

HEARING ON H.R. 3261, THE “STOP ONLINE PIRACY ACT”

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BEFORE THE COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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Good morning, Chairman Smith, Ranking Member Conyers, and Members of the Committee. My name is Linda Kirkpatrick, and I am Group Head, Franchise Development/Customer Performance Integrity, at MasterCard Worldwide (“MasterCard”) in Purchase, New York. It is my pleasure to appear before you today to discuss the important issue of combating the sale of infringing goods over the Internet. We commend the Committee on its attention to this issue, including the hard work that has gone into drafting H.R. 3261, the Stop Online Piracy Act. We greatly appreciate the opportunity to be here today and we look forward to working with you to combat this critical issue going forward.

MasterCard’s rules and requirements prohibit the use of its system for any illegal purposes, including for the sale of products or services that infringe on intellectual property rights, and we are vigilant in our efforts to prohibit the sale of infringing products or services and other illegal or reputation-damaging products or services through the MasterCard system. MasterCard recognizes the important role it plays in combating this issue and has taken a number of steps that demonstrate its commitment to this important cause. These efforts, which are discussed in greater detail below, include: (i) publishing the MasterCard Anti-Piracy Policy, which sets out the specific process by which MasterCard and rights holders can work together to identify and prevent the sale of infringing products or services; (ii) working with the White House’s Office of the U.S. Intellectual Property Enforcement Coordinator in the development of

industry best practices to address copyright infringement and the sale of counterfeit products over the Internet; (iii) the implementation and maintenance of MasterCard's Business Risk Assessment and Mitigation ("BRAM") Program to protect MasterCard against efforts to use the MasterCard system for illegal or brand-damaging activities; and (iv) the development of programs to combat the illicit online sale of pharmaceuticals and the use of the Internet for the sale of child pornography.

Background on MasterCard

MasterCard advances global commerce by providing a critical link among more than 21,000 financial institutions and millions of businesses, cardholders and merchants worldwide who use MasterCard's global payment system to complete MasterCard-branded payment card transactions. MasterCard licenses its customers around the world to use the MasterCard service marks in connection with those payment card transactions. Importantly, MasterCard neither issues payment cards to cardholders, nor does it contract with merchants to accept payment cards. Rather, MasterCard's financial institution customers issue payment cards to cardholders and/or contract with merchants to accept the cards. The card-issuing customers are known as "issuers." Those customers that contract with merchants for card acceptance are commonly called "acquirers." Each cardholder's account relationship is with the issuer that issued the card to the cardholder, and each merchant's acceptance relationship is with its acquirer.

Typical Transaction

When a MasterCard-branded credit card is used to make a purchase at a brick-and-mortar merchant, the card typically is swiped through a terminal which reads basic information about the card (*e.g.*, card number and expiration date) from the magnetic stripe on the back of the card.

For Internet-based transactions, this information typically is captured by the merchant by prompting the cardholder to enter the basic information in an electronic form. This information is linked together with the dollar amount and date of the transaction, as well as basic information about the merchant. A message containing the information is then transmitted to the acquirer that signed up the merchant to accept the card. This is known as the “authorization message.”

The acquirer routes the authorization message to MasterCard and MasterCard then routes the authorization message to the issuer. The issuer checks to make sure that there is sufficient credit associated with the cardholder’s account to cover the transaction and that the card has not been reported as lost or stolen, and then sends to MasterCard a message authorizing the transaction. MasterCard then routes the message to the acquirer, which transmits the message back to the merchant to authorize the transaction. In the MasterCard system, an authorization request and response is completed, on average, in 120 milliseconds. A second message, called the “clearing message,” generally is sent later in the day to confirm that the transaction has been completed and to initiate the movement of funds. The clearing message follows the same route from the acquirer to MasterCard, and then back to the issuer. The issuer uses that record to post the transaction to the cardholder’s account. Once clearing is completed, a daily reconciliation is provided to each customer to facilitate the exchange of funds between issuers and acquirers. The process of moving funds from issuers to acquirers is known as the “settlement” process.

MasterCard’s Efforts to Prevent Infringing Online Sales and Other Illicit Online Activities

In General

At MasterCard, we take our responsibility as a corporate citizen very seriously. MasterCard has a long history of working with law enforcement, private stakeholders, its

customers, and others to address illegal or otherwise brand-damaging activities that may involve the MasterCard payment system or the unauthorized use of our widely recognized family of payment brands.

