

**The United States Senate  
Committee on the Judiciary**

**Hearing on Targeting Websites Dedicated To  
Stealing American Intellectual Property**

**Testimony of Denise Yee, Visa Inc.**

Visa Inc. welcomes the opportunity to provide its input on targeting websites dedicated to stealing American intellectual property, the challenges of protecting intellectual property online, and proposed legislation for addressing “rogue” websites.

Visa fully appreciates the value of intellectual property. The “VISA” trademark itself is one of our company’s most valuable assets, and we expend millions of dollars protecting and enforcing the “VISA” trademark each year.

To promote growth in e-commerce, to protect the Visa brand and because it is the right thing to do, Visa goes beyond any legal requirements to prevent the use of its payment system for illegal electronic commerce transactions. Visa’s policy is unequivocal and clear: its system should not be used for illegal transactions. Our rules further state that “[p]articipants in the Visa system agree to take appropriate measures to prevent the Visa system from being used for or associated with illegal activities.” The integrity of the Visa brand is critical to the success of the system. The system works because of consumer confidence in its security and reliability. Accordingly, we are committed to ridding our system of merchants that engage in illegal transactions, including transactions involving the sale of counterfeit and copyright infringing goods.

We do, however, recognize that there are some challenges to eliminating bad faith infringing merchants from our system. These include chasing merchants who hide in the shadows of the Internet under multiple shell companies, reconciling differences in

copyright law in different jurisdictions, and balancing the competing interests of multiple stakeholders.

Nevertheless, Visa voluntarily and willingly assists intellectual property owners in combating infringement on the Internet, and Visa has spent several years developing and refining its procedures to do so. We believe our current procedures strike a proper balance between taking swift action against clear instances of illegal conduct, and protecting interests of participants in the Visa system when issues of illegality are reasonably disputed.

In this testimony, Visa will provide a brief overview of its operations and structure. It will then discuss the concerns and challenges we face when helping to protect third party intellectual property in the digital environment. We will describe the efforts Visa undertook to prevent the use of its payment system by the Russian website AllofMP3.com, and the liability and legal costs it and its partner bank incurred as a result. We will also discuss *Perfect 10 v. Visa International Service Association*, where a publisher of an adult magazine sued Visa for copyright infringement, and the Ninth Circuit held that Visa and other payment systems were not secondarily liable for the use of their networks to purchase infringing material from websites. Despite the decision in *Perfect 10* underscoring that Visa is under no legal obligation to take action, Visa does so, because it does not condone illegal activity in its system. Therefore, the testimony will then discuss Visa's current policy for responding to complaints by intellectual property owners concerning websites selling infringing material, and the best practices developed by payment system industry players to address this issue. Next, we will discuss possible unintended consequences to legislative action. And finally, the

testimony will provide Visa's views on the Combating Online Infringement and Counterfeiting Act (COICA), including its general support for what this legislation is intended to accomplish.

## **I. The Visa Network**

Visa Inc. is a global company headquartered in San Francisco, California. The company's operating regions include: Asia-Pacific; Canada; Central and Eastern Europe, Middle East and Africa; Latin America and the Caribbean; and USA. Visa Europe is a separate entity that is an exclusive licensee of Visa Inc.'s trademarks and technology in the European region.<sup>1</sup>

Visa operates a global electronic payments network and facilitates global commerce through the transfer of value and information among financial institutions, merchants, consumers, businesses and government entities in more than 200 countries and territories worldwide.

Visa provides its financial institution clients with a broad range of platforms for consumer credit, debit, prepaid and commercial payments. Our network and payment platforms deliver significant value to our clients and their customers in terms of greater efficiency, security, convenience and global reach. We do not issue payment cards, set cardholder fees or interest rates, or sign up merchants to accept Visa cards. These services are managed by our network of more than 15,700 financial institution clients worldwide.

The typical Visa transaction has four parties:

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<sup>1</sup> Visa Europe is owned and operated by more than 4,000 European member banks and was incorporated in July 2004. In October 2007, Visa Europe became independent of global Visa Inc., with an exclusive, irrevocable and perpetual licence in Europe.

