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**Trade Barriers That U.S. Small and Medium Size Enterprises
Perceive as Affecting Exports to the European Union
ITC Inv. No. 332-541**

**HEARING STATEMENT OF ASCDINATD
for
THE OWNER'S RIGHTS INITIATIVE**

Introduction

On behalf of the Owners' Rights Initiative, an organization of over 20 companies and trade associations dedicated to preserving the right to sell, lend and rent goods on secondary markets, the Association of Service and Computer Dealers International and the North American Association of Telecommunications Dealers ("AscdiNatd") appreciates the opportunity to present their views to the International Trade Commission ("Commission") on barriers small and medium size U.S. enterprises ("SMEs") see as affecting exports to the European Union ("EU"). As the Commission has noted, SMEs make a significant contribution to the U.S. economy in terms of employment, job creation and entrepreneurship.¹ They account for the vast majority of U.S. businesses and approximately half of the GDP generated by nonagricultural sectors. As the United States embarks on negotiations for the Transatlantic Trade and Investment Partnership ("TTIP") with EU, there should be no doubt that improved market access for SMEs is key if the TTIP negotiations are to achieve the goals of spurring U.S. economic growth and creating U.S. jobs.

¹ See *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports*, Inv. No. 332-508, USITC Pub. 4125 (January 2010) at 2-1 – 2-2.

AscdiNatd is a non-profit trade association representing IT and telecom resellers, many of whom are SMEs, operating in secondary markets for new and used computer and telecommunications equipment.² We are based in the U.S, but our members are from all over the world, with a concentration in the United States and the EU.

AscdiNatd's members are independent resellers (*i.e.*, brokers, dealers, lessors, maintainers) as well as original equipment manufacturers, who provide hardware, software, maintenance services, leasing services, business solutions, technical support and value added services. AscdiNatd's customers include distributors, end-users and manufacturers. Independent resellers such as AscdiNatd's member companies play an important role in the U.S. economy generally and with respect to U.S. exports specifically.

Secondary markets are an important and growing segment of the U.S. economy. For example, a recent study by the Commission found that, in 2011, U.S. remanufacturing operations grew by 15 percent to at least \$43 billion, supporting 180,000 full-time U.S. jobs, and generating \$11.7 billion in U.S. exports, with SMEs estimated to account for 25 percent of production and 17 percent of exports.³ But, that is only part of the picture.

Globally, the secondary market for new and used computer and telecommunications equipment alone is estimated to be worth hundreds of billions of dollars. For example, the market for used computer equipment has been estimated at over \$300 billion dollars, with

² New computers and telecommunications equipment refers to "still in the box" products sold by original equipment manufacturers or their authorized distributors into the secondary market. Used equipment is previously owned and/or used and is normally sold by an end user, leasing company or manufacturer into the secondary market.

³ See *Remanufactured Goods: An Overview of the U.S. and Global Industries, Markets and Trade*, Inv. No. 332-525, USITC Pub. 4356 (October 2012) ("*Remanufactured Goods Study*") at xvii. The study also states that Wholesalers are important players in remanufactured goods trade, accounting for nearly one-third of U.S. exports.

independent resellers estimated to account for approximately \$200 billion of that market.⁴

Approximately half of those independent resellers are based in the United States.

Barriers to participation in secondary markets can and do have a substantial negative effect on U.S. exports. As noted in a prior study by the Commission, foreign laws and regulations can pose significant barriers to exports.⁵ Nowhere is that more evident than in the EU.

I. Europe's "Gated Community" Stifles International Trade & Competition

The EU is a "Gated Community", protected by a very restrictive trademark and copyright regime, which severely limits the ability of independent U.S. resellers to export genuine, branded⁶ products to the EU. Although intellectual property law is the foundation of Europe's Gated Community, its function has far more to do with restricting trade and competition than with intellectual property rights.

In the United States, we apply the "first sale" doctrine under which a right holders' exclusive right to sell a branded product is exhausted once the rights holder has made or authorized the first sale of the product.⁷ In other words, under U.S. law, you buy it – you own it – and because you own it, you can resell it. The system is balanced. The rights holder retains the exclusive right to affix the brand, is compensated, and is protected against pirating, counterfeiting and the introduction of materially different goods under the same mark. At the

⁴ See *Oracle v. M-Tech*, Court of Appeals [2009] EWHC 2992 (Pat), August 24, 2010 ("*Oracle I*") at para. 7 ("There is a large market in second-hand computer hardware. In 2007, the market was approximately €260 billion, of which €160 billion is traded by independent resellers." The cited Euro amounts have been converted to dollars.)

⁵ See *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms*, Inv. No. 332-509, USITC Pub. 4169 (July 2010).

⁶ For ease of discussion we use the term "branded" to refer to both trademarked and copyrighted goods.

