “selective liability” (i.e., operating as if there was a genuine choice between fault-based and strict liability legal regimes) to examine the apparent plausible deniability pact between online selling platforms and the sellers. Through an analysis of online trading data, this paper considered the issues inherent in prosecuting traders who use online auction platforms to sell ivory in contravention of “CITES” regulations. Three bone euphemisms for ivory (antique bovine bone, antique cow bone, antique Chinese cow bone) were identified to track sales over the course of 90 days. The results showed that sellers are using such euphemisms to sell ivory online and these findings highlighted the contradiction between a firm’s ban on ivory sales and the apparent ease with which ivory is sold through a website.

Key words: Selective liability; strict liability; elephants; conservation; online illegal ivory trade; online auction sites; CITES

Introduction

On May 23, 2018, the International Fund for Animal Welfare (IFAW) published its report, *Disrupt: Wildlife cybercrime – Uncovering the scale of online wildlife trade* (IFAW, 2018). This report concluded that the online illegal wildlife trade is openly operating on many online marketplace platforms, and concluded that one-fifth of the bone products being advertised for sale were ivory, or suspected ivory. The international legal position on the sale of ivory is set out in The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Its provisions state that all commercial international trade in the ivory of African elephants (*Loxodonta Africana*) and Asian elephants (*Elephas maximus*) is prohibited although exemptions to this do exist for, among others, pre-Convention ivory and ivory legally acquired prior to the CITES prohibition date (Convention on the International Trade in Endangered Species of Wild Fauna and Flora [CITES], 2018). However, there are significant differences between ratifying states in the penalties they apply for breaches, priorities they place on legislative changes, public awareness campaigns, domestic legislation, and enforcement methods. It is these jurisdictional differences that lay behind some prominent online auction websites banning the sale of ivory. In 2008, for example, eBay announced that it was banning the sale of ivory on its auction website. The policy stated that, “we simply can’t ensure that ivory listed for sale . . . is in compliance with the complex regulations that govern its sale. So . . . eBay has decided to institute a global ban on the sale of all types of ivory . . . effective January 1, 2009” (eBay Corporation, 2008). As a result, people are prohibited to sell all but a few wildlife products on this website. Some items, including all types of ivory (elephant, hippopotamus, walrus, narwhal) and prehistoric ivory (mammoth tusks) are completely banned (eBay Corporation, 2018). Other items, including manmade or vegetable ivory and bone from non-ivory-producing animals (e.g., cow, oxen), are permitted provided the species is clearly stated in the listing description. Many online sales platforms provide guidelines for sellers that prohibit the sale of ivory, but previous research has shown that sellers wishing to advertise ivory through the platform can breach the rules by simply calling the item something else such as “ox-bone” (Collins et al., 2017). To help rationalize the commercial and legal responsiveness of such digital commercial enterprises, this paper posits a simple behavioral construct termed “selective liability.” By this means, this paper seeks to explore and rationalize the behavior of sellers of certain goods

through online auction websites. Although applicable in the context of many other product types, this paper examines the utility of this construct by applying it to the online sale of worked ivory.

What Is “Selective Liability?”

Liability, in the criminal sense, is the responsibility and accountability for a crime and for the penalty that society exacts for that crime. A defendant may be found liable for a crime if the prosecution proves that they committed the criminal act and had the necessary *mens rea* (criminal intent) to commit the criminal act. For example, a defendant may be found guilty of theft if they steal from a victim with the intention to permanently deprive the victim of their property.

To gain a conviction, the prosecution must usually prove both that the defendant committed the criminal act (e.g., the theft) and that they were liable (i.e., took another’s property with the intention of permanently depriving the rightful owner of it). However, there are certain acts that by simply engaging in them, a defendant may be found criminally liable regardless of intent. These crimes are known as strict liability offenses. The crime of statutory rape (of, in the U.K., a victim under the age of 16) is an example of such a strict liability offense. A defendant may be convicted of statutory rape even if the victim consented to the sexual contact. The prosecution does not need to prove that the defendant intended to rape the victim. The fact of the sexual conduct (the act alone) is sufficient to support a conviction. In a commercial setting, almost all product trading is subject to fault-based liability. Essentially, this is the form of liability in which an accuser must prove that the accused’s conduct was either negligent or intentional. In these circumstances, a firm may deploy extensive legal resources to combat litigation effort by accusers and does not need to cooperate in the assembly of case evidence.

For the purposes of this paper, “selective liability” is defined as the actions of users of online auction platforms in operating as if there was a genuine choice between fault-based (in which the plaintiff must prove that the defendant’s conduct was either negligent or intentional) and strict liability (in which a person is legally responsible for the consequences flowing from an activity even in the absence of fault or criminal intent on the part of the defendant) legal regimes.

Unlike ivory, guns and Nazi memorabilia are rarely found being openly traded on online auction websites. This leads to the suggestion that there must be circumstances where the seller of an illegal item adapts their behavior, such that it aligns to a legal response commensurate with a strict liability offense, when de jure it does not actually have that status. More specifically, it leads to the argument in this paper that online sellers, using online auction websites as their platform, respond to the public's negative sentiments toward the sale of particular goods as if the sale of those items were a strict liability offense. Furthermore, how can people account for those cases where the sale of a particular type of product does not induce a seller to adapt their behavior?

So why do online auction websites respond to some product trading bans as if strict liability applies and in other cases operate routinely with fault-based liability? This paper posits that the choice decision is a function of the expected scale of negative public expressed sentiment. If the expected scale was so large that it would plausibly lead to consumer boycotts and diminution of revenue streams across product lines, then acting as if strict liability applied would be a rational legal and economic response.