1. The **Merchant** is any entity — a store, restaurant, online retailer, hotel or airline — that accepts Visa as payment.
2. The **Acquirer** is a financial institution that enables merchants to accept Visa payments and ensures that the merchant gets paid for each transaction. Acquirers conduct due diligence on potential merchants, accept merchant applications and enter into contract with merchants. Visa generally has no direct contractual relationship with the merchants.
3. The **Issuer** is a financial institution that provides Visa-branded cards or other Visa-branded payment products to consumers and businesses. When a Visa-branded credit card is used for a transaction, the issuer “lends” the consumer the funds to complete the transaction. When a Visa-branded debit or prepaid card is used for a transaction, the funds are automatically withdrawn from the consumer’s account and transferred to the Acquirer.
4. The **Account Holder** is any consumer or business using a Visa card or other Visa-branded payment product to make purchases.

Visa provides the network that enables these four parties to conduct transactions worldwide within seconds.

In 2010, Visa processed more than \$5 trillion worth of transactions comprised of more than 70 billion transactions. The 1.8 billion cards issued by our 15,700 financial institution clients are accepted at millions of merchant outlets and over one million ATMs worldwide.

Maintaining the integrity of the Visa brand in the online environment is a priority for the company, and is demonstrated by Visa's voluntary involvement in this area. For years, our team has worked cooperatively with law enforcement in the United States and around the world. Visa takes special steps in cases of criminal activity and activity that threatens health and safety. For example, Visa voluntarily searches the Internet for merchants selling or advertising child pornography or illegally distributing controlled substances and expels them from our system as soon as they are discovered. Visa works cooperatively with law enforcement, other payment processors and the National Center for Missing and Exploited Children in the Financial Coalition Against Child Pornography to share information and take collaborative steps against merchants that sell child pornography.

Visa works with the Secret Service, the Federal Bureau of Investigation, the Federal Trade Commission, and State Attorneys General to assist their efforts to stop fraud, identity theft, and data breaches. We work with the Department of Justice and State Attorneys General to respond to their concerns about illegal online tobacco sales. In response to the Unlawful Internet Gambling Enforcement Act (UIGEA), Visa devised a coding and blocking scheme that prevents U.S. cardholders from engaging in illegal Internet gambling. And most recently, Visa has joined the Center for Safe Internet Pharmacies (CSIP) to combat illegal distribution and counterfeit pharmaceuticals online.

## **II. Challenges to Protecting Intellectual Property in the Digital Environment –**

### **A Payment System's Perspective**

The task of preventing the Visa system from being used by merchants to process payments for counterfeit and copyright infringing products is extremely challenging.

First, the Visa system (or any payment system) cannot determine on its own whether a particular transaction involves payment for a counterfeit or copyright infringing product. The billions of payments that Visa processes each year cannot be screened to identify whether an underlying transaction involves the sale of counterfeit and infringing products or not. Instead, we rely on intellectual property owners to notify Visa that a particular merchant may be selling counterfeit and infringing products on the Internet and identify those infringing websites before Visa is able to take any action.

Second, when Visa is alerted to a merchant that may be involved in selling counterfeit and infringing goods, Visa must work through the Acquirer who signed up that entity to be a Visa accepting merchant, as Visa generally has no direct contractual relationship with the merchant. Moreover, nefarious merchants often cover their tracks by creating multiple shell companies under different names and enter into merchant agreements with numerous Acquirers under false pretenses. When an unlawful merchant is identified and expelled from the Visa system, it often changes its name and moves on to another Acquirer under another merchant account name. Ridding our system of these bad faith infringers is like a constant game of “Whac-a-Mole”.

Moreover, there are limitations to payment systems’ enforcement of third party intellectual property because Visa does not have authority to adjudicate genuine legal disputes between intellectual property owners and merchants. If Visa is forced to make an enforcement decision with which the intellectual property owner or the merchant disagrees, Visa may find itself sued in the jurisdiction of the intellectual property owner or the merchant. In fact, when Visa voluntarily assisted intellectual property owners in a

case alleging illegal downloads of music, this assistance proved costly for Visa and the Acquirer.

