

1150 18th Street, NW
Suite 700
Washington, DC 20036

p. 202/872.5500
f. 202/872.5501

December 6, 2010

The Honorable Gary Locke
Secretary of Commerce
US Department of Commerce
1401 Constitution Ave. NW
Washington, DC 20230

VIA EMAIL: freeflow-noi-2010@ntia.doc.gov

Re: Inquiry on the Global Free Flow of Information on the
Internet (75 Fed. Reg. 60068)

Dear Secretary Locke:

The Business Software Alliance (BSA)¹ appreciates this opportunity to provide comments in response to the Department of Commerce's examination of issues related to the global free flow of information on the Internet. BSA 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

¹ The Business Software Alliance (www.bsa.org) is the world's foremost advocate for the software industry, working in 80 countries to expand software markets and create conditions for innovation and growth. Governments and industry partners look to BSA for thoughtful approaches to key policy and legal issues, recognizing that software plays a critical role in driving economic and social progress in all nations. BSA's member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected, and secure. BSA members include Adobe, Altium, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, Cisco Systems, CNC/Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, HP, IBM, Intel, Intuit, Kaspersky Lab, McAfee, Microsoft, Minitab, PTC, Progress Software, Quark, Quest Software, Rosetta Stone, Siemens, Sybase, Symantec, Synopsys, and The MathWorks.

education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce.

This submission is divided into two parts. Part I describes the role of the software industry in the US economy and its importance to the global exchange of information on the Internet. Part II provides responses to the specific questions posed in the Notice of Inquiry.

Part I: The Software Industry in the US Economy and the Harm of Software Theft

A. The Role of the Software Industry in the US Economy

The software industry has long been a driver of jobs and economic growth. In 2007, 1.7 million people were directly employed in the US software and related services industry. These jobs paid 195 percent of the US national average per capita income (\$85,600 vs. \$43,900). The industry contributed more than \$261 billion to US GDP (almost 2 percent) and generated a commensurate amount in sales, income, payroll and corporate taxes to federal, state and local governments.² These contributions have been growing much faster than the economy as a whole each year since 2003.³ The software industry also generated a \$37 billion surplus for the US balance of trade in 2009.⁴

In addition to BSA member companies, the software industry includes thousands of distributors, re-sellers, developers and others that build and rely on our success. Jobs in these enterprises, which

² OECD STAN Database, available online at <http://stats.oecd.org/Index.aspx?DatasetCode=STAN08BIS&lang=en>. "Software and related services" are those businesses that fall under code 72 in the ISIC rev. 3 industry classification. US economic figures for 2008 and 2009 are not yet available from this source.

³ Id.

⁴ Nathan Associates, Worldwide Packaged Software Sales and the U.S. Trade Balance for All and Selected Industries, Including the U.S.-Owned Software Industry, 1997-2009 (unpublished research performed for BSA).

often are small and medium-sized businesses, also are at risk because of software theft.

B. The Role of the Software Industry in Promoting the Free Flow of Information

The Internet is an indispensable part of global communication and commerce. It has opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. It has also opened up new forms of social interaction that render geography largely irrelevant. As technology innovators, BSA's members are at the forefront of these developments. Software and software functionality are not only sold and delivered over the Internet, but also comprise a key component of the Internet infrastructure. By enabling the near-instantaneous sharing of information around the world, software has expanded and enhanced the so-called marketplace of ideas and contributed immeasurably to the global free flow of information on the Internet.

The success of the Internet is built on a foundation of intellectual property rights. Innovation and creativity are essential drivers of the Internet infrastructure and the content that flows over it. IP laws are essential to providing incentives for innovation and creativity. As the Supreme Court has noted, "[t]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."⁵

Part II: Response to the Notice of Inquiry

The United States can contribute to the global free flow of information in the Internet in numerous ways. In its response, BSA has focused its response to the NOI on the following: best practices

⁵ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

and the role of internet intermediaries, and trade agreements and international cooperation.

A. Identifying Best Practices and the Role of Internet Intermediaries

Internet intermediaries perform vital roles without which the Internet and electronic commerce would not function. In the course of their activities they are exposed to a number of sources of potential liability. For example, intermediaries potentially may be secondarily liable for unlawful conduct by their subscribers. They may also risk direct liability for conduct that is integral to the operation of the Internet.

