

Testimony of
Mr. Robert Holleyman

President and CEO
Business Software Alliance
July 22, 2004

July 22, 2004

Good afternoon. My name is Robert Holleyman. I am the President and CEO of the Business Software Alliance¹. BSA is an association of the world's leading software and hardware companies. BSA's members create approximately 90% of the office productivity software in use in the U.S. and around the world.

The BSA commends you, Mr. Chairman, and Senator Leahy, for bringing a focus to bear on the problem of online piracy of copyrighted material. This is a matter of great concern for BSA member companies that are the targets of such illegal activity. BSA believes that ways need to be found to address piracy generally, and online piracy specifically, which do not encumber the development and distribution of innovative technologies.

The Committee has embraced the challenge of crafting a law that deters bad actors who use technology to intentionally cause others to infringe while preserving unfettered the ability of legitimate companies to develop and

¹ 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, Cisco

Systems, CNC Software/Mastercam, Entrust, HP, IBM, Intel, Internet Security Systems, Intuit, Macromedia, Microsoft, Network Associates, RSA Security, SolidWorks, Sybase, Symantec, UGS and

VERITAS Software.

Page 2 of 2

invent new technologies and services unencumbered by the threat of frivolous litigation. We commend you for doing so. We recognize this is not an easy task and we remain committed to working with this Committee to achieve that goal.

We believe that new legislation, properly focused and balanced, should be viewed as only one of several elements of finding a solution to the problem

of P2P piracy. In a statement of joint policy principles endorsed by BSA, the Recording Industry Association, and the Computer Systems Policy Project, we recognized that meeting the challenge of piracy requires a multifaceted approach that includes creating legitimate and content rich on-line alternatives to illicit P2P file sharing systems as well as consumer education, enforcement of existing civil and criminal statutes, the use of technological protection measures and strengthening international sanctions for piracy. Consistent with these agreed principles, BSA believes that the most effective way to address the harm done by operators of illicit file sharing networks is through the marketplace. Consumers will embrace appealing legal alternatives that offer a rich and varied array of content. A number of these alternatives are already available for music, including iTunes and a now legal Napster, and their commercial success speaks volumes.

A second approach to the challenge is to prosecute the operators of these illicit file-sharing networks under existing laws. For example, the Justice Department has recently created a task force to address piracy specifically. We think this is a very timely and positive development and we encourage the Justice Department to pursue such cases as appropriate.

Third, we believe it is vitally important to educate all users of the Internet about safe and legal ways to harness the power of this important resource.

Page 3 of 3

BSA sponsors an active education campaign, as do a number of other groups. But this is not enough. We believe the government should also play a role: specifically we recommend an ad campaign similar to past public awareness campaigns on the environment, smoking and drugs: it is timely and much needed with respect to the Internet.

Finally, technology can play an important role in protecting digital content. Just as banking and other commercial transactions can be performed securely over computer networks, digital content can be distributed securely through the use of existing technology tools. The marketplace is working to provide the tools necessary to secure distribution of digital assets, including content and we fully support continued industry-led efforts towards this end.

If the Committee determines that an additional cause of action, such as S. 2560, is necessary to address the problem of online piracy, we urge that any such bill be carefully crafted and properly balanced to curtail irresponsible and harmful practices while avoiding adverse unintended consequences for legitimate technology companies.

Finding this balance will not be easy. We think that by focusing on regulating conduct the sponsors have identified a key element of any viable solution. As you move forward, we urge you to ensure that beneficial technologies are not put at risk by the need to stop bad actors and to avoid overbroad or ambiguous standards that could chill innovation, deprive consumers of access to beneficial new technologies, and encourage costly litigation.

Any new law should be crafted against the backdrop of the existing law that

ensures legitimate technologies can be developed and made available to
Page 4 of 4

consumers. To make certain this is the case and to ensure that the language of a new law is interpreted consistent with your intent, key elements of existing law and jurisprudence should be specifically spelled out in the bill. BSA stands ready to work with this Committee to structure sound legislation, that does not burden those who, in good faith, develop, manufacture, or consume general or multi-purpose technology products such as software and computers.

