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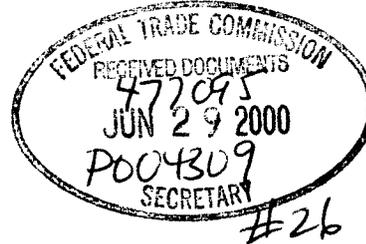
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VIA HAND DELIVERY

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Washington, D.C. 20580

Re: Alternative Dispute Resolution for Consumer Transactions in the  
Borderless Online Marketplace

Dear Mr. Clark:

On behalf of the intellectual property and e-commerce practice group, and the litigation and alternative dispute resolution practice group, of Keller and Heckman LLP, we are pleased to submit these comments on "Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace." Keller and Heckman represents domestic and foreign companies, primarily large national and multinational companies, who offer online marketplaces to consumers, as well as to businesses. We hope that these additional comments are useful as the Federal Trade Commission (FTC) and U.S. Department of Commerce (DOC) continue to explore the potential for alternative dispute resolution mechanisms to facilitate the growth of e-commerce worldwide.

## 1. CONSUMER CONFIDENCE IN THE ELECTRONIC MARKETPLACE DEPENDS ON BRANDING.

One of the most striking points made at the workshop was the general agreement on the importance of **brands** in instilling consumer confidence. This is not surprising; trademark owners spend literally millions of dollars to create a relationship of trust with their customers, both online and offline. That relationship is based on consumer confidence in both the quality of their products or services, and their responsiveness to customer needs. Several panelists at the workshop emphasized that their business models relied on **customer satisfaction** and **dispute avoidance** as the first line of defense – indeed, for companies such as eMusic, their *sole* line of defense - in resolving consumer complaints.

## 2. COMPANIES BUILD BRANDS THROUGH DISPUTE AVOIDANCE.

The second area of striking agreement involved **dispute avoidance**. Quite simply, brand-building is based on consumer satisfaction. Trademark owners around the world have been actively engaged in implementing consumer-friendly approaches to expand Internet sales and maintain customer satisfaction. As companies gain more experience with the Internet, they are developing and issuing guidelines or codes of conduct for the conduct of e-businesses, translating existing codes and standards for offline behavior into online norms, and often working with government agencies to do so. Their guidelines or codes can serve as roadmaps for companies and consumers to avoid disputes. The announcement made by the E-Commerce and Consumer Protection Group at this Workshop on a draft code of conduct and guidelines, the Organization for Economic Cooperation and Development (OECD) *Guidelines on Consumer Protection in the Context of Electronic Commerce*, and BBBOnline's developing "Code of Conduct" are examples. The development of codes of conduct is a positive step, provided that it does not lead to code clutter, where the concept becomes meaningless because the codes or seals become the end, and not the means to the end. We believe that it is more important for companies to concentrate on implementing common sense, consumer-friendly rules as they engage in e-commerce with a primary view to customer satisfaction and dispute avoidance.

The available codes of conduct and guidelines show remarkable commonality. In this regard, Guidelines for online businesses issued by the FTC, *Electronic Commerce: Selling Internationally*, are perhaps the most succinct of the codes of conduct available that online business are following every day.

Our views on the major provisions of the FTC Guidelines are as follows:

- **Use fair business, advertising and marketing practices.** All of the developed countries have laws in place that address false or fraudulent

advertising and marketing practices, complemented by self-regulatory systems such as the International Chamber of Commerce (ICC) code and the National Advertising Division (NAD) program here in the United States. Codes and legal rules on advertising are often sectoral, as well as regional.

