

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

In the Matter of Apperian, Inc.; Atlanta Falcons Football Club, LLC; Baker Tilly Virchow Krause, LLP; BitTorrent, Inc.; Charles River Laboratories International, Inc.; DataMotion, Inc.; DDC Laboratories, Inc.; Level 3 Communications, LLC; PDB Sports, Ltd., d/b/a Denver Broncos Football Club; Reynolds Consumer Products Inc.; Receivable Management Services Corporation; and Tennessee Football, Inc.

FTC File Nos. 142-3017-3020; 142-3022-3024; 142-3028; 142-3025; 142-3030-3032

February 20, 2014

By notice published on January 29, 2014, the Federal Trade Commission (“FTC” or “Commission”) has proposed consent agreements with Apperian, Inc.; Atlanta Falcons Football Club, LLC; Baker Tilly Virchow Krause, LLP; BitTorrent, Inc.; Charles River Laboratories International, Inc.; DataMotion, Inc.; DDC Laboratories, Inc.; Level 3 Communications, LLC; PDB Sports, Ltd., d/b/a Denver Broncos Football Club; Reynolds Consumer Products Inc.; Receivable Management Services Corporation; and Tennessee Football, Inc. (“the Companies”).¹ The proposed consent agreements would settle alleged

¹ Atlanta Falcons Football Club, LLC, Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,697 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129atlfalconsfrn.pdf; The Receivable Management Services Corporation, Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,714 (proposed Jan. 29, 2014); Tennessee Football, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,701 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharbortennesseetitans.pdf; Reynolds Consumer Products Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,713 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborreynolds.pdf; PDB Sports, Ltd., d/b/a Denver Broncos Football Club, Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,705 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharbordDenverbroncos.pdf; Level 3 Communications, LLC, Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,716 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborlevel3.pdf;

“false or misleading representations” that the Companies made concerning their participation in the Safe Harbor privacy agreement between the United States and the European Union (“U.S.-EU Safe Harbor Framework”).² The consent agreements would also settle alleged “false or misleading representations” that Apperian, Inc., DataMotion, Inc., and Level 3 Communications made concerning their participation in the U.S.-Swiss Safe Harbor Framework.³ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to ensure that the final orders adequately protect the privacy of consumers who interact with the Companies.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy

DDC Laboratories, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,698 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborddc.pdf; Data Motion, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,707 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharbordatamotion.pdf; Charles River Laboratories International, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,709 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborcharlesriver.pdf; Bit Torrent, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,706 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborbittrent.pdf; Baker Tilly Virchow Krause, LLP, Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,700 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborbakertilyfrn.pdf; Apperian, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 4,703 (proposed Jan. 29, 2014), http://www.ftc.gov/system/files/documents/federal_register_notices/2014/01/140129safeharborapperianfrn.pdf.

² *Id.*

³ Apperian, Inc., Analysis of Proposed Consent Order to Aid Public Comment; DataMotion, Inc., Analysis of Proposed Consent Order to Aid Public Comment; Level 3 Communications, LLC, Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 1.

issues and to safeguard the privacy rights of consumers.⁴ EPIC’s 2010 complaint concerning Google Buzz provided the basis for the Commission’s investigation and subsequent October 24, 2011 settlement concerning the improper disclosure of user information.⁵ In that case, the Commission found that Google “used deceptive tactics and violated its own privacy promises to consumers when it launched [Buzz].”⁶ The Commission’s settlement with Facebook followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organization in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.⁷ EPIC has also submitted comments to the Commission on numerous proposed orders that implicate the privacy interests of consumers. However, to date the Commission has adopted these consent orders without any modification.⁸ While we appreciate the thoughtful commentary that

⁴ See, e.g., Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., *FTC* File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, *FTC* File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., *FTC* File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

⁵ Press Release, Federal Trade Comm’n, *FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network* (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁶ *Id.*

⁷ Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief) [hereinafter EPIC 2009 Facebook Supplement]; Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf [hereinafter EPIC 2010 Facebook Complaint].

