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BACKGROUND

The global e-marketplace raises new and complex consumer protection issues. Until recently, consumer protection in most countries has been largely a domestic concern: U.S. consumers, for example, traditionally have done business with U.S. firms, relied on familiar protections, and sought relief in nearby courts. U.S. companies, which may have faced numerous hurdles in retailing directly to consumers in foreign markets, generally have directed sales mostly to U.S. consumers and dealt mostly with U.S. marketing laws. And U.S. consumer protection agencies at the state and federal level have focused their efforts on U.S. fraudsters that target U.S. consumers.

With global online commerce promising to grow at a stunning rate, the world of consumer protection is changing. Just as television, mail order sales, and telemarketing transformed a once local market into a national one, the Internet has created a global marketplace. Consumers can learn about and buy goods and services anytime, from almost anywhere, without leaving home. And businesses have immediate and inexpensive global advertising reach, making possible a worldwide customer base. This new marketplace challenges national consumer protection regimes and creates the need for a framework that provides consumers with effective protection and businesses with a predictable legal environment. Without the confidence of consumers and business, the marketplace will fall far short of its full potential.¹

FTC Workshop

In June 1999, the FTC facilitated a dialogue on how government, industry, and consumer groups together can address this important challenge with a workshop on “U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace.”² Appendix A summarizes the workshop testimony and the 69 public comments received.³

The Workshop brought together industry members, consumer advocates, academics, and domestic and foreign government officials, who grappled with many difficult questions: What information disclosures do online consumers need to make informed decisions? What are fair business practices online? What are appropriate roles for government and the private sector in securing effective consumer protection? For cross-border business-to-consumer transactions, which countries’ laws should apply, and which countries’ courts should hear disputes? How can stakeholders best work together internationally to protect consumers?

Although workshop participants agreed that online consumers should be afforded effective protection that is not less than the protection afforded to offline consumers, they identified three special concerns of online consumers: the anonymity of sellers who may be difficult to trace; consumers’ inability to examine products or labels; and

obstacles to resolving disputes. Accordingly, participants recognized a heightened need for disclosures about online businesses, the goods and services they offer, and the terms and conditions of transactions. They also identified the need for order confirmation mechanisms, to ensure that consumers clicking through a Web site are not held to the terms of an online contract they never intended to make. Consumer advocates also pushed for cancellation rights, protections related to merchandise

OECD Guidelines for Consumer Protection in Electronic Commerce

Staff of the FTC and Department of Commerce relied on the Workshop's record to help develop voluntary international guidelines for consumer protection in e-commerce. The OECD issued the Guidelines in December 1999. They reflect consensus among 29 countries on a blueprint for governments building online consumer protections, private sector organizations developing self-regulatory schemes, and consumers shopping online.⁹

The Guidelines address many of the concerns raised at the Workshop. Indeed, the overarching principle in the Guidelines echoes a theme repeated throughout the Workshop – that consumers should be afforded effective and transparent protection in e-commerce that is no less than the protection afforded in other forms of commerce.

The Guidelines also are consistent with specific Workshop recommendations on business practices, dispute resolution, and global cooperation. They describe basic fair business, advertising and marketing practices, such as avoiding deception and having substantiation for advertising claims. They identify what disclosures suffice to allow consumers to make informed choices, including clear and accurate disclosures about the businesses themselves, their goods and services, and their terms and conditions of sale. They also call for secure payment mechanisms and clear processes to confirm transactions. The Guidelines do not dictate whether these protections should be implemented by law or through private sector initiatives. Rather, they recognize that effective consumer protection in the e-marketplace will require a combination of education, law enforcement, and private sector initiatives.

In addition, the Guidelines acknowledge the new issues raised by the international nature of the emerging marketplace. They call for international law enforcement cooperation, cross-border judgment recognition, and consumer education on laws in different countries. In the short term, they call for developing alternative dispute resolution mechanisms that provide consumers meaningful access to redress without undue cost or burden. Finally, they acknowledge the importance and complexity of applicable law and jurisdiction, but offer no definitive resolution of these issues.