- **Provide accurate, clear and easily accessible information about the company and the goods or services it offers.** Consumers should know who they are dealing with online. Where famous trademarks are concerned, the brand, itself, serves as the indicator of the source or origin of the site.
- **Disclose full information about the terms, conditions and costs of the transaction.** Companies whose first priorities are customer satisfaction, brand-building, and dispute avoidance are already making clear their ordering, payment, cancellation and return policies, and including information on taxes, shipping and handling. This simply makes commercial sense.
- **Ensure that consumers know they are making a commitment to buy before closing the deal.** Many of our clients who offer e-commerce-enabled web sites have already adopted approaches similar to the Organization for Economic Cooperation and Development's (OECD) "three-click" approach to ordering. They use prompts reminding customers to check their order for completeness, and often include final reminders indicating that, once submitted, processing of the transaction begins. This allows the consumer to change or cancel an order, preventing the delivery of unwanted goods or services. E-mail notices that confirm orders are commonplace, and many companies use UPS or other firms that offer tracking numbers to help consumers track their packages.
- **Provide an easy-to-use and secure method for online payments.** Universally, all of our clients who offer online purchasing opportunities use secure transmission technology to increase consumer confidence. Many, in addition to offering online purchase options, allow consumers to use mail or facsimile to make a purchase order. This gives consumers conventional ordering options with which they are more familiar.
- **Protect consumer privacy during electronic commerce transactions.** Privacy is, of course, a key issue. We note that our clients are major national and multi-national companies that create a competitive edge by closely holding data about their customers. They collect and use data to fulfill consumer requests, to improve the products and services that they offer, and to promote their own products. They do not sell data to third parties. Data is typically shared only as necessary, *e.g.*, to shipping firms or others who help fulfill a transaction or otherwise respond to a consumer's request.
- **Address consumer complaints and difficulties.** Brand-building depends on customer satisfaction. Businesses have an incentive to

expeditiously and cost-effectively resolve consumer complaints that they cannot avoid, and spend significant resources (sometimes including settling unmeritorious claims with a consumer) to do so. Many web transactions involve relatively small dollar amounts where the business will often decide it is cheaper, easier, and more consistent with brand-building to try to resolve them directly with the consumer before trying other ADR mechanisms.

- **Adopt fair, effective, and easy-to-understand self-regulatory policies and procedures.** Self-regulation begins with self-governance. Many of those who wish to build their brands on the web are aggressively courting consumers by actually implementing guidelines such as this one. They are attempting to respond to customer needs online, and attempting to resolve consumer dissatisfaction, just as they do offline. The same businesses that offer a full guarantee of satisfaction, that allow customers to return purchases for a refund, store credit, and the like offline, are doing so online. Clearly, a market for consumer satisfaction options has developed in the Internet consumer response spectrum, with more and more companies following what they observe market leaders doing.
- **Help us educate consumers about electronic commerce.** Guidelines such as this one and the FTC's related consumer guide, *Going Shopping? Go Global!*, which is available on the web, are excellent tools for consumers.

### 3. DISPUTE AVOIDANCE IS A TWO-WAY STREET.

*Going Shopping? Go Global!* offers a useful reminder that consumers can also take some common-sense steps to avoid disputes, a point made by several at the workshop. Our views on the major provisions of this publication are as follows:

- **Know who you're dealing with.** If the company is known and the brands that it offers are among those liked and trusted by the consumer, chances are good that the company will attempt to resolve customer satisfaction issues related to online sales promptly, just as they do offline. Where the company is unknown, its brands unfamiliar, and the consumer lacks prior experience with the merchant, seal or trustmark programs may help overcome the lack of brand power. Trustmark programs may be especially useful in helping small and medium size e-businesses build their own brand names on the Internet.
- **Know what you're buying.** Consumers can and should exit sites that do not disclose adequate information on the products or services available for purchase.
- **Understand the terms, conditions and costs involved in the sale.** If customary disclosures do not appear, consumers should avoid ordering merchandise from the site
- **Protect yourself when paying online.** Use of credit cards offer an ADR option for consumers who become dissatisfied with a purchase. Most web purchases are

paid for via a credit card, on sites using secure sockets layer (SSL) technology to safeguard this data during transmission. In addition, some companies offer to reimburse consumers for the \$50.00 fee they customarily would have to pay under their credit card agreements with the issuing bank in the event of theft or improper use of the card at the site. While chargebacks cannot resolve all problems, they offer an existing ADR vehicle for consumers and businesses.