⁷ See, e.g., 17 U.S.C. § 106(3), *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013); *Davidoff & CIE, SA v. PLD International Corp.*, 263 F.3d 1297 (11th Cir. 2001).

same time, genuine goods placed on the market by the rights holder may be freely traded, promoting competition and consumer choice.⁸

In contrast, in the EU the right to control the sale of branded products is exhausted if, *and only if*, the branded product is first sold in the EU.⁹ Hence, the EU is a Gated Community within which competition rules ensure that branded goods can be freely traded, while insulating the EU market from outside competition. The rights holder retains a perpetual monopoly over all trade in products first sold outside the EU, and companies can and do use that monopoly power to block independent U.S. resellers from exporting genuine branded products to the EU.

The EU applies the principle of exhaustion *within* the EU to avoid conflict with EU competition policy, which promotes competition and the free flow of goods within the European Community. In other words, the EU recognizes the anti-competitive effect of granting rights holders a perpetual monopoly on the resale of genuine, branded products within the EU, but it is content to stifle competition from trading partners outside the Community. That anti-competitive effect is graphically illustrated by a case recently decided by the UK Supreme Court.

⁸ Secondary markets are often referred to as “gray” markets, implying that the transactions are somehow “shady” or illegal. It is important, therefore, to stress that what we are talking about here are companies selling genuine, legal branded products. AscdiNatd actively promotes and enforces high standards and best practices by requiring its members to abide by the Industry Standard Code of Ethics. The Code is enforced through a system in which customers may file grievances, and violations are punishable by suspension or expulsion.

⁹ See *Oracle I* at para. 1; see also EU Directive 2001/29/EC, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>, and Directive 2008/95/EC, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:299:0025:0033:en:PDF>.

Oracle v. M-Tech concerned an action for trademark infringement brought by Oracle against M-Tech for exporting 64 Oracle disk drives from the United States to the UK.¹⁰ The goods were identical to those marketed in the EU and there was no way for M-Tech to verify where they were first placed on the market. While Oracle maintained that information, it deliberately adopted a policy of not making that information publicly available, and required its distributors to purchase new and used equipment solely within the Oracle network. The lower court granted summary judgment in favor of Oracle. The Court of Appeals reversed. Lady Justice Arden, writing for the Court of Appeals, stated that Oracle's practices arguably have more to do with restricting imports and preventing price competition than with the proper exercise of intellectual property rights.¹¹ Nevertheless, the U.K. Supreme Court reversed, finding that the alleged unlawful conduct by Oracle was a "collateral" issue.¹² The Court reinstated summary judgment against M-Tech based solely on the fact that the goods in question were not first sold within the EU and therefore, in the Court's view, Oracle had an absolute right to prevent their importation.

II. Europe's Gated Community Has Had A Significant Negative Impact on U.S. Exports by SMEs

The Oracle decision firmly established Europe's Gated Community as a formidable barrier to U.S. exports. The AscdiNatd estimates that, prior to the decision, U.S. technology resellers exported approximately \$39 billion in computer and telecom equipment to the EU, approximately 82 percent of which was used equipment. Since the decision, those U.S. exports

¹⁰ See *Oracle America Inc (Formerly Sun Microsystems Inc) v. M-Tech Data Limited*, [2012] UKSC 27 (June 27, 2012) ("*Oracle IP*").

¹¹ See *Oracle I* at para. 33. The Court of Appeals set aside the lower courts order for summary judgment in favor of Oracle.

¹² See *Oracle II* at para. 24.

have declined by approximately \$7.8 billion. Individual members have reported declines of 50 to 90 percent in their exports, and employee layoffs. They also report that manufacturers are refusing to verify products by serial number to determine if the products were first marketed in the EU, thereby further stifling legitimate competition from the United States.

Given market growth, members estimate that, if the EU opened its secondary market to competition from the United States, U.S. exports could increase by as much as 30-50 percent. And the benefits of liberalizing trade would extend beyond U.S. exports. A robust, competitive secondary market enables U.S. companies to earn a higher return on their investments in technology products and use the higher resale income to finance the purchase of newer, more advanced technology, which in turn makes them more efficient and globally competitive. A robust secondary market also promotes environmentally sound and sustainable management of end-of-life products.

III. The United States Should Negotiate An Agreement That Opens Europe's Gated Community To U.S Exports by SMEs

As the Obama Administration stated at the outset of the TTIP negotiations, the United States and the EU share the conviction that "transatlantic trade and investment can be an even stronger driver of mutual job creation, growth, and increased competitiveness."¹³ The EU recognizes that the principle of exhaustion is essential to promoting competition and free trade and therefore applies the principle *within the EU*. Failure to apply that principle equally to trade with the United States is unquestionably at odds with the goal of increased trade and

¹³ See Press Release, "Obama Administration Notifies Congress of Intent to Negotiate Transatlantic Trade and Investment Partnership", available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/administration-notifies-congress-ttip>.

competition and mutual economic growth. We therefore urge the Commission to address this issue in its report to the Office of the U.S. Trade Representative.

On behalf of AscdiNatd and other members of the Owners Rights Initiative, I thank you for your consideration.

Respectfully submitted,
Joseph Marion
President, AscdiNatd