A fundamental rule of our system is that each customer must conduct its MasterCard programs and activities in accordance with all applicable laws. This includes, for example, the obligation of an acquirer to ensure that any transaction the acquirer submits into the MasterCard system pertains only to legal activity. MasterCard also has a series of rules that require acquirers to ensure that the merchants with whom they contract to accept MasterCard-branded cards are legitimate and engage only in legal activities. These rules mandate, among other things, that an acquirer perform due diligence on a merchant before enabling the merchant to accept MasterCard-branded cards. These rules also require acquirers to monitor merchants for compliance with these rules. Customers that fail to comply with these rules may be required to absorb the cost of any illegal transactions, and may be subject to assessments, suspension or termination. MasterCard has forged strong working relationships with rights holders and their trade associations. This collaboration has led to the investigation of thousands of Internet sites and the termination of hundreds of rogue merchants.

MasterCard also works extensively with law enforcement officials to address situations where the legality of activities related to MasterCard-branded payment card transactions is in question. For example, in the U.S., MasterCard works with a variety of federal and state law enforcement agencies on these issues generally, including state Attorneys General, the Drug Enforcement Administration, the Food and Drug Administration, the U.S. Secret Service, the Federal Bureau of Investigation, and other branches of the Department of Justice. A major objective of these efforts is to ensure that MasterCard provides appropriate support to law

enforcement in their efforts to address illegal activity. We recognize that our efforts to enforce the MasterCard rules have the potential to unintentionally hinder ongoing law enforcement investigations. For example, when an acquirer shuts off MasterCard acceptance with a merchant because the merchant violated MasterCard's rules, law enforcement's ability to gather evidence through MasterCard's system can be impeded. Further, the merchant may suspect that it is the subject of an ongoing investigation. Accordingly, we work closely with law enforcement and will act in accordance with instructions from law enforcement officials, including by not taking action that could compromise an investigation.

MasterCard's Anti-Piracy Policy

MasterCard's commitment to preventing the use of MasterCard-branded payment cards in connection with the online purchase of goods or services that violate intellectual property rights is evidenced by our industry leading Anti-Piracy Policy, which is publicly available at http://www.mastercard.com/us/wce/PDF/MasterCard_Anti-Piracy_Policy.pdf and a copy of which is attached as APPENDIX A. In accordance with that policy, MasterCard has established procedures that apply when a law enforcement entity or rights holder brings to MasterCard's attention the online sale of a product or service that allegedly infringes copyright or trademark rights of a party.

These procedures are complex, as they involve multiple constituents in the payments value chain, each of which has a role to play in an investigation. When a law enforcement entity is involved in the investigation and provides MasterCard with evidence of illegal activity, MasterCard will first endeavor to identify the acquirer that has the relationship with the alleged infringing merchant. MasterCard performs a test to determine whether the Internet site in

question actually accepts MasterCard-branded payments and, if so, to identify the acquirer for the Internet site. The timing for completion of this process depends in part on the speed at which a merchant submits payment transactions into the system. Many times after conducting a test of payment acceptance, we determine that an Internet site that purports to accept MasterCard-branded payments, in fact, does not. If MasterCard believes that its brand is being used in connection with alleged illegal activity, it will require the relevant acquirer to conduct its own investigation and, within two business days, provide a written report to MasterCard setting forth the results of the investigation and any steps taken to address those results.

If the acquirer determines that the merchant was engaging in the sale of an infringing product or service, the acquirer must take the actions necessary to ensure that the merchant has ceased accepting MasterCard-branded cards as payment for an infringing product or service. If the acquirer determines that the merchant was not engaging in the sale of an infringing product or service, the acquirer must provide to MasterCard compelling evidence of this conclusion. If the acquirer decides to terminate the merchant, MasterCard will require that the acquirer add the merchant to a MasterCard database for terminated merchants, if applicable, and thereby afford other acquirers notice that the merchant has been terminated and of the reason code used by the acquirer for the termination.

When a law enforcement entity is not involved, a rights holder may notify MasterCard of its belief that the online sale of a product or service violates its intellectual property rights and request that MasterCard take action on such belief. MasterCard generally will also accept such notices from a rights holder's trade association. Significant collaboration with the rights holder community has led to the development of this notification process, and MasterCard is committed to maintaining an open dialogue with rights holders.