- **Look out for your privacy.** Consumers who fail to find a link to a privacy policy on the home page of a site should think twice about sharing personal information with the site, or even navigating the site. With so many different models of sites, however, privacy policies necessarily differ. Information collection practices of sites offering facilitated e-commerce (as, for example, e-Bay does), necessarily differ from those of a company that only promotes and markets its own goods and services. Seal and trustmark programs may be useful in helping consumers understand that a site meets some basic privacy standards, but a serious risk exists that these programs will be misunderstood by consumers as suggesting that sites operate under identical standards.
- **Understand what recourse you have if you run into problems with your purchase.** Many web operators establish procedures for handling claims and disputes in their "user agreement" or "terms of use." Consumers who do not like those policies can elect not to purchase at the site.
- **Demand consumer friendly policies and procedures.** The Internet is spawning and will continue to spawn competition in the area of consumer-responsiveness while increasing consumer choice. The Internet means that consumers are not limited to the only grocery store or department store in town. The world is fast becoming their shopping mall, and that is bringing better prices, better service, and better responsiveness from more and more companies as a result. In short, the Internet is an engine of competition for consumer satisfaction.

#### **4. FACILITATED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS OFFER EFFICIENT WAYS TO RESOLVE CONSUMER DISPUTES THAT CANNOT BE AVOIDED OR RESOLVED DIRECTLY.**

The vast majority of our clients have experienced consumer affairs departments that are staffed by individuals trained to respond to consumer questions or complaints. Apart from advertising dispute resolution programs (where complaints are typically filed by competitors and regulators, not consumers), few of our clients have ever experienced the need to participate in existing consumer ADR programs offline. They believe that they are unlikely to require ADR in connection with their online activities as a result, but nevertheless support the development of online ADR programs to further the effective and efficient development of e-commerce globally.

Companies without the infrastructure or experience to handle consumer complaints well, however, are likely to be less able to avoid or resolve them directly. Recognized ADR programs will certainly be a benefit without which they may never grow, since no

government, and no court system, has adequate resources to handle small consumer disputes as well as deal with serious frauds on the Internet. ADR (including ADR forms facilitated by a third party) offers an appropriate way for responsible businesses and consumers to try to resolve complaints where, for whatever reason (including lack of an established consumer affairs group within a company), the parties cannot do so between themselves. Thus, ADR is needed to supplement dispute avoidance efforts given the fact that litigation is not feasible in most situations.

Two of the thorniest questions raised by e-commerce, of course, are how to resolve multi-national jurisdiction disputes and how to enforce judicial awards internationally. The reality is that consumers dealing with well-established multinational companies who offer their own dispute resolution approaches to complaints – whether or not they use a third party - and those who deal with respected organizations offering ADR services, have the best chance of obtaining redress.

##### **5. APPLICATION OF DISPUTE-AVOIDANCE PRINCIPLES SUPPORTS UPHOLDING ADR PROVISIONS OF WEB USER AGREEMENTS.**

Common sense application of the FTC's guidance to businesses and to consumers could support a conclusion that, not only are ADR programs likely to be essential to facilitate global e-commerce, but ADR provisions of consumer agreements must be given legal effect to advance international policy objectives. It also leads to another important policy point, namely, that, to minimize the expenditure of scarce resources and avoid burdening an already clogged, expensive and inefficient judicial systems with suits, businesses and consumers should be required to exhaust ADR remedies before seeking alternative remedies. We note that larger businesses will be inconvenienced, but not fatally wounded, if ADR agreements are not viewed as binding or if consumers do not need to exhaust ADR remedies first. Small and medium size enterprises (SME's), however, are likely to be seriously harmed, and may forego foreign e-commerce opportunities because of liability fears.

U.S. businesses operate in an environment where legal agreements – including “click-wrap” agreements – are typically upheld unless they are “unconscionable.” The lack of equal bargaining power, alone, does not make an agreement unconscionable in the U.S. This offers an important benefit to both U.S. firms engaged in e-commerce in the U.S. and foreign firms who may be hesitant to enter the U.S. marketplace otherwise because of fears about the expansive liability exposure they may face in the U.S.