⁸ Comments of the Elec. Privacy Info. Ctr., *FTC* Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., *FTC* Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the

we have often received from the Commission regarding its decisions not to incorporate our recommendations,⁹ we believe the FTC's failure to make any changes to proposed settlements based on comments it has explicitly requested is (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;¹⁰ (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;¹¹ and (3) contrary to the interests of American consumers. In fact, it is becoming unclear what purpose is served by the Commission's request for public comments on a proposed settlement if the agency is unwilling to make any modifications. Nonetheless, EPIC offers these recommendations to strengthen the proposed settlement and to protect the interests of consumers.

I. The Commission Should Prioritize U.S.-EU Safe Harbor Enforcement

The Safe Harbor Framework is an industry-developed self-regulatory approach to privacy compliance.¹² Coordinated by the Department of Commerce, the Safe Harbor program allows firms to self-certify privacy policies in lieu of establishing adequate privacy protections in the United States that regulate business practice. The Safe Harbor arrangements developed in response to the European Union Data Directive, a comprehensive legal framework that established essential privacy safeguards for consumers across the European Union.¹³ The Federal Trade Commission has been tasked

Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

⁹ *See, e.g.*, Letter from Federal Trade Commission to EPIC (Apr. 15, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwareltrepic_2.pdf.

¹⁰ Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

¹¹ Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

¹² U.S. Dep't of Commerce, Safe Harbor Privacy Principles, http://export.gov/safeharbor/eu/eg_main_018475.asp (last updated Jan. 30, 2009).

¹³ Directive 95/46/EC of the European Parliament and of the Council of Oct. 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995

with penalizing US firms that incorrectly claim current Safe Harbor certification, but only “sanctions” companies by proscribing them from future misrepresentations.

Academic experts have long criticized the Safe Harbor Framework, noting that almost a decade passed before the Federal Trade Commission brought an enforcement action against a U.S. company with respect to the Safe Harbor.¹⁴ Furthermore, three studies of the Safe Harbor Framework, conducted in 2001, 2004, and 2008, found numerous deficiencies, with the most recent study finding that “the growing number of false claims made by organisations regarding the Safe Harbor represent a new and significant privacy risk to consumers.”¹⁵ In 2010, a German state Data Protection and Privacy Commissioner demanded termination of the Safe Harbor agreement, citing low levels of enforcement by the United States.¹⁶ And recently, a report of the European Commission set out thirteen changes that would strengthen the Safe Harbor protections.¹⁷ The suggested modifications include changes to Safe Harbor’s transparency, redress

O.J. (L 281) 31, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

¹⁴Anita Ramasastry, *EU-US Safe Harbor Does Not Protect US Companies with Unsafe Privacy Practices*, FINDLAW (Nov. 17, 2009), <http://writ.news.findlaw.com/ramasastry/20091117.html>.

¹⁵ World Privacy Forum, *The US Department of Commerce and International Privacy Activities: Indifference and Neglect*, 18 (Nov. 22, 2010), available at <http://www.worldprivacyforum.org/wp-content/uploads/2009/12/USDepartmentofCommerceReportfs.pdf>. See also Chris Connolly, *Galexia, The US Safe Harbor – Fact or Fiction?* (Dec. 2, 2008), available at http://www.galexia.com/public/research/assets/safe_harbor_fact_or_fiction_2008/safe_harbor_fact_or_fiction.pdf.

¹⁶ *Id.* at 19.

¹⁷ Communication from the Commission to the European Parliament and the Council—Rebuilding Trust in EU-US Data Flows, COM (2013) 846 (Nov. 26, 2013), available at http://ec.europa.eu/justice/data-protection/files/com_2013_846_en.pdf; Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, COM (2013) 847 (Nov. 26, 2013), available at http://ec.europa.eu/justice/data-protection/files/com_2013_847_en.pdf.

procedures, enforcement procedures, and the extent to which companies allow US law enforcement to access their data.¹⁸

EPIC commends the Commission for beginning to address widespread concern about Safe Harbor compliance but cautions that the minimal sanctions that currently result do not provide sufficient assurance of compliance. EPIC urges the Commission to revise the proposed consent order with the following changes:

- 1) Require the Companies to comply with the Consumer Privacy Bill of Rights;
- 2) Publish the Companies' compliance reports as they are submitted; and
- 3) Strengthen the sanctions against DDC Labs, a DNA testing firm, whose privacy misrepresentation are particularly serious.