Moreover, a country-of-origin scheme is no less defined by physical world borders than is the rule of destination; it simply applies a different formula for selecting which borders are relevant.

One difficulty posed by the borderless medium is the inability in certain instances for a company to know where its customers are. If a company is to be subject to a country's laws and courts, the company should be directing its business to or knowing that it is doing business with people in that country. It is necessary to distinguish between the marketing phase (before a contract has been entered into) and the transaction phase of business-to-consumer dealings.

Transaction Phase: Where there is an actual business-to-consumer transaction, identifying consumer locations is a challenge, but not an insurmountable one. Businesses can face difficulties in identifying consumer locations for both tangible and electronic products. Sales of tangible goods are less of a problem, because ultimately, they are delivered to an identifiable physical location. But there are complications: offline delivery is made to someone other than the buyer (a U.S. consumer buys a gift for a friend in France), or a customer accesses a merchant's Web site while away from home (from an Internet café or a cellular phone). Such scenarios are not unique to the online world (a French consumer calls a mail order house from a pay phone to order a gift for a friend in New Jersey). More challenging are transactions where goods or services (like information and software) are delivered electronically, that is, not to a physical location.

A look at private sector uses of high- and low-tech means to determine consumer location suggests that these concerns do not warrant revamping the current jurisdictional framework. In many instances, businesses simply can ask the customer where they are located; rules could be developed to give companies some comfort in relying on the information a consumer provides. Indeed, businesses have incentives to know where their customers are and where their products are going: It helps to ascertain marketing preferences, to do follow-up sales and service, and to ensure payment. In addition, technology is evolving that can automatically convey to the seller all necessary information about customers.¹² Finally, consumers face similar difficulties in determining where an online company is located, because the consumers may have to rely on what the company itself discloses about its location and because companies, as artificial legal entities, may exist in many places and in no place at all.

Marketing Phase: The pre-transaction phase poses more difficulties for merchants. The challenge is determining when a merchant is directing its marketing to, or "targeting," a given jurisdiction. Targeting is relevant in the U.S. to establish specific personal jurisdiction, which allows a court to enter a judgment against a nonresident defendant.¹³ In the European Union, it is necessary to establish whether an online company has made a specific invitation to a foreign consumer, because this is a

determining factor for applicable law and jurisdiction.¹⁴ In many cases, making this determination is not difficult: online companies often seek out customers in a particular country, by advertising their Internet addresses in offline media targeted to a given country (through mail order catalogues, magazines, billboards, television, etc.); registering their sites with search engines geared to people in a given country; tailoring the content of their sites to people in a given country (“special discount for U.S. consumers”); and indicating the countries where they do business.

At the same time, the fact that a consumer anywhere can access a Web site makes it difficult to determine where an online company is seeking to market its goods or services. If a country-of-destination approach were stretched to its extreme, online companies simply posting a Web site could be subject to courts and conflicting laws around the world, regardless of where they intended to do business. This approach would be profoundly unfair and unpredictable for businesses. *Thus, a critical first step for legislators and policy makers should be to define when the content of a Web site by itself can subject a merchant to a country’s courts and laws, especially those laws prescribing marketing rules with certain disclosure and advertising requirements.*

In addition to distinguishing the marketing phase from the transaction phase, it is important to distinguish legitimate practices from those that are fraudulent and deceptive. Even in the marketing context, there is little legitimate interest in reducing compliance burdens for companies making fraudulent or deceptive claims on their Web sites. These companies should be subject to prohibitions on these practices regardless of where they are located.

The framework for both jurisdiction and applicable law should provide guidance to businesses about their liability exposure in both the marketing and transactional phases, so they can clearly predict when their practices could subject them to the application of foreign laws or jurisdiction by foreign courts. It also should ensure that this liability exposure is not disproportionate to the business’ connection to the relevant forum’s laws and courts. For example, companies should not be subject to foreign courts or foreign laws for pre-transactional, non-deceptive online practices (such as non-deceptive, non-interactive advertisements) that could not reasonably have been expected to affect the citizens of that jurisdiction.