An example of this can be seen when comparing the online sale of Nazi memorabilia with that of ivory. Although the sale of Nazi memorabilia is strictly prohibited in parts of Europe, it is perfectly legal to sell in other areas of the world, including in the U.K. and the U.S.A. In 2000, the U.S.A. based web services provider Yahoo! was sued in the case of LICRA v. Yahoo! (2000). The plaintiffs in the case were the Union of Jewish Students and the International League against Racism and Anti-Semitism who argued that Yahoo! were "justifying war crimes and crimes against humanity" by allowing such memorabilia to be sold via its auction pages (LICRA et UEJF v Yahoo! Inc., 2000). Yahoo!'s response was to ban the sale of Nazi memorabilia through its website (Hunter et al., 2004). Fearing similar litigation, the online auction platform eBay introduced new rules for sellers regarding the sale of Nazi memorabilia in 2003. eBay's policies prohibit the sale on its websites of items relating to Nazi propaganda, items made after 1933 that contain a swastika, Nazi reproduction items such as uniforms, and all Holocaust-related products. eBay's policy is vigorously and strictly enforced – a testament perhaps to their users' strength of feeling (Bergstein, 2006). Although the trade in items made from elephant ivory features negative sentiment (The Drum, 2018), arguably it pales in significance in comparison to the situation of permitting the open trading in Nazi memorabilia

to continue.

Conservation Action through Prosecution in the Physical and Online Worlds

Online auction platforms face considerable challenges in the governance of their businesses. The online auction platform eBay is active in 190 markets with more than one billion active listings at any time and is among a number of other online auction websites across the globe, including companies such as Bonanza (Bonanza.com, 2020) and Mercari (Mercari.com, 2020). eBay must comply with multiple international and national laws, and contend with cross-jurisdictional enforcement and the “camouflage” words that rogue eBay sellers use for selling illicit goods (including ivory) in contravention of the corporation’s declared policies. With such issues in mind, platforms such as eBay can perhaps be forgiven for struggling to effectively police the sale of ivory on their platforms. That said, Nazi memorabilia seems to be almost completely absent from the product lines being sold.

Prosecution data show that it is hard enough to successfully prosecute suspects for the sale of illegal ivory in the physical world where the item is available to handle and examine. In the U.K. between 1992 and 2014, there were 15 successful convictions for offenses relating to the trade in ivory (National Wildlife Crime Unit, 2016). Cox (2016a) suggested that this difficulty is due to a lack of investigative resources and low political will. However, the landscape is changing and the introduction of the Ivory Act in 2018 made the U.K.’s new (although yet to be in force) ivory legislation the strictest in the world following several years of debate among stakeholders. Among the successful prosecution stories is the Metropolitan Police Service’s “Operation Gulak” that resulted in the first successful prosecution of an auction house in the U.K. (Cox, 2016b). This operation, which was led by a Metropolitan Police Service Special Inspector, saw plain clothed officers carry out a series of sweeps of The London Portobello Road Antiques Market. However, the difference between an operation such as Gulak and the problems of policing online sales platforms is marked. Human resource constraints and current policing priorities mean that officers are not available to undertake time consuming online searches for potentially illegal ivory (Wellsmith, 2011).

The low numbers of prosecutions of illegal online ivory sales may be because of the difficulties in differentiating ivory from similar materials such as bone, and ascertaining that the age falls under the “antiques derogation” and was “worked” before June 1947. Correctly

identifying ivory can be difficult when the physical item is available for inspection. When the item can only be viewed by means of a written description and photographs posted on an online sales platform, the task becomes even harder. eBay's own selling policy attempts to address this by placing the onus on the seller to make the identification and be clear about species from which the artifact is made (eBay Corporation, 2018). However, as this project and previous studies have shown, this policy is ignored by some sellers partially due to crime recording (Yeo et al., 2017). Unlike in Scotland, most wildlife crimes in England and Wales are not centrally recorded.

Despite the difficulties of policing an online illegal ivory trade, there have been two recent successes against eBay's sellers. The first is that of Janet Winstanley, who was successfully prosecuted for attempting to sell more than 100 elephant ivory ornaments she advertised for sale on eBay as "bovine bone." Winstanley was fined £1000. A second example is of antiques dealer Shane Ball who, in September 2014, posted 22 eBay advertisements for carvings that he described as "bone." He received a seven-month jail sentence that was suspended for 18 months plus payment of £1,134 costs (Winter, 2014). These sellers were not identified by eBay, but by the website's users and law enforcement officers (National Wildlife Crime Unit, 2016). Ball had also been charged (although the prosecution offered no evidence on this) with two additional charges relating to the prohibited purchase and sale of a leopard skin. This study undertook a systematic analysis of ivory being sold on eBay U.K.'s platform. However, online platforms are known to provide a market for the sale of other illegal wildlife trade products (TRAFFIC, 2019). Therefore, it is suggested that the methodology, results, and conclusions described in this paper could be applicable across a range of illegally traded wildlife products found for sale at online auction websites.

Methods

This project analyzed items that have been sold through eBay U.K.'s online platform during the period of December 25, 2017 to March 25, 2018 using eBay's Advanced Search function and checking the "sold items" box on the Advanced Search page. Items that had been sold by auction or as a "buy it now" were included. Only items that had progressed to a successful sale within the 90 day period by either of these methods were included in the data. The search period included both the Christmas period, the Chinese New Year

(February 16, 2018), and the period immediately following the end of the British Government's consultation on the sale of ivory in the U.K. (which sought views on banning U.K. sales of elephant ivory, and seeking evidence on the effect such a ban would have) that closed on December 16, 2017. The following exact words were searched in the exact order using the advanced search tool: "antique bovine bone," "antique cow bone," and "antique Chinese cow bone." These search terms were chosen because they are the terms used for selling ivory online (Harrison, 2016) and following discussions with law enforcement officers working in this field.