The U.S. legal environment is characterized by liberal discovery and motions practice rules, the opportunity to be represented by counsel on a contingency fee basis, and the general absence of a “loser-pay” rule. We believe that these features have led to a robust litigation environment that is unparalleled elsewhere. Foreign firms fear this exposure. The legal systems of many other jurisdictions bar both contingent fee cases and liberal discovery, while a “loser pays” principle is the norm at the same time. Those

systems, while inhibiting far-reaching litigation of a sort possible here, nevertheless, leave many U.S. companies, especially SME's, concerned about the uncertainties should ADR options not be available. Jurisdictional issues and possible application of a "country of destination" principle could effectively leave them powerless to defend themselves in multiple jurisdictions. Consumers too may fear the unknown, particularly when dealing with a distant web site operator (as opposed to a company that markets familiar brands internationally and that may already enjoy a reputation for quality and fair dealing). Giving Internet-related ADR programs legal effect internationally may overcome business hesitancy about selling in multiple jurisdictions, and may actually offer new avenues for consumers to obtain redress internationally as a practical matter, given limited available litigation options in most parts of the world.

While some panel members complained that the average consumer does not read the terms and conditions until after something goes wrong, the FTC, at least, appears to agree that Web consumers should be reviewing terms and conditions of sale. We assume that such a review would include application of ADR efforts *before* making an online purchase and shopping online for the best consumer satisfaction programs. This again suggests that pre-dispute ADR agreements should be given legal effect as a policy matter, a point particularly needed to maintain a competitive environment where both multinational concerns and SMEs can best thrive, to the maximum advantage of consumers.

As to whether ADR awards should be binding, by definition, mediation is not and arbitration is. However, there is an emerging form of partially-binding arbitration that has promise: The seller is bound, but the purchaser is not. (In effect, the award would be an advisory opinion on the strength of the purchaser's position.) Consumer groups expressed a strong preference for such partially-binding awards. We believe that businesses may elect to try partially-binding procedures for a period of time during which their value could be assessed. Most disputes that are not settled can be arbitrated, and a relatively small number of consumers are likely to remain dissatisfied with a decision, if the process is fair, so larger companies may find this approach useful as a consumer satisfaction tool. Nonetheless, for business certainty, businesses should be entitled to specify in user agreements that arbitration awards are to be binding. SME's, in particular, facing the cost of an ADR process plus the additional costs of a subsequent judicial proceeding, may simply avoid web marketing or limit the geographic reach of sales to avoid those additional costs, unless ADR decisions are binding.

## **6. A WIDE ARRAY OF ADR OPTIONS SHOULD BE AVAILABLE.**

Conventionally, mediation and arbitration (binding, partially-binding and non-binding) are the most common forms of facilitated ADR. A variety of other techniques are being used to deal with online consumer transaction issues. One technique that has not been explored in detail, however, is the notion of insuring the transaction, an idea noted during both last year's and this year's workshops. Much as one can buy insurance

to cover breakage during shipping and handling, one can envision that more insurance products will be developed to offer consumers and businesses a low cost way to resolve disputes involving lower-value transactions. Particularly in the international marketplace, if goods purchased do not arrive, are damaged, or are the wrong size and color, insurance payments may offer an efficient and expeditious way to resolve disputes. We suggest that additional evaluation of the insurance aspect as a tool for avoiding or minimizing disputes should be explored.

Given the nascent nature of e-businesses, it is premature to determine whether some types of ADR are better suited for online transactions than others. We believe that all approaches designed to avoid disputes and promote customer satisfaction should be encouraged. Whether, when more formal ADR is required, face-to-face ADR or "virtual" online approaches are preferable has not yet been made clear. Panelists observed both that virtual ADR may offer an opportunity to avoid some possible biases occasioned by face to face ADR, and that web technologies will allow for a form of face-to-face "web-cast" ADR in the future. Whatever options are used, translation software will increasingly be available to overcome language barriers. This means that cultural differences may pose the greatest difficulty for businesses and consumers alike.

In keeping with the notion of a developing marketplace of competition for consumer satisfaction, various ADR providers will emerge to satisfy available needs. One can envision, for example, an array of linked arrangements where, through a central organizing body or ombudsman, parties can elect to use recognized ADR services. The clear consensus of participants at the meeting was that a "one size fits all" approach will not work in the varied e-commerce environment, given the vast array of consumer goods and services that are traded online, but that some basic principles should apply.