The risk of broad liability can result in severe limits on the free flow of information online. It can reduce investment in and deployment of Internet Technology, and it can provide perverse incentives to Intermediaries – particularly ISPs – to exercise editorial control over content that puts them at risk. At the same time, these considerations must be balanced against the need to provide incentives to intermediaries to cooperate with third parties, such as copyright owners, in preventing the circulation of content that violates IP and other laws.

As a general rule BSA supports an approach in which intermediaries are offered a limitation on remedies as an incentive to cooperate in addressing unlawful behavior by Internet subscribers. Intermediaries are thus free to carry out their essential functions without fear of facing huge damage awards, provided that they take specified steps to stop unlawful activity that their services enable.

The prominent examples of this approach in US law are the notice-and-takedown provisions in Section 512 the Digital Millennium Copyright Act (DMCA). The DMCA grants ISPs a safe harbor from monetary remedies for certain specified types of activities that may infringe copyright. In exchange, ISPs need to establish and

implement policies against infringing use of their systems and cooperate with copyright owners in removing infringing materials that the copyright owners identify. The DMCA includes a clearly defined procedure for intermediaries with its notice-and-takedown safe harbor. Such a system minimizes uncertainty for Internet users, copyright holders and intermediaries and maximizes the free flow of information on the Internet.

By contrast, BSA opposes the mandatory use of technologies to detect and prevent transmission of illegal content. Filtering tools, for example, have long been suggested as a potential answer to online piracy of content. Such an approach, however, would undercut the clarity of responsibilities and inhibit the exchange of information by forcing intermediaries to impose sharp restrictions on information flows in an effort to prevent liabilities. That is, filtering raises substantial questions of privacy and censorship. Filtering advocates too often simply ignore these important private rights and focus exclusively on only one issue, namely copyright infringement.

Further, the development and deployment of filtering technologies entails significant costs. It has the potential to disrupt networks and degrade performance. Placing those burdens entirely on ISPs and technology companies would be unfair and inappropriate.

Mandated use of filtering technology is a special case of the broader issue of technology mandates. The technology industry strongly opposes government mandated use of particular technologies. The regulatory process is not well-suited to the pace of technological development. To the contrary, all evidence suggests that technology develops most effectively in response to marketplace forces. Technology mandates freeze technology and disrupt innovation. Such mandates substitute backwards-looking regulations for the type of forward-looking development that has helped grow the online marketplace of ideas.

B. Trade Agreements and International Cooperation

The movement of information across borders poses a number of challenges. The applicability of existing trade rules for goods and services to cross-border transmissions of commercial content is unclear. Differences in the rules in different jurisdictions regarding the privacy and proper handling of certain types of data (such as personally-identifiable information (PII)) can make it risky or impossible to move information from one country to another. Some types of information (e.g., some categories of PII and government data) may not be transmitted out of a particular jurisdiction at all. All of these factors can act as barriers to the free flow of information on the Internet.


International agreements, including trade agreements, can help to address some of these barriers. For example, the free trade agreements (FTAs) negotiated by the US on a bilateral and regional level over the past decade extend the principle of national treatment to electronic commerce and reduce barriers to trade in services (including the telecommunications services that provide access to the Internet). The FTAs include important improvements to copyright protection, including protection online. They also address some of the Internet-related liability issues discussed in the previous section by clarifying liability rules for Internet Service Providers.

BSA supports the continued use of trade negotiations as a foundation for the continued growth of the Internet as both an economic engine and a channel for the exchange of information. In the future, greater attention should be brought to issues concerning cross-border data flows. Trade agreements are a potentially effective vehicle for harmonizing rules concerning data stewardship and reducing barriers to the transmission of information from one jurisdiction to another. As the software industry moves increasingly to a cloud computing model, where software and IT functionality is delivered to customers over the Internet, the imperative to reduce

barriers to cross-border data flows becomes clear. A key element of the economics of cloud computing is the unrestrained ability to move data and workloads wherever the computing resources to service them are available.

Looking forward, the free trade agreement model could similarly be used to enable the expansion of cloud computing by smoothing the path for the sharing of information across the internet. Cloud computing, which represents the next generation of computing, relies on the free flow of information. On the Internet, that flow crosses international borders as easily as it crosses the underlying fiber-optic lines. Government officials increasingly are becoming aware of the barriers to cloud computing presented by the varying international frameworks on data transmission. The United States, European Union and the Asia-Pacific Economic Cooperation each are working separately on various, and often conflicting, privacy and data regulatory frameworks. By harmonizing a framework for cross-border data flows, government could clear the way for the further development of the online marketplace of ideas in the cloud.

Sincerely,



Robert W. Holleyman, II
President and CEO