**A. AllofMP3.com**

In 2006, Visa received a documented complaint by copyright owners in the recording industry that the AllofMP3.com website based in Russia was allowing downloads of music without authorization. At its own cost, Visa engaged outside legal counsel in Russia to provide an opinion of legality on the matter. Counsel concluded that under Russian law and the law in the vast majority of the jurisdictions in which the merchant's consumers were located (many of whom were located in the United States and the United Kingdom), the merchant's transactions were illegal. In September 2006, after providing appropriate notice to AllofMP3.com, the Russian Acquirer responsible for entering into the merchant contract with AllofMP3.com stopped processing Visa transactions for the website. When the merchant began routing transactions through an affiliated site called Alltunes, the Russian Acquirer terminated Visa acceptance from that site as well.

The merchant owner of both affiliated sites subsequently sued the Russian Acquirer in a Russian court. Visa intervened in the case as a third party in support of the Acquirer. In June 2007, the Russian court found in favor of the merchant, concluding that by terminating payment processing, the Russian Acquirer was in breach of its contract with the merchant. The court ordered the Acquirer and Visa to resume providing payment processing services to the merchant. The court dismissed the Acquirer's claim that the merchant was acting illegally and in violation of Visa rules. The court found that Visa did not have the authority to determine copyright infringement in Russia; only a

Russian court could do this. While some record companies brought a separate copyright infringement action in Russia against the merchant, that court had not yet rendered a judgment as of June 2007, when the first court found that the Russian Acquirer had breached its contract with the merchant.

Subsequently, in August 2007, the second court ruled against the record companies in the separate copyright infringement action. Surprisingly, that court held that AllofMP3.com and similar downloading music sites were legal in Russia. Even though the copyright owners claimed they had not given permission to the merchant to sell copies of their music, a Russian collective management organization had the right to license use of the sound recordings. The court determined that AllofMP3.com and its affiliates were in compliance with Russian law to the extent that they paid for rights from this organization.

These court cases created a serious challenge for Visa. Visa had received a fully documented complaint alleging copyright infringement from the copyright owners and an opinion of local counsel that the websites infringed the recording industry's copyrights. The Russian Acquirer and Visa (as a third party intervener) had defended vigorously in court at their own expense. Nonetheless, the Russian courts disagreed with Visa and the copyright owners; they found that there was no infringement and ordered the Russian Acquirer to resume payment processing. Visa had no choice but to allow the Russian Acquirer to resume payment processing for the merchant's domestic transactions.

Visa learned important and costly lessons from this case. First, that there are limitations on private sector enforcement of intellectual property disputes. Visa rules simply can not override a country's laws, and any attempt by Visa to do so may result in



conflicting legal obligations. Intellectual property law (including copyright law) is extremely complex. There are genuine disputes regarding what constitutes infringement and the outcome of such disputes may not be predictable in many cases, particularly when the laws vary from country to country or when we do not have access to all of the relevant evidence. As a payment processor, Visa is not in a position to resolve disputes over allegedly infringing sales, particularly involving cross-border transactions. If Visa takes a position on the dispute and a court later determines that Visa was incorrect, Visa exposes itself to potential claims. Ultimately, resolving these issues requires government-to-government discussions that harmonize local legal structures and lead to predictable and consistent judicial decisions. It is only within these harmonized legal structures that private enforcement efforts can fully succeed.

Second, we recognized that as technology was moving faster and faster, we had to articulate a clear global e-commerce policy for cross-border transactions that accounted for differences in local laws. Accordingly, in 2007, Visa adopted the following global policy: **“a transaction must be legal in both the Cardholder's jurisdiction and the Merchant's jurisdiction.”** This policy is still in effect today.

#### **B. Intellectual Property Owner Attacks Visa in *Perfect 10 v. Visa***

Despite Visa's voluntary efforts to assist intellectual property owners in combating infringement on the Internet, and although the payment systems are far removed from the infringing activity itself, one intellectual property owner sought to have Visa held liable for secondary infringement based on a merchant's use of the Visa system to process payments for allegedly infringing photographs. In *Perfect 10 v. Visa International Service Association*, 494 F.3d 788 (9<sup>th</sup> Cir. 2007), the U.S. Court of Appeals for the Ninth

Circuit held that payment systems do not bear secondary copyright liability for the use of their networks by websites selling infringing material. Because *Perfect 10* defines the scope of payments systems' legal liability for third party infringement, it merits attention.