To facilitate a notification from a rights holder, MasterCard has established an email address for the submission of such requests and a set of information requirements for such requests. The information requests must include a description of the alleged infringement, evidence that a MasterCard-branded payment card can be used to purchase the allegedly infringing product, a copy of the rights holder's cease and desist letter or Digital Millennium Copyright Act notice or an appropriate attestation from the rights holder, and evidence that the rights holder owns the intellectual property in question.

Upon receipt of a notice that meets the information requirements, MasterCard will endeavor to identify the acquirer that has the relationship with the merchant. As noted above, the timeframe within which the acquirer is identified varies based on factors that may be beyond MasterCard's control. MasterCard will require an identified acquirer to investigate the alleged illegal activity and, within five business days, provide a written report to MasterCard setting forth the results of the investigation and any steps taken to address those results. The measures required of an acquirer upon a determination that the merchant is, or is not, engaged in the sale of an infringing product or service are the same for both rights holder and law enforcement notifications to MasterCard. Because rights holder notices do not carry the certainty that comes with a law enforcement notice, these investigations often require more time to complete. In some cases, it may be necessary to afford an acquirer additional time to complete its investigation and other obligations before an accurate assessment of the merchant's activities can be made. Following receipt of the results of an acquirer's investigation, MasterCard will inform the rights holder (or trade association) of those results.

Collaboration with the U.S. Intellectual Property Enforcement Coordinator

In addition to the development and implementation of the MasterCard Anti-Piracy Policy, MasterCard worked closely with the White House's Office of the U.S. Intellectual Property Enforcement Coordinator in the development of a "best practices" document to address copyright infringement and the sale of counterfeit products over the Internet. Development of the best practices document involved input from a wide variety of stakeholders, including numerous representatives from the rights holder community, payment networks, and other parties involved in online commerce. The best practices document prescribes clear and transparent procedures for payment networks to address sales of infringing products and counterfeit trademark products over the Internet. The best practices are designed to assist rights holders in protecting their intellectual property through a voluntary system and in no way diminish the ability of rights holders to take independent action to enforce their intellectual property rights. The MasterCard Anti-Piracy Policy incorporates the best practices and, indeed, exceeds the standards established in the best practices document.

MasterCard Efforts to Address Other Illegal or Brand-Damaging Internet-based Activities

BRAM Program. MasterCard is dedicated to preserving the strength and value of the MasterCard family of brands and strives to ensure that the MasterCard marks are not in any way associated with illegal or brand-damaging activities. The BRAM Program is a key component of these corporate efforts and is designed to preserve the integrity of the MasterCard payment system and protect against illegal and brand-damaging transactions. More specifically, the BRAM Program serves to restrict access to the MasterCard system by merchants whose products and services may pose significant fraud, regulatory, or legal risks. The BRAM Program was

created to enforce MasterCard rules prohibiting acquirers from engaging in or supporting any merchant activity that is illegal or that may damage the goodwill of MasterCard or reflect negatively on the MasterCard brand. Merchant activities that infringe upon the intellectual property rights of another are expressly covered under the protocols of the BRAM Program.

Other activities addressed by the BRAM Program include the sale or offer of sale of a product or service other than those in full compliance with applicable law, and the sale of a product or service, including an image, which is patently offensive and lacks serious artistic value. As part of the BRAM Program, MasterCard uses a sophisticated Internet monitoring service designed to ensure that MasterCard has robust and current profiles of high-risk merchants doing business in the MasterCard system. This enables MasterCard to monitor its system for illegal and brand-damaging merchant activities and proactively pursue remedial actions with acquirers that may unknowingly be facilitating transactions for merchants engaged in infringing or other illicit activities.

Combating Child Pornography. MasterCard has partnered with the National Center for Missing and Exploited Children (“NCMEC”) in the U.S., and its international counterpart, the International Centre for Missing & Exploited Children, to form the Financial Coalition Against Child Pornography (“Coalition”). The Coalition represents a partnership of companies and governmental entities that have come together to combat perpetrators of child pornography, including criminals who traffic in child pornography on the Internet. It includes a broad range of financial institutions, Internet service providers, and technology companies committed to working with NCMEC and governmental agencies to develop a coordinated approach to detecting and combating child pornography and to provide a critical mechanism for assisting law

enforcement in developing the information needed to apprehend and prosecute persons who perpetrate child pornography crimes.