Compliance Costs

Subjecting companies to the laws and courts of the jurisdictions where they do business

While government needs to be cognizant of compliance costs, concerns about such costs can be overcome, assuming the system is predictable and fundamentally fair. In the domestic context, companies that want to do business nationally have successfully sorted out and complied with 50 different state consumer protection laws, and may be sued in any one of the 50 states. Even internationally, in the offline world, multinational businesses have a long history of complying with international legal regimes and defending lawsuits around the world to take advantage of an international customer base. Trade associations and other organizations have been available for years to help businesses reduce compliance costs.¹⁵

In addition, the Internet facilitates compliance with different laws by making it easy to access information about different countries' consumer protection laws. In the past year, for example, more online companies have posted different Web sites tailored to consumers in different jurisdictions. Similarly, a growing number of entities are offering international compliance services for online companies.¹⁶ The cost of such services is likely to decrease. Governments should play a leading role in educating businesses about their laws and law enforcement policies.¹⁷

Compliance burdens also can be reduced by increasing convergence of consumer protection laws and by making available alternative dispute resolution mechanisms that are convenient to both parties.

Concerns Raised by the Proposed Country-of-Origin/ Prescribed-by-Seller Approach

Shifting to a pure country-of-origin approach to address challenges inherent in the current system risks undermining consumer protection, and ultimately consumer confidence in e-commerce. The same would be true under a "prescribed-by-seller" approach to the extent it would allow contractual choice-of-law and choice-of-forum provisions dictated by the seller to override the core protections afforded to consumers in their home country or their right to sue in a local court.¹⁸

Race to the Bottom

Workshop participants noted that a pure country-of-origin or prescribed-by-seller framework would create incentives for business to operate from – or have transactions be governed by the laws of – jurisdictions with lax consumer protections. Even legitimate companies have incentives to minimize compliance burdens, although competitive pressures and concern about reputation may mitigate this effect. This framework could encourage the worst in industry to evade compliance with consumer protection laws altogether.¹⁹

The result – a “race to the bottom” – would hurt consumers around the world. For example, for U.S. consumers, it would erase protections not widely available elsewhere, including requirements for the disclosure of key information about loans, requirements for the pre-transactional disclosure of warranty information, protections regarding the delivery of goods, and protection of children’s online privacy.

Ineffectiveness of Law Enforcement

If a country-of-origin/prescribed-by-seller regime applied also to public consumer protection law enforcement, as some advocates propose, companies would be subject only to law enforcement authorities where the companies are located (or in the jurisdiction designated in the contract), regardless of where their customers are. Governments – both national and provincial – would be expected to refrain from protecting their own citizens from foreign wrongdoers,

Although the current system needs to be improved, moving to a pure country-of-origin/prescribed-by-seller approach for public consumer protection laws likely would have corrosive effects on consumer confidence in the global marketplace. It likely would prevent government agencies in participating countries from effectively protecting their citizens from foreign perpetrators of fraud and deception.

Uninformed Decision Making

Market economies work best when consumers can make informed purchasing decisions. Therefore, if consumer protections for cross-border Internet transactions were weakened in exchange for legal and/or practical benefits – the case under a country-of-origin/prescribed-by-seller framework – it would be imperative that consumers *knowingly* choose to give up certain protections. This is particularly true in an international context, where choice-of-law and choice-of-forum clauses could have profound effects on consumer rights.

A knowing choice would require that a consumer know at least which country's laws and courts would govern the transaction. A country-of-origin approach would require a disclosure of where the company was located. A prescribed-by-seller approach would require clear disclosure of the applicable law and jurisdiction as selected by the seller.

Moreover, simply knowing which laws and jurisdictions govern the transaction does not enable consumers to make a knowing choice. The more difficult issue is ensuring that consumers understand how the governing law or forum would affect their rights. While the Internet makes it easier to access information about the laws of various countries, the issues are not often easily understood by consumers. Consumers would need to understand how the substantive protection of the company's chosen jurisdiction differed from those conferred at home and whether the procedural rights would enable them to invoke those core protections. Though businesses have legitimate concerns about the burden of determining what consumer protection laws apply in any given jurisdiction, individual consumers would have a comparatively more significant burden under country-of-origin rules.