II. Scope of the Proposed Consent Orders

In this case, the Companies represent a variety of industries, “including retail, professional sports, laboratory science, data broker, debt collection, and information security.”¹⁹ Each company has previously self-certified to the Safe Harbor Framework.²⁰ According to the Federal Trade Commission investigation, each company failed to renew its self-certification but continued to represent to consumers that it was a current member of the Safe Harbor Framework.

The proposed Consent Orders prohibit the Companies from making misrepresentations about their membership “in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting

¹⁸ *Id.*

¹⁹ Press Release, Fed. Trade Comm'n, FTC Settles with Twelve Companies Falsely Claiming to Comply with International Safe Harbor Privacy (Jan. 21, 2014), *available at* <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-settles-twelve-companies-falsely-claiming-comply>.

²⁰ *Supra* note 1.

organization, including but not limited to, the U.S.-EU Safe Harbor Framework.”²¹ All the proposed settlements include reporting and compliance provisions, also include record-keeping requirements that allow the FTC to monitor the companies’ compliance with the orders for the next 20 years.²²

EPIC supports the proposed consent orders in this case. The orders will help prevent the Companies from engaging in similar privacy violations in the future. But the existing Safe Harbor principles do not provide adequate data protection. Additional protections are needed, and the Commission should adjust the Consent Orders accordingly.

III. The Commission Should Require the Companies to Implement the Consumer Privacy Bill or Rights

Although EPIC supports the relief proposed in the consent orders, the Commission should also require the Companies to comply with the President’s Consumer Privacy Bill of Rights,²³ which is based on the widely known Fair Information Practices (“FIPs”).²⁴ FIPs appear in various privacy laws and frameworks, such as the Organization for Economic Cooperation and Development (“OECD”) Privacy Guidelines,²⁵ the

²¹ *Supra* note 1.

²² *Id.*

²³ See WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 2012, <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf> [hereinafter “CPBR”].

²⁴ EPIC has made the same recommendation to the FTC in other similar settlement proceeding where the FTC has asked for public comment. See, e.g., Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (Jul. 11, 2012), *available at* <https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (May 11, 2012), *available at* <https://epic.org/privacy/ftc/EPIC-FTC-Ad-Disclosures-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

²⁵ OECD Guidelines on the Protection of Privacy and Transporter Flows of Personal Data, *available at*

Privacy Act of 1974,²⁶ and the European Commission’s recent Data Protection Regulation.²⁷ Several of these principles are also highlighted in the Commission’s recent report.²⁸

The White House’s Consumer Privacy Bill of Rights (“CPBR”) is one particularly significant formulation of the FIPS for the FTC. The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, and Accountability.²⁹ As the President stated:

My Administration will work to advance these principles and work with Congress to put them into law. With this Consumer Privacy Bill of Rights, we offer to the world a dynamic model of how to offer strong privacy protection and enable ongoing innovation in new information technologies.³⁰

By requiring compliance with the CPBR, the Commission will ensure that the personal data of consumers is protected throughout the data lifecycle. More importantly, the Commission will put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers.

Since the CPBR’s publication and following the President’s statement, many executive agencies, including the Department of Commerce and the Department of State, have expressed their support for the CPBR and their intention to advocate for its adoption

http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.

²⁶ Privacy Act of 1974, 5 USC § 552a.

²⁷ Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data (General Data Protection Regulation), E.C. COM (2012) final, (Jan. 25, 2012), available at http://ex.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

²⁸ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

²⁹ *Id.*

³⁰ CPBR Report, Introduction.

in international cooperative environments, such as the Working Party on Information Security and Privacy.³¹ Cameron Kerry, Commerce Department General Counsel, applauded the CPBR for its “baseline privacy protections for those areas not covered today by sectoral regimes.”³²

IV. The Commission Should Make the Compliance Reports Publicly Available

The Commission should also make the Companies’ compliance reports publicly available. Although Companies may choose to exempt trade secrets or confidential commercial information, the initial assessment required by the consent orders should be releasable without redaction.