BSA's member companies are the leading developers of computers, software, security and networking technologies. To meet customer needs, these products are designed and intended to be multipurpose products. By their very nature, many of these products are freely programmable and can be modified by the user. How customers use these products changes over time and such uses are limited only by the customer's needs and imagination.

The functions built into these products are also by design multipurpose. These functions enable copying, modifying and transmitting a broad variety of digital content. For example, they permit users to copy documents they create on storage media such as optical disks for safekeeping, to edit, cut and paste text data and graphics to enable graphics designers to do their jobs more efficiently, and to edit family photos or home video recordings to share with other family members. These functions are at the heart of the information technology revolution.

We know that it is not your intent Mr. Chairman nor that of Senator Leahy to put at risk any of these functions or the legitimate companies that make products incorporating these functions. It is also our understanding that you do not mean to impose specific constraints on the design of general-purpose technology products or the functions they include. As you noted in your
Page 5 of 5

floor statement, Mr. Chairman, these decisions should be left to the marketplace and engineers.

It is a fact that unscrupulous persons have harnessed technology to provoke others into engaging in illegal acts such as infringement of copyright.

Today's piracy threat is posed by such unscrupulous persons using fundamentally sound P2P technologies for illicit purposes by encouraging infringement for their own ends from the sale of advertising and spyware.

These unscrupulous persons, in many cases, are not themselves the direct infringers. The direct infringers are the persons who are drawn to these services by the opportunity to get software and other works for free through unauthorized acts of uploading and downloading.

To ensure their ends, these bad actors intentionally design their services to make piracy almost unavoidable. Most often file-sharing functions are enabled by default, are very hard to disable, and often continue running in the background, even after the user has closed the application. These practices are well known and well documented.

To distinguish bad actors from good, we believe that five key areas need to be addressed through specific language.

? To effectuate your intent that legitimate products and technologies not be threatened, it should be made clear that technology products that can be used for significant legitimate purposes - in the copyright vernacular, substantial non-infringing uses - are not subject to copyright infringement liability. To this end the bill should state clearly that the Supreme Court's decision in the Betamax case is unaffected. That decision has stood for 20 years, and technology companies and the marketplace have come to rely on it.

Page 6 of 6

? To ensure that only bad actors are found liable, it should be made clear that to meet the intent standard of the bill an actor must be shown to have engaged in conscious, recurring, persistent and deliberate acts demonstrated to have caused another person to commit infringement.

? The bill should state explicitly that mere knowledge by a developer of a technology or a provider of a service of the actual or potential infringing acts of another person using that technology or service does not demonstrate intent to induce copyright infringement.

? It should also be made clear that the bill does not create liability based on advertising or providing support to users, including instructions for using the technology or service provided through manuals or handbooks, nor by providing assistance for using a product through a company's on-line help system or telephone help services.

? Finally, a mechanism needs to be included to effectively deter weak, harassing or frivolous law suits. The legislation should establish a procedure to ensure that frivolous cases do not go forward and that discovery is appropriately limited and not unnecessarily intrusive.

Persons with bad motives have repeatedly used developments in the marketplace and technology to their own ends. Today is no different. In the past such bad actors have used the postal system, telephones, automobiles, and other avenues of commerce for their own illicit ends. Now, they are also using computers, software and the Internet. Just as past solutions focused on these bad actors, and did not outlaw overnight delivery, cars, or telephones, today's solutions must leave intact the

Page 7 of 7

important contributions computing technologies make to our daily lives, and allow these technologies to make even greater contributions in the future.

As I noted at the outset Mr. Chairman we commend you and Senator Leahy for your long-term commitment to combating intellectual property piracy.

We fully support your efforts. We look forward to working with you as you continue to address piracy challenges while preserving an environment in which BSA members and other technology companies can continue to

innovate, which is what they do best.
Thank you.