Competition Concerns

Under a country-of-origin approach, U.S. business could be at a competitive disadvantage. In many instances, foreign companies doing business with U.S. consumers would have to comply with their own countries' legal standards, many of which are less onerous than U.S. standards. That would put U.S. companies at a competitive disadvantage when dealing with U.S. customers. For example, U.S. car dealers and manufacturers offering car leases to consumers over the Internet would have to comply with the disclosure requirements in the Truth in Lending Act. Non-U.S.

companies, on the other hand, could disclose much less information, causing their deals to appear better to potential customers.

A pure country-of-origin regime could also splinter the integrally linked areas of consumer protection and antitrust. In the United States, as in many other market-oriented countries, consumer protection and antitrust laws are enforced in tandem. A market-oriented approach seeks to ensure the proper functioning of the marketplace by enforcing laws promoting competition (antitrust) and laws promoting free and informed consumer choice (consumer protection). Coordinating the two areas ensures that consumer protection provisions do not have unintended competitive effects, and competition provisions promote consumer welfare. They cannot, however, be coordinated as well if the "marketplace" for competition purposes is the country where products are purchased, while the "marketplace" for consumer protection purposes is the country where the products originate.

Access to Courts

Requiring consumers to travel to a foreign and often times remote forum to seek redress in an unfamiliar legal system – either through a country-of-origin approach for jurisdiction, or by allowing companies to impose an exclusive forum by contract – would in many cases effectively deny consumers access to judicial redress. For example, a U.S. consumer who buys but does not receive \$500 worth of pottery from an Italian Web site is unlikely to buy a \$700 plane ticket to travel to Italy to pursue relief through a foreign judicial system.

One argument used to support the country-of-origin approach is that country-of-destination also fails to ensure consumers meaningful judicial recourse for most cross-border transactions. Even if consumers can sue in their home courts, it often is impossible for them to get their judgments recognized abroad. Under any system, it is important to make judgment recognition easier to ensure that judicial redress is meaningful. At the same time, further development of private law remedies such as alternative dispute resolution can offer companies and consumers a practical and convenient mechanism to resolve cross-border disputes. The importance of judgment recognition and alternative dispute resolution are discussed in more detail below.

Problems with the Deference Approach

A variation on the country-of-origin/prescribed-by-seller approach involves deferring to the laws (and perhaps the law enforcement agencies) selected by the business, as long as they provide an adequate overall level of protection.²³ This approach is referred to as the "deference" approach. The approach raises troubling substantive and logistical concerns. While it seeks to address the "race to the bottom" problem, it does not



denominator. Another is to maintain some flexibility to respond to new threats on the consumer protection horizon. Still another is to reach agreement in a timely manner.

The OECD Guidelines reflect existing consensus among 29 countries on some basic fair business practices online, including general prohibitions against fraud, deception, and unfairness, and protections specifically linked to online transactions, such as pre-sale disclosure of key information and fair confirmation processes.

Still, different countries may apply the Guidelines differently. For example, the Guidelines call for a mix of law and private initiatives, without dictating which protections are provided in what manner. In the U.S., laws that prohibit fraud, deception and unfairness online are enforced vigorously.²⁵ Private sector initiatives are addressing other recommendations in the Guidelines, such as the online disclosure of contact information. Other countries have a different mix of regulation and self-regulation.

The time is right for legislators and policy makers around the world to begin work toward convergence of substantive consumer protection laws in specific areas. This process should avoid reducing existing protections to the lowest common denominator. Potential starting points for such international discussions include:

- (1) identifying areas where substantive protections are equivalent but *technical compliance requirements* differ (e.g., different formatting requirements for similar disclosures) and working toward convergence on those requirements;
- (2) working toward agreement on defined aspects of core protections, such as *fraud and deception*, that governments could enforce across borders;
- (3) working toward agreement on core protections in *specific sectors* (e.g., minimum disclosure standards for consumer lease agreements); and
- (4) drafting an international code that would govern contracts for the cross-border sale of goods and/or services to consumers.²⁶

Finally, countries could increase uniformity of consumer protection laws within their own borders. This approach could preserve a role for state and regional authority, by having states and regional authorities enact provisions for compliance and enforcement in a way that does not impose varying compliance obligations.²⁷ While it is not something to



enforcement backstops. If such a program proves effective, governments might agree to a safe harbor, i.e., to deem compliance with the program as compliance with at least some of their own countries' consumer protection laws.