Each identified advertisement was downloaded to an Excel spreadsheet and analyzed by a PhD Forensic Science student whose research focuses on the identification of ivory. The following points were noted for further analysis: initial information obtainable from the photograph accompanying the item (evidence of Schreger lines [described below], color, or alternatively obvious indications that the item was not ivory); the type of item being offered for sale; information given regarding the size of the item; information regarding the weight of the item; price; and stated origin of the item. In designing the study, it was hypothesized that in using multiple high quality photographs, rather than text descriptions, sellers may be actively seeking to evade eBay's text monitoring policy.

It is the dentine of an elephant's tusk that may show Schreger lines, which are also referred to as cross-hatchings, engine turnings, or stacked chevrons (Espinoza & Mann, 1991). These terms may appear in advertisements to describe the items being offered for sale. The outer Schreger lines are easily seen with the naked eye and so in cases where the item has been carved from the root of the tusk, they are easily visible in a photograph, provided it is of reasonable quality. Schreger lines are less easy to see from a photograph if the item has been carved from tusk nerve or if the photograph is poor quality. In such cases, a positive, negative, or unknown identification of ivory was made by examination of additional information given in the listing. Photographs were key to the advertisements. Good quality photographs can be successfully used for identifying Schreger lines in an item. The use of photographs was observed to avoid the need for lengthy text statements. Photographs were also examined for evidence that the items being offered for sale were not ivory (e.g., bone or horn). Bone can be identified (provided photographs are of reasonable quality) by the presence of Haversian canals on the surface of the material (Espinoza &

Mann, 1991). When Haversian canals were identified on an item, it was disregarded and no further analysis on it was conducted.

It is rare to see an advertisement where the item is described as ivory. Instead, various terms are used in the heading of the advertisement, but details in the text lead a buyer to understand the true nature of the item being offered for sale. The data collected in this study, as well as previous research in this area, suggest that there are a number of pseudonyms used when offering elephant ivory for sale online (Harrison, 2016). If “ivory” was not used, the more opaque descriptions of the color were noted (e.g., terms such as “lovely patina,” “genuine color,” “natural color”).

Another identification tool utilized in the study was the inclusion in the advertisement of the weight of the item being offered for sale. There is evidence that ivory is bought in the U.K. and sent to the Far East to be re-carved or sold on, so the weight of an item is relevant in making an identification of ivory (Environmental Investigation Agency, 2017).

Also considered was that the price of an item being offered for sale on a “buy it now” advertisement and on an auction sale would be an indication of whether the item was ivory. It is possible for exceptional antique carved bone items to sell for considerable sums of money, but the value of ivory remains consistently higher and although the price of ivory has fallen over the last few years, from a high of 2,100 USD per kg in 2014 to 730 USD in 2017, it remains a valuable commodity. As a result, where there was a positive physical identification, reference to the weight of the item, and an item of higher value, the item was more likely to be ivory; this was regardless of it being described as bone.

Although eBay’s policy prohibits the sale of all ivory, regardless of age, the current legislation in the U.K. does allow the sale of pre-1947 worked ivory items.² This project, therefore, was interested in observing whether eBay sellers considered giving the age of an item to be important to their description, in which the seller makes a point of stating that the item offered for sale pre-dates 1947.

Data on the size of items offered for sale were also collected. This project was interested in observing whether eBay was acting as a sales platform for smaller items or whether items of varying size were being sold through the platform. Previous research has shown that ivory items of sufficient size, bought in the U.K., are exported by the postal system to countries including China, Hong Kong, and Laos to be re-carved (Gupta, 2018).

eBay's sellers policy states that the sale of bone is permissible provided the species from which it is derived is stated in the advertisement. Where it was concluded that items were not ivory or were potentially ivory, but could not result in a firm conclusion, they were disregarded from this study's data.

Finally, any other data considered to be relevant from the advertisement were collected, including: location of the seller (i.e., based in the U.K. or based abroad, but using eBay's U.K. website to sell their items), instructions given by the seller as to where they were (or were not) willing to post the item, and, where possible, the seller's history of selling similar items on eBay's U.K. website. Also noted were "adverts within the advert," such as where sellers indicated that they were willing to sell other similar items "off-site." Also noted were instances where sellers advertised their items both in English and in Chinese text because China and Hong Kong are acknowledged as the largest markets in the world for ivory (WWF, 2018).

Results

During the search period, a total of 684 items advertised under either antique cow bone, antique Chinese cow bone, or antique bovine bone proceeded to a successful sale on the eBay U.K. website. Where an item appeared in the search under more than one search term criteria, it was counted only once to ensure an item was not double counted. Items sold as bone, but were ascertained to be ivory, included jewelry, snooker and billiard balls, and various other items.

Antique Cow Bone

During the 90-day search period, a total of 46 items were recorded under this category heading (Figure 1). The cumulative sales value for these items was recorded as £4,003.04. After disregarding five items for lack of positive identification, the remaining 41 items that were sold as antique cow bone, but ascertained to be ivory, collectively sold for a total of £3,788.79, equating to an average price per item of £92.41.

Figure 1. Number of items sold in each 30-day period from December 25, 2017 to March 25, 2018 on the eBay U.K. platform showing results for the search category “antique cow bone.”

Antique Chinese Cow Bone

A total of 24 items were listed under this heading and 16 of these were concluded to be ivory following the methodology set out above. There was insufficient evidence to identify the remaining items as ivory. In this category, the total value of the 24 items sold as antique Chinese cow bone amounted to £2,253.83. This resulted in a total value of ivory sales under this category of £2,085.03 (Figure 2), equating to an average sale price per item of £130.31.

Antique Bovine Bone

This search category returned the largest number of sold items. In total during the search period, 641 items sold through eBay’s U.K. website under antique bovine bone (Figure 3). The total value of these items amounted to £50,538.34, giving each item sold an average sale value of £78.84.