#### **7. ELEMENTS OF FAIR AND EFFECTIVE DISPUTE RESOLUTION PROGRAMS FOR ONLINE CONSUMER TRANSACTIONS.**

ADR options should be disclosed to the consumer, in keeping with the notion that ADR agreements should be upheld. Fees should be low to consumers and reasonable for businesses. Rules followed should be fair to both parties, allowing for adequate "due process." The process should be expeditious and some clear decision or recommendation rendered. And, it is important that decision-makers understand the basic principles of ADR and have some understanding of the specific types of products, services and disputes at issue to be effective. When you add language and cultural elements, tailored programs geared to specific industries or sectors or even regions seem preferable, at least at this time. While large multinational companies accustomed to dealing with multiple jurisdictions will likely be open to alternatives, SMEs may prefer the certainty of dealing with an organization of their choosing, and one that has "neutrals" (designated specialists versed in the issues) who speak their language, to be comfortable in engaging in e-sales. Consumers will have similar concerns, and this again will drive the development of new

models of ADR designed to deal with the cross-cultural, multilingual nature of cross-border disputes.

**8. GOVERNMENTS SHOULD ENFORCE NATIONAL LAWS AND CONTINUE EDUCATIONAL EFFORTS, SUPPORT ADR, AND AVOID MANDATING SPECIFIC PROGRAMS OR PROVIDERS.**

It is an unfortunate reality that bad actors or fly-by-night companies always will try to prey on unsuspecting consumers. ADR is an essential part of a strategy to promote e-commerce, simply because scarce government resources (including judicial resources) should focus on combating fraud, especially the egregious or repeat offenders that most threaten confidence in e-businesses. Thus, governments should have the following four important prongs of a broad strategy designed to promote consumer trust and high ethical standards by businesses.

First, governments must focus resources and cooperate internationally to root out fraud and educate their citizens on how to avoid online bad actors in sectors and even regions. Educating consumers to identify and affirmatively avoid jurisdictions or web sites that have a pattern or practice of ignoring consumer concerns could be a real benefit to consumers.

Second, governments should promote, but not mandate, use of ADR. More important, governments should allow the marketplace for ADR programs to develop and avoid the temptation of establishing “minimum” standards, which could become a ceiling rather than a floor of conduct. Self-regulatory codes should be permitted to evolve, allowing the marketplace to function as a vehicle to achieve higher standards of ethical conduct and better consumer satisfaction.

Third, governments should not mandate the use of particular forms of ADR, particular providers, or require the display of seals or trustmarks indicating that a company participates in an ADR program as a business requirement. In other contexts – for example, with environmental seal programs – the FTC has rightfully expressed skepticism over the extent to which the display of some “green seal” might mislead consumers. In its Guides for the Use of Environmental Marketing Claims, for example, the FTC adopted restrictions on such real or mock use, quite in contrast to other countries and regions that promote government-sponsored green seal programs. For any government to mandate adherence to a government-sponsored or recognized form of ADR (to require, in essence, some form of certification), could stifle the emerging marketplace in ADR services. Such action will actually provide less incentive for companies to proactively offer consumer satisfaction programs as part of their branding strategies, will dilute trademarks of existing owners of famous trademarks, which have dispute avoidance strategies that largely obviate the need for ADR, and will have potentially significant anti-competitive implications. Trustmark programs should not be

promoted by governments in a manner that dilutes rights of existing owners of famous trademarks and important brand names.

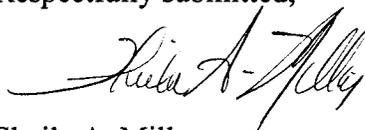
Finally, governments can play a key role in education. E-businesses are developing new programs and approaches to promote consumer trust, based on traditional approaches to brand-building, such as developing codes of conduct and commercial standards for operations, and offering protections beyond what they are legally required to provide. Guides such as those developed by the FTC are extraordinarily helpful tools that should benefit consumers and businesses alike.

## CONCLUSION

The development and growth of e-commerce in the U.S. has been advanced in no small measure by the decision of key policy makers to rely primarily on industry self-regulation. U.S. web sites are benchmarking their competitors, looking every day at what market leaders are doing and providing information to consumers on cancellation, return and refund policies. The market is working and industry and government should collectively cooperate on ways to promote more efficiencies and continued improvements in client satisfaction and dispute resolution.

We hope these comments are useful and appreciate the opportunity to express our views.

Respectfully submitted,



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