CONCLUSION

Protecting consumers in the e-marketplace is complicated, but the foundation is in place to develop an effective and fair system.

- Representatives from government, industry and consumer groups must continue to work together to address the problems posed by current jurisdictional systems without rushing to impose a country-of-origin regime.
- Stakeholders must pursue incremental efforts toward convergence of substantive protections.
- Stakeholders must work toward international arrangements for cross-border judgment recognition and enforcement for both private and public actions.
- Governments must continue to develop effective arrangements for cross-border information sharing and law enforcement cooperation.
- Business and consumer representatives must continue to develop effective programs to prevent and resolve disputes.
- Governments must support their efforts.

These steps will be challenging and take time, but the promise of the new marketplace will make the journey worth the effort.

1. See, e.g., Transcript of the June 8, 1999 main session of the FTC's Public Workshop on "U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace," testimony of FTC Chairman Robert Pitofsky at pp. 4-8; Secretary of Commerce William Daley at pp. 9-18; U.S. Trade Representative, Ambassador Charlene Barshefsky at pp. 15-20; Under Secretary of the International Trade Administration of the Department of Commerce, Ambassador David Aaron at pp. 303-15. There are four transcripts for the Workshop proceedings, one for each of the main sessions on June 8 and June 9 and one for each of the breakout sessions on those days. These transcripts are available at <http://www.ftc.gov/bcp/icpw/index.htm>. Throughout this document, references to testimony presented at the Workshop will include the date of the session, whether it was a breakout session, the last name of the participant, and the relevant page numbers, e.g., June 8, Pitofsky at 4-8.
2. 63 Fed. Reg. 69,289 (December 16, 1998). Two subsequent notices were published, providing further information regarding comment submission and details about the Workshop: 64 Fed. Reg. 5,062 (February 2, 1999) and 64 Fed. Reg. 19,782 (April 22, 1999).
3. These comments can be found on the FTC Web site (available at <http://www.ftc.gov/bcp/icpw/comments/index.htm>)

Cyberspace Utopianism, 74 Ind. L.J.893, 911-42 (1999).

11. Some argue that a system in which the consumer's law and courts govern poses another drawback – it motivates dot com companies to place geographic limitations on the availability of their goods and services to avoid having to comply with too many legal regimes. Companies may choose not to make their products available globally, thus denying consumers the benefits of a truly global marketplace. Consumers in less attractive markets (perhaps smaller, poorer, or more remote places) would be hurt the most, as companies may choose not to do business there. However, such countries could avoid this result (and still protect their consumers) by passing national legislation to attract foreign business. Each country would decide how best to protect its own consumers and might through its own laws even incorporate consumer protections existing elsewhere.

12. As noted by Professor Goldsmith, some jurisdictional complications purportedly caused by the difficulties in determining the location of a consumer are based on technological assumptions that are already outdated. Workshop Transcript, June 9, Goldsmith at 77.