Again, using the same methodology as for the previous listing, 75 items were disregarded as either not being ivory or there was insufficient evidence to confirm whether or not the item was ivory. The value of these disregarded items amounted to £3,546.88, leaving the sales value for ivory items being sold under this category at £46,991.46 (Figure 4). This equates to an average sale price per item of £83.02. This category again showed a similar phenomenon to the other two search categories in that the value and number of items sold increased in the final 30 days of the search period.

As stated above, this project sought to understand the importance of an inclusion of the weight of an item in an advertisement. Items purporting to be made of bone, but where the seller gave the weight (as part of the description of the item), were common where the item was identified to be ivory. This project also took note of items that made specific reference to the age of the object offered for sale. Twenty-two advertisements referred to the age of the item. In some cases, these were detailed, precise, and appeared to be fundamental in indicating the antique characteristics of the item (e.g., “Old hand carved antique 1900–1930’s Chinese . . . bead necklace”). Additionally, it was noted that although the research was confined to eBay’s U.K. website, sellers from 13 countries (other than the U.K.) were found to be advertising during the research period (Figure 5). The largest group of overseas sellers was based in the U.S.A.

This project also sought to understand the types of sellers using eBay U.K.'s website to sell ivory. In particular, it sought to understand whether they were one-off sellers of single items or whether they were sellers who were repeatedly using the website. The results showed that 254 items were sold by the top 24 sellers using the largest sale category (antique bovine bone). One U.K. based seller (Seller 1 U.K.) successfully sold 46 items of ivory during the search period (Figure 6). This information was considered in terms of the value of ivory sales to the top sellers (Figure 7), which showed that in the category "antique bovine bone" the one repeat seller sold a total of £4,434.35 worth of ivory during the search period. This seller (Seller 5 U.K.) achieved this amount through the sale of 14 items over the 90-day period.

Discussion

Over the course of the 90-day search period, presumed ivory was being sold on eBay's U.K. website in contravention of the company's selling policy. Sellers rarely used the term "ivory" to identify the item being offered for sale. The use of high quality photographs appears to be a regularly used selling tactic. The most used euphemism for ivory in the categories searched was "antique bovine bone," suggesting that eBay's policy to allow the sale of bone from an identified source (e.g., cow, bovine) is enabling some users to sell ivory on the platform. During the search period, a total of £46,991.46 worth of ivory was believed to be sold as "bovine bone." Over the same period, the value of those items ascertained to actually be bovine bone sold for £3,546.88. One listing was particularly interesting because of its clear deviation from eBay's selling policy. This item was described as "Antique Vintage Hand Carved Elephant Tusk Ivory Bovine Japanese Asian Man Figure." The item successfully sold despite its description being clearly in contravention of eBay's policy by advertising the item as elephant ivory. This, however, was a rare example of a seller using the words "tusk" or "ivory" in the advertisement. The ivory items listed under the three headings examined in this study presented with similar characteristics; all displayed multiple good quality photographs, the description text drew the potential buyer's attention to the photographs (e.g., "LOOK," "see pictures"), and the listings displayed the weight of the item and (in most cases) the size. In terms of revenue, eBay's sale platforms charge both a listing fee (a minimal fee that is calculated according to the package chosen by the seller) and then an additional sale commission. eBay states that, "When your item sells, you pay 10% of the final transaction

value, including postage. We call this a final value fee.” It is the case that eBay will “reward” regular users with special commission offers from time to time. This could include, for instance, a flat fee with no additional sales commission. It was not possible to ascertain from the information available whether any of the sellers analyzed were able to use such offers. It is suggested that on the total sales values for those items analyzed and deduced to be ivory, eBay’s total commission across the short search period amounted to £5,365.12. In the case of “bovine bone” alone, eBay’s commission could amount to a total of £4,777.77. During the period, eBay’s commission for real bovine bone would have amounted to just £286.30. Since the eBay ban on ivory sales, using a simple constant trading volume assumption over the period of 2008 to 2018, total U.K. sales commission on items sold as “bovine bone,” but deduced to be ivory would amount to approximately £218,000 in nominal terms (unadjusted for inflation). To put this in context, eBay reported more than £1.3 billion in U.K. revenue in 2017. It seems clear that a meaningful eBay total ban across all animal bones would actually have a negligible effect on aggregate U.K. sales commission revenues, but a substantial impact on making illegal trade more difficult.

The access available to online sellers (e.g., via digital cameras) of high quality photographs to accompany their advertisements has arguably made the online sale of ivory artifacts via eBay easier. Although eBay has in place word and phrase capture technology to identify certain types of illegal or illicit goods being offered for sale on the platform, the items identified in this study largely circumnavigated these by using photographs. eBay is a visual e-commerce website and, as such, more sophisticated technology is required to ensure that it is not being used illegally or illicitly.

During the course of the project, a number of recurring themes were identified that merit further discussion. The first observation was regarding the sale of snooker and billiard balls on the website. Throughout the 18th and 19th centuries, billiards balls were made from ivory (Clarke, 2018). Three of the advertisements examined (all three from the same seller) referred to this directly stating “one antique 19th century snooker ball . . . it’s not resin.” In another advertisement for a billiard ball, the description read, “superb vintage billiard ball, over 100 years’ old, nice color and grain, weight is 2.9 oz . . . vintage elephant.” The seller offering three snooker balls had listed them with identical advertisements and also stated that they could be mailed worldwide. This is significant in at least two ways. First,

whether or not the snooker balls would be currently legal to sell in the U.K. (by virtue of being made before 1947), all ivory items (including those that fall within the antiques derogation) require a CITES Certificate to send outside of the E.U. No statements were made in the advertisement about provision of a CITES certificate. Second, it is known that ivory items are imported into China, Hong Kong, and Laos where they are re-carved for the home consumer (House of Lords, 2017). These advertisements appear to be appealing to this market.