Perfect 10 is a publisher of adult magazines and websites. Perfect 10 believed that operators of other websites had, without authorization, copied images from the Perfect 10 website and then displayed the copied images on their websites. Rather than file suit against the website operators, Perfect 10 initiated a series of suits against a variety of intermediaries, including web hosts, search engines, and payment systems, for facilitating the infringement. The courts rejected Perfect 10's claims.<sup>2</sup>

In its action against Visa, MasterCard, and other providers of payment services, Perfect 10 claimed that by providing payment services to websites selling images that infringed Perfect 10's copyrights, the payment systems were secondarily liable for copyright infringement.<sup>3</sup> The district court granted the payment systems' motion to dismiss Perfect 10's complaint. On appeal, the Ninth Circuit found that Visa and the other defendants were not liable for either contributory infringement or vicarious liability.

Consistent with the Ninth Circuit's finding in *Perfect 10*, Visa continues to believe strongly that payment systems should not be secondarily liable for copyright or trademark infringement committed by merchants, especially in a four-party payment system where the network typically has no contractual relationship with the merchant, and the know-your-merchant duty resides with the Acquirer. Extending liability to payment systems for infringing acts of merchants would shift legal responsibility to parties far removed

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<sup>2</sup> See also *Perfect 10 v. CCBill*, 488 F.3d 1102 (9<sup>th</sup> Cir. 2007); *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9<sup>th</sup> Cir. 2007).

<sup>3</sup> Perfect 10 also brought claims for trademark infringement and state law claims for false advertising and unfair competition. Perfect 10 lost on these claims as well.

from the infringing activity that do not have the ability to discover or prevent the infringement. The rights-holders are in the best position to enforce their intellectual property rights, and the merchants involved in the infringing conduct are the culpable parties. Payment providers should not be held legally responsible for infringement committed by third parties. Imposing liability on payment providers may discourage Acquirers from signing up innocent, small business merchants in the future. And imposing liability on intermediaries (for instance, shipping companies like the United States Postal Service) may unduly hinder international e-commerce.

### **III. Joining the Fight to Curb Intellectual Property Infringements**

#### **A. Visa's Current Policy**

Despite the costly lesson suffered in *AllofMP3.com*, and the favorable decision finding no secondary liability in *Perfect 10*, Visa continues to believe it is necessary to provide voluntary assistance to rights holders to combat intellectual property infringement on the Internet. We still have deep concerns about cross-border disputes, secondary liability, and the unintended consequences of Visa's efforts to help combat infringement. Foreign courts continue to decline to impose liability on foreign websites considered by U.S. rights-holders to facilitate infringement.<sup>4</sup>

Nevertheless, Visa is committed to protecting the integrity and trust in our payment brand worldwide. As an intellectual property owner who continually plays cat and mouse with phishing sites determined to tarnish our brand, Visa empathizes with other intellectual property owners. It is time consuming, expensive and frustrating to try to stop infringing conduct on the Internet, where the wrongdoers can conceal their

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<sup>4</sup> For example, Rojdirecta, Rapidshare, and Baidu.

identities and make enforcement difficult through the operation of redundant websites on multiple mirrored servers in different locations throughout the world. However, the best course of action is for intellectual property rights owners, payment providers, and others involved in international commerce to work together to try to stop infringement.

After adopting the cross-border rule in 2007 that the Visa system can only be used to process transactions that are legal in both the cardholder's jurisdiction and the merchant outlet's jurisdiction, Visa formalized procedures to facilitate the enforcement of this rule. Visa has continually reviewed, refined and enhanced these procedures resulting in its current anti-counterfeit and piracy policy which is free to the intellectual property owner and made available entirely at Visa's cost. The current policy can be divided into five steps:

- 1. Report** (by intellectual property owner): At no cost, the intellectual property owner may report instances of merchants selling counterfeit or infringing products to Visa at its dedicated e-mail inbox, [Inquiries@visa.com](mailto:Inquiries@visa.com), attaching any relevant cease-and-desist letters notifying the merchant of the infringement and a list of the intellectual property owner's rights.

