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March 20, 2008

Mr. Stanford K. McCoy
Acting Assistant USTR for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Anti-Counterfeiting Trade Agreement (ACTA): Request for Public
Comments, 73 FR 8910 (February 15, 2008)

Dear Mr. McCoy:

This letter responds to the Request for Public Comments appearing in the Federal Register on February 15, 2008. The request invites submissions from the public concerning specific matters that should be the focus of an anti-counterfeiting trade agreement that USTR seeks to negotiate with US trading partners.

The Business Software Alliance (BSA)* strongly supports USTR's efforts to address counterfeiting and piracy through a plurilateral trade agreement that strengthens international cooperation, enforcement practices, and participants' legal frameworks.

Piracy in the Software Sector and its Economic Impact

BSA companies, and the software industry as a whole, lose billions of dollars to software piracy each year. In 2006 35% of PC software placed in service was illegally copied. In many countries the piracy rate exceeded 75%, reaching highs of 90% or more in some markets. The resulting losses total more than \$39 billion worldwide. These losses have an impact on local economies around the world that go well beyond the direct impact to software producers. A recent IDC study estimates that reducing software piracy by 10 points over four years could stimulate the entire IT sector and produce 600,000 new jobs, \$24 billion in increased tax revenues and \$141 billion in new economic growth.

Software Industry Efforts to Reduce Piracy

BSA and its individual members devote significant financial and human resources to preventing piracy worldwide. Our efforts are multi-faceted.

First, we are engaged in extensive educational efforts, designed to increase public understanding of the value of intellectual property and to improve overall awareness of copyright laws, on a global basis.

Second, we work closely with national and international bodies to encourage adoption of laws that strengthen copyright protection and promote an environment in which the software industry can continue to innovate.

Finally, where appropriate, BSA undertakes enforcement actions against those involved in the unlawful use, distribution or sale of its members' software. On the Internet, for example, BSA conducts a far-reaching "notice and takedown" program. BSA also engages in civil litigation against corporate end-users who are using our members' products without authorization. We work closely with local, national and international law enforcement bodies to protect the intellectual property rights of our members.

Software Industry Expectations for ACTA

In response to the request for "specific matters that should be the focus of such an agreement," there are a number of elements that we propose for inclusion in ACTA. These elements would have a direct, beneficial impact on industry efforts to reduce piracy of business software.

- **Government software legalization:** Parties to the agreement should take appropriate action (through legislation or administrative or executive decrees) to ensure that government agencies do not use infringing computer software and only use software as authorized in the relevant license agreement. These measures should regulate both the acquisition and management of software for government use. The US government and the governments of many of our trading partners have already adopted such measures. Legalizing public sector software use provides a valuable example to private businesses, as well as reducing piracy rates directly.
- **Statutory damages:** Parties should establish and maintain a range of pre-established (statutory) damages that are available in civil infringement cases at the election of the right holder. These damages should be in an amount sufficient to deter future infringements and to compensate fully the right holder for the harm caused by the infringement.
- **Prohibition on illicit product packaging and labels:** ACTA parties should strengthen anti-counterfeiting enforcement rules by prohibiting trafficking in illicit product packaging and labels (e.g., stolen or misapplied labels or packaging elements that indicate product authenticity). These materials, once taken out of the legitimate supply chain, are destined inevitably for use in connection with pirate products in order to deceive consumers and law enforcement. Nonetheless, some

countries laws against counterfeiting do not cover these materials unambiguously.

- **Clarification of the meaning of "copyright piracy on a commercial scale":** Article 61 of the TRIPS Agreement requires parties to "provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting copyright piracy on a commercial scale." The US and a number of other trading partners have interpreted "copyright piracy on a commercial scale" to include end-user software piracy when committed willfully by a business entity. ACTA provides an opportunity for like-minded trading partners to confirm this interpretation among themselves.
- **IP address collection:** In a number of European countries one of the biggest impediments to efforts by right holders to enforce their IP rights on the Internet is the overbroad interpretation of privacy laws by some European authorities that has arguably made it illegal for right holders effectively to investigate open and notorious piracy. These authorities consider Internet Protocol (IP) addresses to be personal data that cannot be collected or used without the permission of the individual with whom the data are associated. This interpretation not only impedes online enforcement, it also stymies efforts by the software industry to provide security products that protect consumers from computer viruses, phishing, spyware and malware, and other harmful activities. We urge the US government to raise these concerns – particularly with our European trading partners – within the framework of the ACTA negotiations.
- **Resources for law enforcement:** Another key impediment to effective enforcement of IP rights around the world is inadequate resources for authorities tasked with IP law enforcement. The agreement should make clear that, notwithstanding Article 41.5 of the TRIPS Agreement, decisions by governments concerning the allocation of enforcement resources will not excuse that country from complying with its obligation to provide adequate and effective protection and enforcement of IP rights.

Tech Industry Concerns about Mandated Use of Technologies

As a right holder organization, BSA supports truly voluntary, industry-led cooperation between right holders and ISPs as a means of combating online infringement. There are complex technical and policy issues that must be addressed for such a voluntary system to function effectively and fairly.

However, BSA opposes the imposition of regulatory requirements on ISPs and technology providers aimed at detecting, intercepting or preventing

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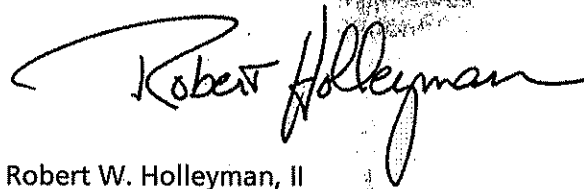
online copyright infringements. The regulatory process simply cannot keep pace with technological change. Moreover, technology develops most effectively in response to market forces. Government mandates would stifle innovation and retard progress. Consequently, BSA would oppose the inclusion of any such requirements within the ACTA framework.

Of course, technology plays a role in protecting intellectual property rights. Content owners must take responsibility to ensure that their works are not easily subject to theft, rather than rely wholly on others to protect their intellectual property. Accordingly, BSA's members have invested hundreds of millions of dollars and thousands of engineering hours in developing technologies to protect content and intellectual property. Our companies have worked diligently, voluntarily and cooperatively with content providers and consumer electronics companies to create systems that will foster the legitimate distribution of digital content. Experience clearly demonstrates, however, that there is no silver bullet technological solution that will solve the problem of piracy.

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Thank you for the opportunity to provide the views of our industry on this important initiative. We look forward to working with the Administration as this effort moves forward.

Sincerely,



Robert W. Holleyman, II
President and CEO

** The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CA, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Corel, Dell, EMC, HP, IBM, Intel, McAfee, Microsoft, Monotype Imaging, PTC, Quark, Quest Software, SAP, Siemens PLM Software, SolidWorks, Sybase, Symantec, Synopsys, and The MathWorks.*