Items purporting to be made of bone, but where the seller gave the weight (as part of the description of the item), were common in cases where the item was ascertained to be ivory. The results here showed that sellers were likely to include information about the weight and size of an item in their description. There is some evidence, as discussed by Lord Carrington in the House of Lords debate on the ivory trade, that items of ivory sold online (or indeed in the corporeal world) may be bound for re-carving in the Far East and that this may explain the inclusion of weight (and size) in an advertisement for larger items (House of Lords Debate, 2017). It would seem less likely that smaller items, such as a bracelet, would be re-carved and would therefore suggest that when this information is included in a description, it is for another reason, possibly to identify the item as ivory to a potential buyer. There is evidence that ivory items are purchased in the U.K. and then sent to the Far East to be re-carved or re-sold, so the weight of an item is relevant in making an identification of ivory (Environmental Investigation Agency, 2017).

Although eBay's ivory policy is that no ivory can be sold through the website, it is currently legal to sell pre-1947 worked ivory (i.e., ivory that has been carved into an object so that it can no longer be considered as raw ivory) in the U.K., which could explain the prevalence of item dating in the advertisements analyzed here. Although eBay has stated that their ban was introduced to remove the potential for confusion between the differing ivory laws between jurisdictions, it is possible that confusion remains between the current U.K. legislation and eBay's regulations. However, there is another potential explanation. These sellers know enough about an item to state its date. It, therefore, does not seem unreasonable to suggest that with this level of knowledge, they are also aware that the material from which the item is made is not cow bone, but ivory. Therefore, the inclusion of date information suggests evidence that the seller is listing an item knowing that they are

doing so in breach of eBay's policy. In addition, where they sell to a buyer outside of the E. U. in breach of E.U. regulations, it is suggested that (at worst) they knowingly breach or (at best) negligently do so.

eBay is an international online auction website, but by deliberately restricting analysis to eBay's U.K. website, this study was interested in observing the number of overseas sellers also making use of the platform. It is possible for overseas sellers to opt in to advertising their items for sale on eBay platforms outside their home country, but this entails an additional listing fee. In some circumstances, a seller may also find that their advertisement is listed on overseas sales platforms if they state that they are willing to mail items abroad. This study's observations showed that after the U.K., the largest number of sellers was based in the U.S.A. There could be several reasons for the number of American sellers using eBay U.K.'s website, including the fact that they will not face language barriers that may be present when selling through a non-English website. However, it is also possible that American sellers are opting to sell on eBay's U.K. website as a result of the implementation of the "Final Rule" introduced by the Obama administration in 2016. This rule saw the implementation of strict laws and regulations regarding the sale, importation, and exportation of ivory in the U.S.A. Sales between states are also now much more robustly regulated. Interstate commerce in ivory is limited to items that both meet the antiques exemption (meaning that the items must be more than 100 years old) and only contain a de minimis amount of ivory (meaning that the ivory component must weigh less than 200 g and account for less than 50% of the whole object). This suggests that the transatlantic trade is worth further research in light of the above restrictions. In this study, the U.S.A. items observed being offered for sale on eBay's U.K. website were small, solid ivory items. This may suggest that sellers in the U.S.A., notwithstanding the provisions of the Lacey Act (16 U.S.A.C. §§ 3371–3378), are not prepared to risk breaking federal law in selling intra-state, but are prepared to sell outside of the U.S.A. using eBay as a means of doing so.

This study was interested in observing whether sellers were making regular use of eBay's U.K. website as a platform to sell ivory items. This is particularly important for British law enforcement officers when they consider the feasibility of bringing a prosecution for the illegal sale of ivory under the current U.K. regulations. Unless the value of the item is high,

the police must make both strategic and human resources decisions regarding a potential prosecution, and are unlikely to prosecute a one-off seller. This study found evidence of repeat sellers. In each case, items were listed individually (i.e., the advertisements were not for more than one item), but evidence was found of sellers referring potential buyers either to other items they had listed on eBay's U.K. website or requesting potential buyers contact them directly for further similar items. This would suggest that these sellers are trade sellers, perhaps antiques dealers. As such, the income derived from sales is likely to be a consideration in them choosing eBay as a sales platform for their merchandise. In this study, a seller identified as "Seller 5 U.K." shows hallmarks of a commercially intent seller (Hollerit, 2013). This is just the sort of seller who law enforcement officials may be interested in investigating further. None of these items would have been sold with CITES certification (because Seller 5 U.K. was not declaring them as ivory) and as such, if they were leaving the E.U., these sales, even if they were genuinely pre-1947 worked ivory, would be in breach of CITES regulations.

The granting of the Royal Assent of the Ivory Act in 2018 has been a welcome move by the British Government. Secretary for State for the Environment (at the time of being Royal Assent being given), Michael Gove, underlined his government's commitment to elephant conservation by stating that with this Act, the "U.K. has shown global leadership and delivered on a key commitment in the 25 Year Environment Plan. We are determined to end this insidious trade and make sure ivory is never seen as a commodity for financial gain or a status symbol."

However, as important as the Ivory Act of 2018 is, it remains legitimate to question its potential effect on the online ivory trade. Although this Act effectively bans the sale of all ivory (save the five derogations set out in the Act), the regulation and policing of the online trade will remain difficult for the reasons discussed above.³ Research by the Wildlife and Countryside Link illustrates that there were more than 4,000 incidents of wildlife crime involving four of the Government's priority wildlife crime areas (which includes ivory) between 2005 and 2010. Yet, these data are not collated through police forces and the Home Office (Gosling, 2017).