Illicit Internet Sales of Pharmaceuticals. MasterCard has partnered with a number of private-sector companies involved in the online payments, advertisement, and shipping industries to establish the Center for Safe Internet Pharmacies (“CSIP”) in an effort to prevent illicit Internet sales of pharmaceuticals. The chief goals of the CSIP are to educate consumers about the dangers of the illegal sale of prescription pharmaceuticals and to provide a forum for working with law enforcement to take legal action against merchants involved in this process. The CSIP also provides a forum for the sharing of information by and among private-sector entities and global governmental agencies regarding the illicit online advertisement and distribution of prescription pharmaceuticals.

H.R. 3261, the Stop Online Piracy Act

MasterCard supports the Committee’s efforts to address the issue of Internet sales of infringing products or services. As noted above, MasterCard is fully committed to continuing to do our part to address this important issue. As the Committee moves forward with legislation to address the sale of infringing products or services over the Internet, MasterCard believes it is essential to ensure that any obligations imposed on payment systems are capable of being readily implemented through reasonable policies and procedures, and that payment systems be shielded from litigation and liability when acting in accordance with the bill’s requirements.

Accordingly, we wish to identify a number of key areas where we believe that changes to the bill would ensure that MasterCard can continue to play an appropriate and effective role. We are committed to working with the Committee as the bill moves forward to help improve the bill in a

manner that is consistent with its objectives, and we appreciate the opportunity to offer specific comments and suggestions on the bill to the Committee.

Five-Day Timeframe. The bill provides that payment network providers must take certain measures within five days after being served with a copy of an order or receiving a notice from a rights holder. Upon receiving a copy of an order or receiving notice from a rights holder, there are many circumstances that may arise which make a five-day window to complete the required actions not workable for a four-party payment network, such as MasterCard. For example, simply identifying the acquirer for an Internet site may take several days depending upon how long it takes for the alleged infringer to submit payments to its acquirer. The process becomes even more complex if the acquirer does not respond or asks for an extension because of local jurisdiction or other issues. Additionally, providing the merchant an opportunity to respond (in the case of a notice from a rights holder) also requires time. Moreover, confirming that a merchant may no longer accept payment from our brand for an infringing product may also take time. MasterCard is committed to begin this process within five days. However, MasterCard urges the Committee not to set an artificial deadline for the performance of a specific action as it may present impossible compliance challenges in some circumstances.

Certification Requirement. Under the bill, service of a copy of a court order by a rights holder on a payment network provider would trigger an obligation of the payment network provider to file with the court a certification of receipt not later than seven days after service. In MasterCard's view, this obligation would impose material costs on payment network providers without a commensurate benefit. The process would require additional employee resourcing, the retention of qualified local counsel, and the payment of any applicable court fees. Moreover, the bill provides a rights holder the ability to seek the imposition of monetary sanctions on a

payment network provider that does not comply with the court certification process, even though rights holders also have a remedy if a payment network provider does not take the required measures in response to a court order. The certification and sanctions approach is at odds with the cooperative approach that MasterCard and others have taken in their efforts to work together against online intellectual property piracy through the best practices and, in the case of MasterCard, our Anti-Piracy Policy.

Liability. We are grateful to the Committee for incorporating into the bill several essential protections against liability for payment network providers. However, it is important that the bill be clarified regarding the liability protection for payment network providers that receive notice from a rights holder of an allegedly infringing Internet site. While the bill contemplates that a rights holder may pursue a court order against such a site if a payment network provider does not complete certain required actions within the five-day window of time, the bill does not provide that the pursuit of such a court order is a rights holder's sole remedy in that context. It is vitally important to MasterCard that it not face a claim from a rights holder for failing to take action on a rights holder's notice when the rights holder has an ability to seek a court order against the allegedly infringing site and has the ability to enforce the bill against a payment network provider that has received a copy of the court order and not fulfilled its obligations under the bill related to the court order.