In the past, the Commission has stated that privacy assessments by other companies would be available to the public, subject to applicable laws. After finalizing a consent order with Google that required similar independent assessments, the Commission wrote to EPIC and stated that “[t]o the extent permissible under law, the public may have access to the submissions required pursuant to the order.”³³ Indeed, Google’s initial compliance report was released without redactions.³⁴

Furthermore, the experience of the international community provides evidence of the feasibility of such transparency. In 2009, the Canadian Privacy Commissioner conducted an investigation of Facebook’s privacy policies and released a 113-page report

³¹ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 3 (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

³²Natasha Singer, *An American Quilt of Privacy Laws, Incomplete*, NY TIMES (March 30, 2013), http://www.nytimes.com/2013/03/31/technology/in-privacy-laws-an-incomplete-american-quilt.html?pagewanted=all&_r=0.

³³ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Oct. 13, 2011), <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzepic.pdf>.

³⁴ Letter from Sarah Mathias, Associate General Counsel, Fed. Trade Comm’n, to Ginger McCall, Director, EPIC Open Gov’t Program (Feb. 15, 2012), available at <https://epic.org/privacy/ftc/google/EPIC-FTC-Google-Compliance-Reply-02-17-12.pdf>.

that described in detail the findings of the investigation and the office's recommendations.³⁵ More recently, the Irish Data Protection Commissioner's investigation into Facebook produced a 150-page report and 77 pages of "technical analysis" that were made publicly available.³⁶

V. The Commission Should Issue Stronger Penalties Against DDC Labs

As explained above, the Safe Harbor provisions prohibit the same kind of misrepresentations, regardless of the type of consumer data the Companies collected. However, the consumer data at issue in *In re: DDC Labs*³⁷ implicates stronger privacy rights, and the consent order with DDC Labs should be modified to reflect the seriousness of the company's misrepresentations.

DDC Labs is a DNA testing and verification center. DDC's main areas of research include testing for paternity and other family relationships, forensics, genetics, and immigration testing.³⁸ By misrepresenting its compliance with privacy standards, DDC Labs puts highly sensitive, extremely intimate personal data at risk. Genetic information, especially in the context of paternity testing, immigration testing, and disease testing, is among the most deserving of stringent privacy protections. The proposed disciplinary action – a consent order containing no real sanctions – is inappropriate for this company.

³⁵ OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, REPORT OF FINDINGS INTO THE COMPLAINT FILED BY THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC) AGAINST FACEBOOK INC. (2009), http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm#complaint.

³⁶ See DATA PROTECTION COMM'R, REPORT OF AUDIT (2011), <http://dataprotection.ie/documents/facebook%20report/report.pdf/report.pdf>.

³⁷ *In re DDC Labs*, FTC File No. 142 3024 (Jan. 29, 2014) available at <http://www.ftc.gov/enforcement/cases-proceedings/142-3024/ddc-laboratories-inc-also-dba-dna-diagnostics-center-matter>.

³⁸ DDC Labs: About DDC (last visited Feb. 20, 2014) available at <http://www.dnacenter.com/about>

Further, DDC's extensive European presence puts not only American consumers but also European consumers at risk. Although DDC is a US-based company, it has offices in Canada, the UK, and Ireland.³⁹ DDC Labs also performs mail-order testing, allowing it to run tests for clients in "168 countries."⁴⁰ Therefore, the consent order should require at least that European consumers are to be notified of DDC Labs' Safe Harbor breach.

VI. Conclusion

EPIC supports consent orders in this case. However, consumers' privacy would be better protected by modifying the orders to require compliance with the Consumer Privacy Bill of Rights, make the Companies' required compliance reports public, and strengthen the penalties against DDC Labs. EPIC therefore urges the Commission to adopt the changes to the proposed orders set out above. EPIC further notes that the Commission has yet to modify an order in response to a request for public comment, and wonders whether the Commission intends in this instance to give any weight to the comments it has requested.

Respectfully Submitted,

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³⁹ DDC Labs: Location Map (last visited Feb. 20, 2014) *available at* <http://www.dnacenter.com/locations>.

⁴⁰ DDC Labs: DDC Worldwide (last visited Feb. 20, 2014), *available at* <http://www.dnacenter.com/international>.