A further concern regarding the continuation (and potential growth) in the online trade follows the experience of the U.S.A. after the implementation of President Obama's 2016 4 (d) Rule of the Endangered Species Act for African Elephants (U.S. Fish and Wildlife Service, 2016). As discussed above, the 2016 revisions to the Endangered Species Act of

1973, known as “The Final Rule,” explicitly exempt antiques from the prohibition and allow certain commercial activities with the issuance of an Endangered Species Act permit.

Although the Final Rule was welcomed by conservation groups, it was also feared that it would lead to sellers taking their commerce online. The results of this study suggest that some sellers based in the U.S.A are using the eBay U.K. platform to sell ivory.

Conclusions

Following their 2009 ivory ban, eBay has continued to declare their intention to work with law enforcement officers and conservation groups. Most recently, eBay has (in conjunction with The World Wildlife Fund [WWF], TRAFFIC, the International Fund for Animal Welfare [IFAW], and a number of well-known internet companies) committed to be part of The Global Coalition to End Wildlife Trafficking Online, aiming to reduce the amount of illegal wildlife trade products going through websites by 80% by 2020. This is positive, but eBay could make a large impact on the amount of ivory selling through its platforms by choosing to act as if a strict liability (rather than selective liability) regime applied. eBay could explicitly prohibit sales of all animal bone by declaring it a prohibited item category. This would result in a small loss of revenue to eBay, but the impact on the sale of ivory through the platform could be significant in perpetuity.

Finally, although the U.K. passed legislation to close its domestic ivory markets, a different story is being played out in the U.S.A. Where the Obama administration took steps to limit the dealing in ivory artifacts both into and within the U.S.A., President Trump has not shown a similar commitment. Following the result of the D.C. Circuit Court decisions in *Safari Club Int’l, et al. v Zinke, et al* (2017), in March 2018, the President reversed the previous position on trophy hunting to allow Americans to bring tusks and other elephant body parts into the country as trophies.

To tilt the balance of selective liability further toward a corporate behavioral response more aligned to acting as if strict liability applied, negative consumer sentiment could be made more visible and maximized by regulators and environmental conservation groups. There are many negative outcomes from a poorly managed wild animal trade, including zoonotic virus pandemics such as COVID-19 (Zhou et al., 2020). Accordingly, legitimately highlighting such an association may help to convince online auction websites to withdraw

their services to illegal wildlife products.

The illicit world of the illegal wildlife trade is such that as one door closes, another route to sale will undoubtedly open. Yet, with the commitment of eBay and similar online sales platforms, along with their technological capabilities and ability to continue investing in screening tools, the solution to ending the sale of ivory online largely lies with them.

Notes

1. 16 USCS § 4244 (Title 16, Conservation; Chapter 62, African Elephant Conservation; Miscellaneous), the term “worked ivory” means “any African elephant tusk, and any piece thereof, which is not raw ivory.”
2. Although the Ivory Act of 2018 passed into law on December 20, 2018 it has not, as yet, been enacted.
3. The five derogations set out in the Ivory Act 2018 are, *de minimus* items with less than 10% ivory by volume and made prior to 1947, musical instruments with less than 20% ivory and have been made prior to 1975, portrait miniatures made prior to 1918, sales to and between accredited museums and items of outstanding artistic, cultural or historic significance made prior to 1918.

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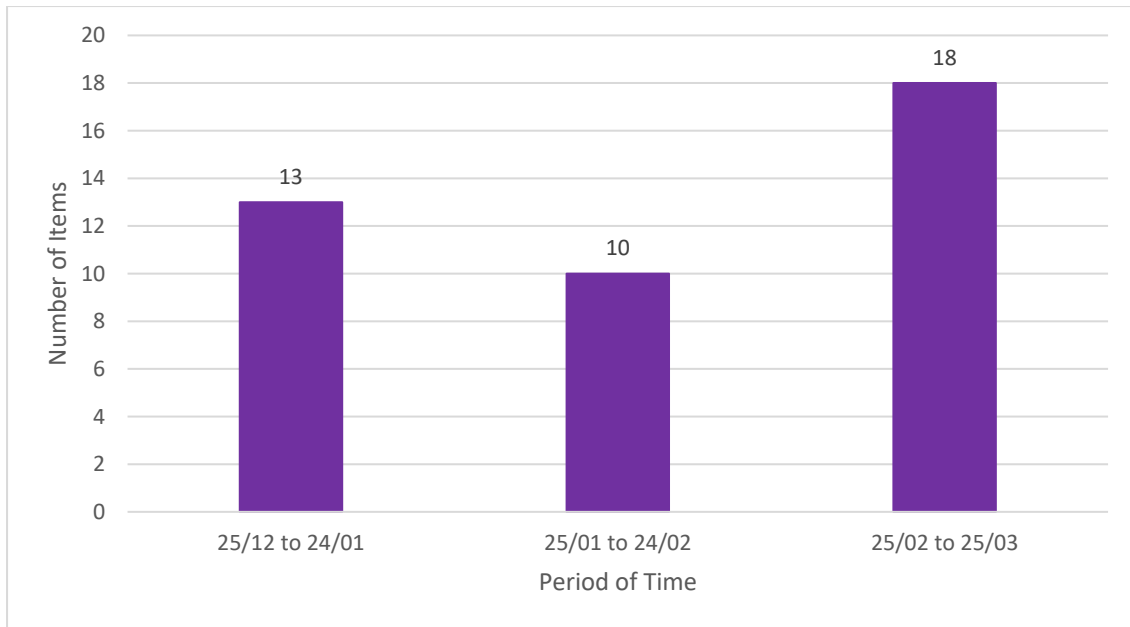


Figure 1. Number of items sold in each thirty-day period of the search for Antique Cow Bone