13. To establish personal jurisdiction under U.S. law, the defendant must have purposefully directed, or targeted, its activities or performed some act by which the defendant purposefully availed itself of the privilege of conducting business in the forum, thereby invoking the benefits and protections of its laws, such that the defendant could have reasonably anticipated being haled into the forum. In the context of the Internet, to determine whether an online company has purposefully availed itself of the benefits of doing business in a particular jurisdiction through its Web site, U.S. courts have identified three categories of Web sites (referred to as the "Zippo Continuum"). First, courts generally exercise personal jurisdiction over businesses that directly enter into contracts through the Internet with residents of the forum because the requisite purposeful availment has occurred. *See, e.g., Thompson v. Handa-Lopez*, 998 F. Supp. 738 (W.D. Tex. 1998) (federal court in Texas could exercise jurisdiction where Texas consumer entered into contract with business on business' Web site). Second, courts decline to exercise jurisdiction where a defendant simply posts information on an Internet Web site that is accessible to users in their jurisdiction. *See Resnick v. Manfredy*, 1999 U.S. Dist. LEXIS 5877 (E.D. Pa. Apr. 26, 1999) (breach of attorney-fee agreement case); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (trademark infringement case); *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest*, 35 F. Supp. 2d 507 (E.D. La. 1999) (trademark infringement case). Because a business cannot purposefully direct information to any particular jurisdiction merely through maintenance of a passive Web site, courts state that the exercise of personal jurisdiction is improper in these situations. Third, occupying a gray area are cases in which a user can exchange information with the host computer but cannot directly enter into contracts through the Internet. In these cases, personal jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *See, e.g., Zippo Manufacturing Co. v. Zippo.Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (trademark infringement case).

In addition, this issue is relevant to applicable law. One factor of several that is considered in determining whether a country can apply its own public laws to conduct outside its territory is whether that conduct has or *is intended to* have substantial effect within its territory. Restatement (Third) Foreign Relations § 402. Other factors include the place of contracting, negotiation, and performance. Restatement (Second) Conflict of Laws § 188. While there is not yet a definitive answer as to how such factors apply to electronic contracts, these questions can be resolved in a way that is consistent with policies outlined here and in a way that is predictable for business and consumers. Courts also take into account the following more general criteria for determining which law should apply: (1) the needs of

14. See discussion on page 13 in section on "Dispute Resolution" in the Workshop Report, attached as Appendix A. Policy makers in Europe are grappling with how to apply this concept in e-commerce. See, e.g., Second Draft Report on the Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(1999)348-C5-0169/1000-1999/0154 (CNS), 13 April 2000.
15. See, e.g., DMA Comment at 4 (discussing compliance aids the Direct Marketing Association provides to its members).
16. See, e.g., www.privacycouncil.com, a Web site that seeks to assist businesses in complying with international laws relating to privacy.
17. Business compliance guides on various topics are available on the FTC's Web site (at <http://www.ftc.gov/ftc/business.htm>).
18. These concerns are reflected in U.S. case law dealing with enforcement of choice-of-law clauses in consumer contracts for offline distance sales. Many U.S. courts refuse to uphold such clauses because it would be contrary to the fundamental public policy of the consumer's home jurisdiction. See Appendix A at 13.
19. See also Presentation of Andrew J. Pincus, General Counsel, U.S. Department of Commerce at "Internet Law & Policy Forum 1999 Annual Conference" (Montreal, Canada, July 27, 1999) (available at <http://www.ilpf.org/confer/trans99/conf99d2.htm>).
20. The difficulties of cross-border telemarketing fraud enforcement are discussed in "United States-Canada Cooperation Against Cross-Border Telemarketing Fraud: Report of the United States -Canada Working Group to President Bill Clinton and Prime Minister Jean Chrétien," (1997) (available at <http://www.usdoj.gov/criminal/fraud/uscwgrtf.htm>).
21. See Debra A. Valentine, "Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions" remarks before Canada/United States Law Institute, Case Western Reserve University School of Law (April 15, 2000) (available at <http://www.ftc.gov/speeches/other/dvcrossborder.htm>).
22. The European Union (EU) has attempted to address this issue through its Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest, Official Journal L 166, 11/06/1998 p. 0051-0055. Once implemented, this Directive will enable certain public bodies and consumer organizations within the EU to initiate proceedings in other EU member states to enjoin violations of numerous European consumer protection laws. See http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0027.html.

25. Since its first Internet case in 1994, the FTC has brought over 120 cases challenging online fraud and deception. See <http://www.ftc.gov/os/1999/9912/fiveyearreport.pdf>.

26. For example, the United Nations Convention on Contracts for the International Sale of Goods, 1980, establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. However, the Convention does not apply to consumer contracts: Article 2(a) excludes the sale of goods “bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.” See