Duty to Monitor. The bill requires a payment network provider to take action based on court orders obtained by the Attorney General and modifications to those court orders. However, the bill currently provides no explicit mechanism for payment network providers to receive notification of modified orders. This gap in the process should be remedied. Also, the bill requires a payment network provider that has acted on a court order obtained by a rights holder

to also take actions based on any subsequent notice from a rights holder that its service is being used to complete payment transactions with an allegedly infringing merchant that was the subject of the order. MasterCard believes that modification of a court order should be a condition to further payment network provider action in the case of a rights holder, as it is in the case of the Attorney General.

Designated Agent Information. The bill contemplates that payment network providers would designate an agent to receive notifications from rights holders, and that the agent's contact information must be posted on the publicly accessible portion of the provider's Internet site. The requirement to post the name and other identifying information of a designated agent creates unnecessary personal risk for individuals designated as agents. The purpose of this requirement could be accomplished through a requirement to have a designated but non-personally identifiable e-mail address that is monitored by the payment network provider. A designated but non-personally identifiable e-mail address is consistent with current industry practice, reduces the potential for process disruption following personnel changes, and eliminates the risk of disruptive or threatening actions being taken against a named agent.

Coverage; Description of Relationship Among the Parties. Other areas of concern include ensuring that the "payment network provider" definition in the bill is sufficiently broad to cover all payment networks. We are confident that this is the intention of the Committee. Also, the bill obligates payment network providers to prevent their systems from being used at infringing Internet sites by persons located in the U.S. and persons subject to the jurisdiction of the U.S. MasterCard is concerned that the latter phrase may require it to determine whether a cardholder located outside of the U.S. is subject to U.S. jurisdiction. Lastly, the framework of the bill contemplates that infringing Internet sites (or merchants more generally) have an account

with a payment network provider. While this may be true of three-party payment networks, it does not accurately describe the relationship of the parties in a four-party payment network, such as MasterCard. We believe that all of these concerns can be addressed in a manner consistent with the intent of the bill.

Conclusion

MasterCard is proud of the role we play and the successes we continue to achieve in combating Internet-related intellectual property infringement. With the collective efforts and commitment of all commercial participants in this fight, we believe that we can forcefully tackle the problem of online piracy of U.S. intellectual property. The Committee's efforts represent an important step in developing a comprehensive framework for addressing this issue and we commend the Committee for its efforts and attention to this matter.

I appreciate the opportunity to appear before you today and I will be glad to answer any questions you may have.

MasterCard Anti-Piracy Policy

The purpose of this document is to set forth MasterCard's policy for addressing the online sale by a Merchant of copyright-infringing products and counterfeit trademark products (the "Anti-Piracy Policy"). The Anti-Piracy Policy supports and is considered in conjunction with MasterCard's Business Risk Assessment and Mitigation ("BRAM") program. The BRAM program, among other things, prohibits a Merchant from submitting for payment, and an Acquirer from accepting from a Merchant for submission for payment, to the MasterCard network any transaction that is illegal, or is deemed by MasterCard in its sole discretion, to damage or have the potential to damage the goodwill of MasterCard or reflect negatively on the MasterCard brand. The following activities are prohibited under the BRAM program: the sale or offer of sale of a product or service other than in full compliance with all laws applicable to the Acquirer, Issuer, Merchant, Cardholder, Cards, or MasterCard (as these terms are defined in the MasterCard Rules).

MasterCard addresses intellectual property piracy as follows:

1 – Law Enforcement Involvement

When a law enforcement entity is involved in the investigation of the online sale of a product or service that allegedly infringes copyright or trademark rights of another party ("Illegitimate Product") by a Merchant and provides MasterCard with evidence of illegal activity for MasterCard's use in taking action under this Policy, MasterCard will endeavor to identify the Acquirer that has the relationship with that Merchant. If MasterCard determines that the merchant is accepting MasterCard cards through an existing acquirer relationship, MasterCard will require that the Acquirer investigate the alleged illegal activity and, within two business days, provide a written report to MasterCard setting forth the results of the investigation and any steps taken to address those results. If the Acquirer determines that the Merchant was engaging in the sale of an Illegitimate Product, the Acquirer must take the actions necessary to ensure that the Merchant has ceased accepting MasterCard cards as payment for the Illegitimate Product. If the Acquirer determines that the Merchant was not engaging in the sale of an Illegitimate Product, the Acquirer must provide to MasterCard compelling evidence demonstrating that finding. MasterCard may exercise discretion to afford the Acquirer additional time to complete the Acquirer's obligations set forth herein. If the Acquirer terminates the Merchant, MasterCard will require that the Acquirer list the Merchant in the MasterCard MATCH compliance system of terminated merchants, where applicable, and thereby afford all Acquirers in the MasterCard network notice that the Merchant has been terminated and of the Reason Code used by the Acquirer for the termination.