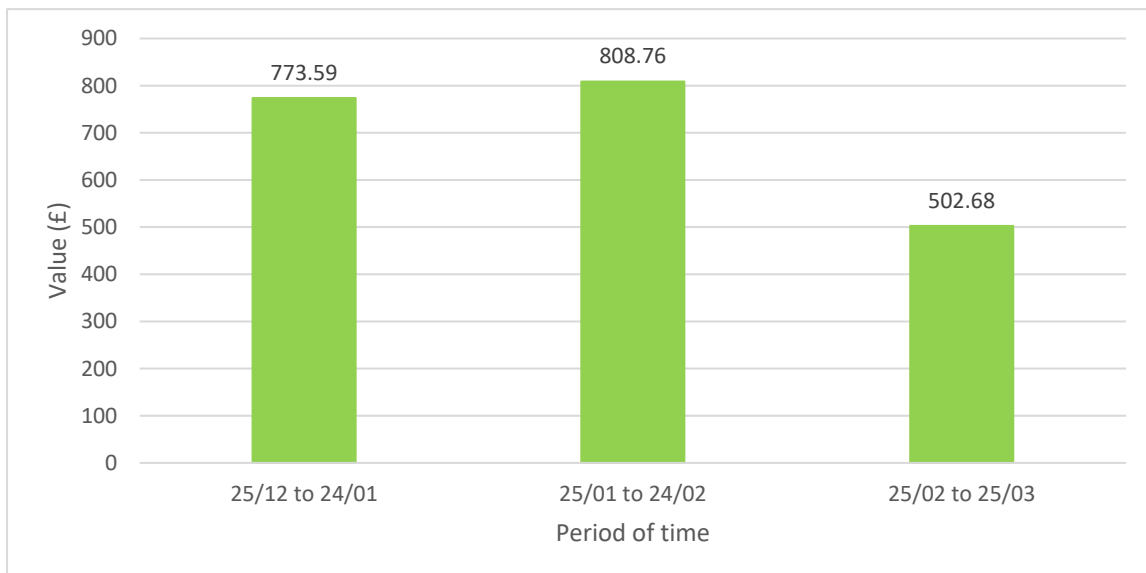


Figure 2: Total sales values for Antique Chinese Cow Bone

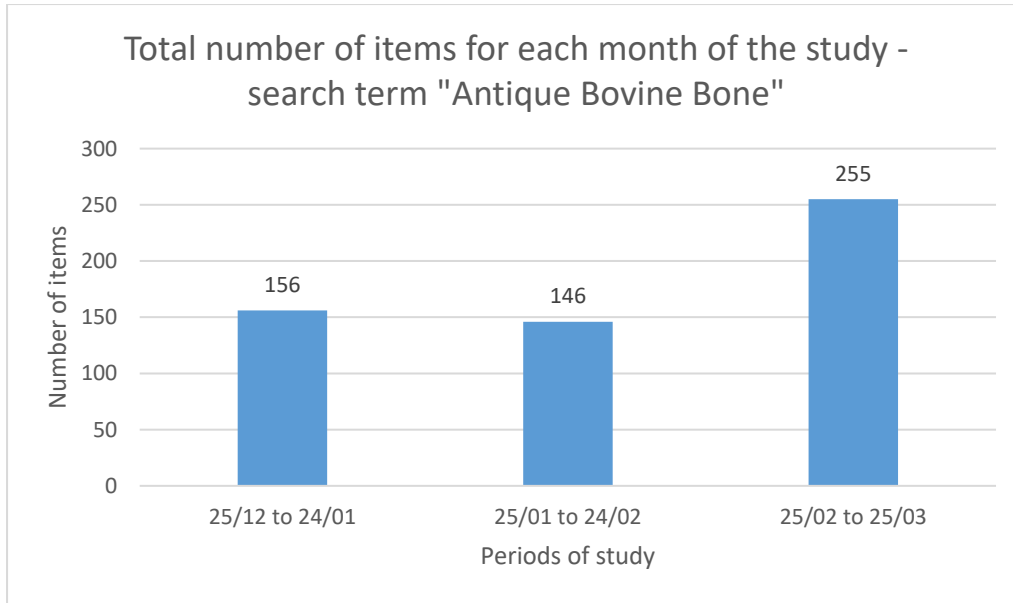


Figure 3: Number of "antique Bovine Bone" items sold over search period

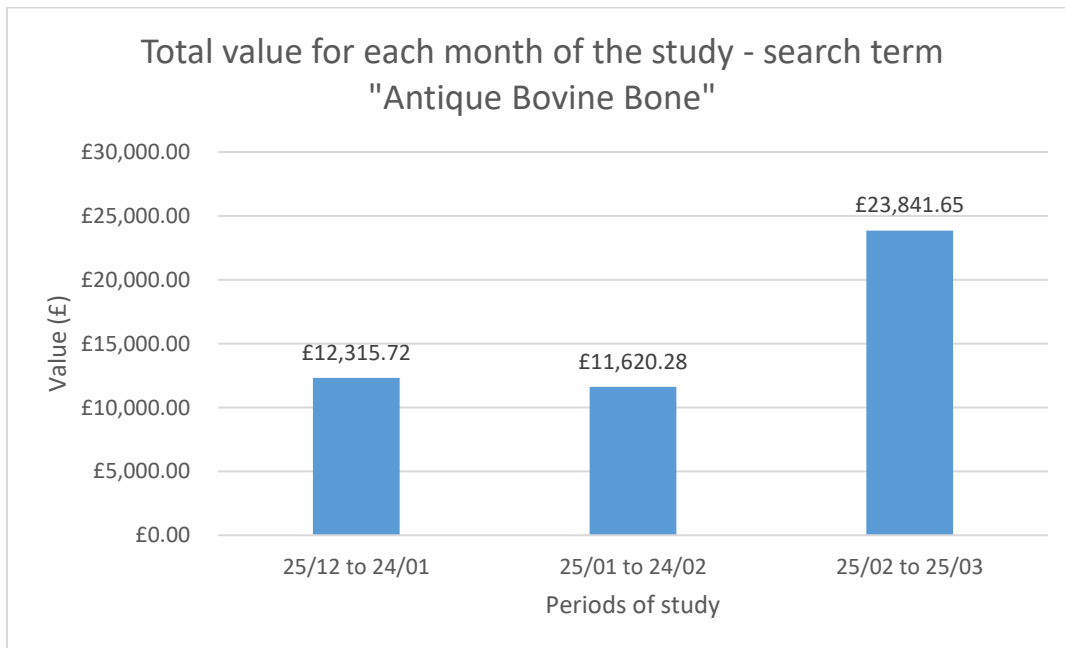


Figure 4: Total value of Antique Bovine Bone items sold across search period

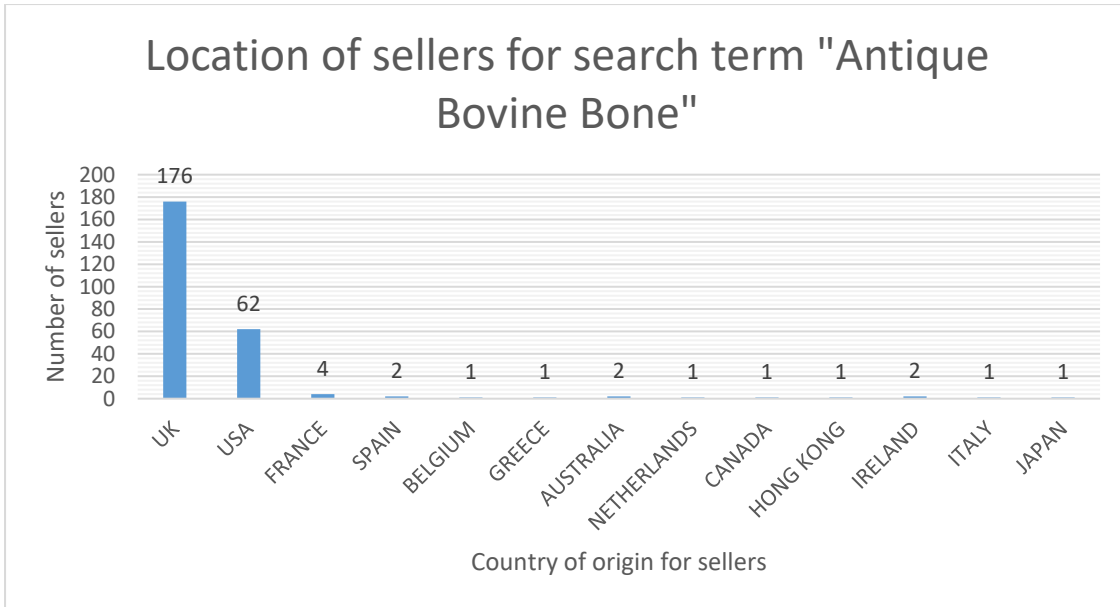


Figure 5: Location of sellers on eBay U.K.'s platform during the research period.

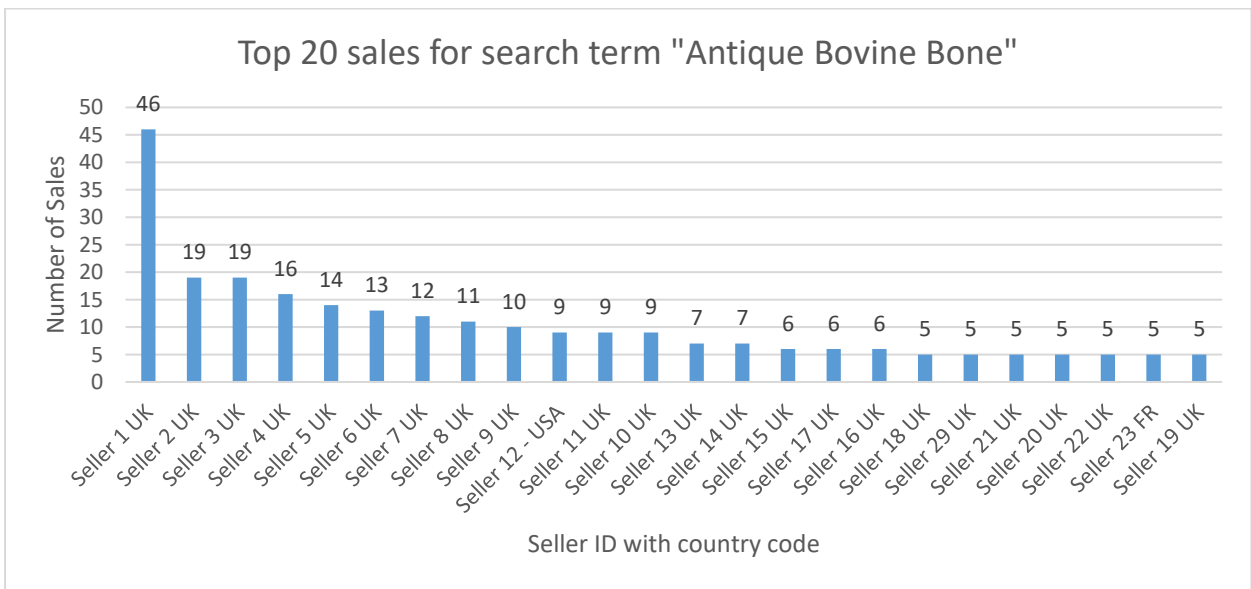


Figure 6: Recurring sellers.