2 – No Law Enforcement Involvement

When there is no law enforcement involvement, an intellectual property right holder may notify MasterCard of its belief that the online sale of a product(s) violates its intellectual property rights and request that MasterCard take action upon such belief. MasterCard maintains the following email address for this purpose: ipinquiries@mastercard.com. The notification and request (the “Request”) must include:

- (a) a description of the alleged infringement, including the specific identity of the site allegedly engaged in the sale of the alleged Illegitimate Product and compelling evidence substantiating the allegation. The notification must specifically identify any products alleged to be an Illegitimate Product and the location of the alleged Illegitimate Product(s) on the website;
- (b) evidence that the allegedly Illegitimate Products can be purchased using a MasterCard-branded payment card, for example, by providing a screenshot of the MasterCard logo appearing on the Merchant website. Test transactions are helpful, but not required to submit a complete notification;
- (c) a copy of the right holder’s cease and desist letter or Digital Millennium Copyright Act (DMCA) notice notifying the website operator or Merchant that it is engaging in infringing activity, or an attestation that, to the best of the right holder’s knowledge, the site is not licensed or otherwise authorized to sell the alleged Illegitimate Products in question; and
- (d) evidence demonstrating that the right holder owns the copyright(s) or trademark(s) in question.

MasterCard will accept a Request from, and otherwise coordinate with, a trade association with legal authority to act on behalf of an intellectual property right holder. By the submission of the Request, the submitter certifies that (i) the information set forth in the Request is true and accurate to the best of the submitter’s knowledge, (ii) MasterCard may disclose the identity of the submitter and the contents of the Request to any person MasterCard deems appropriate, and (iii) the submitter will cooperate in any judicial or other process concerning MasterCard’s receipt and use of the information set forth in the Request.

When MasterCard receives a Request, MasterCard will endeavor to identify the Acquirer that has the relationship with that Merchant. If MasterCard determines that the merchant is accepting MasterCard cards through an existing Acquirer relationship, MasterCard will send the Request to the Acquirer and require that the Acquirer investigate the alleged illegal activity and, within five business days, provide a written report to MasterCard setting forth the results of the investigation and any steps taken to address those results. If the Acquirer determines that the Merchant was engaging in the sale of an Illegitimate Product, the Acquirer must take the actions necessary to ensure that the Merchant has ceased accepting MasterCard cards as payment for the Illegitimate Product. If the Acquirer determines that the Merchant was not engaging in the sale of an Illegitimate Product, the Acquirer must provide MasterCard compelling evidence demonstrating that finding. MasterCard may exercise discretion to afford the Acquirer additional time to complete the Acquirer’s obligations set forth herein. Following receipt of the results of the Acquirer’s investigation, MasterCard will inform the right holder or trade association of those results. If the Acquirer terminates the Merchant, MasterCard will require that the Acquirer list the Merchant in the MasterCard MATCH compliance system of terminated merchants, where applicable, and thereby afford all Acquirers in the MasterCard network notice that the Merchant has been terminated and of the Reason Code used by the Acquirer for the termination.

3 – Other

If the Merchant is located in a country where the online sale of the alleged Illegitimate Product does not violate applicable country laws, the Acquirer must suspend or terminate acquiring sales by that Merchant to account holders of accounts issued in countries where the sale of the alleged Illegitimate Product is illegal or is otherwise prohibited by local law.

4 – Failure to Comply with this Anti-Piracy Policy

MasterCard has the right to limit, suspend, terminate or condition the Membership, Membership privileges, or both, of any Acquirer that MasterCard deems does not comply with applicable law or with this Anti-Piracy Policy. MasterCard has the sole right to interpret and enforce this Anti-Piracy Policy. Furthermore, MasterCard may assess any Acquirer that MasterCard deems does not comply with this Anti-Piracy Policy, as such Policy may be amended from time to time.