- 2. Identify:** Visa incurs the expense of conducting a test transaction and identifies the Acquirer who has signed up the merchant in the Visa system.

- 3. Investigate:** Visa instructs the Acquirer to conduct an investigation into its merchant's business activities including the alleged infringement.

- 4. Report** (by Acquirer): Visa requests the Acquirer's response within five business days of receiving the inquiry from Visa, including the Acquirer's investigation report into its merchant's business activities.

**5. Comply or Terminate:** Absent any written documentation proving the legitimacy of the merchant's activity, the Acquirer must require its merchant to comply with Visa rules (namely, ceasing the sale of the infringing goods) or terminate the merchant. If the transaction is clearly illegal and the Acquirer does not take action, Visa can take further enforcement action against the Acquirer.

As mentioned above, Visa Europe operates as a separate entity. Accordingly, if the Acquirer is located in Europe, Visa Europe (which generally has consistent policies with Visa Inc.) has the responsibility for ensuring that the European Acquirer and its merchant are in compliance with Visa rules.

When the Acquirer investigates the merchant's activities, Visa's procedures build in an opportunity for the merchant to prove their lawfulness by providing us with written proof disproving any infringement. In the majority of cases, we believe that it will be clear to the Acquirer and Visa whether the merchant has met its burden. In a minority of cases, however, Visa anticipates that a further inquiry will be warranted to ensure fairness to all parties. For instance, shades of grey in intellectual property law (particularly in copyright), the sale of gray market goods (genuine goods sold in different jurisdictions or through different distribution channels from those authorized by the intellectual property owner), differing opinions among multiple jurisdictions, or the intellectual property owner's dissatisfaction with an Acquirer's conclusion may require further discussion and the intellectual property owner's full involvement. Under these circumstances, if an intellectual property owner continues to allege that a merchant is infringing its rights after completion of Steps 1 through 5, Visa will work with the intellectual property owner to determine whether a further demand should be made on the Acquirer. If there is a lack of

clarity as to whether infringement exists in the relevant jurisdiction, and if undue risk will be shifted to Visa were we to decide in favor of the intellectual property owner, Visa may request indemnity from the intellectual property owner if further steps are taken by Visa or the Acquirer to force the termination of Visa acceptance by the merchant.

Visa has taken other steps to address the problem of online infringement. We believe that educating Acquirers about the sale of counterfeit and infringing goods is of utmost importance. This past October, Visa circulated a global communication to all Acquirers that specifically highlighted the issue with the sale of counterfeit and infringing goods. Moreover, we are in the process of building a dedicated webpage for intellectual property owners to learn about our policy and report violations. The webpage will go live today and is located at [Visa.com/ReportBrandAbuse](http://Visa.com/ReportBrandAbuse).

### **B. Payment Industry's Best Practices**

Visa is not the only payment system that offers voluntary procedures for combating intellectual property infringement. Visa has worked with American Express, Discover, MasterCard and PayPal to develop "Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet" for the International Trademark Association (INTA) and developed "Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet," at the request of the Intellectual Property Enforcement Coordinator (IPEC), Victoria Espinel. These best practices are consistent with Visa's current policies and demonstrate the payment industry's commitment to work with intellectual property owners to prevent the distribution of sale of counterfeit and infringing products on the Internet.

### **C. Intellectual Property Owners Must Identify Infringements**

Visa believes its voluntary procedures are effective. On the occasions when intellectual property owners provided Visa with documented evidence of websites that were suspected of engaging in illegal activity and accepting Visa as a form of payment, Visa promptly took action under our procedures to address these concerns. Within days of notification, the applicable Acquirers began investigating these websites and, as necessary, terminated payment services to these websites or brought their merchants into compliance. However, few intellectual property owners have availed themselves of Visa's procedures. In the last six months, Visa has received only 30 inquiries. Other payment systems have shared similar experiences. Intellectual property owners have not explained their reluctance to report instances of online infringements to us.

It is imperative to the process that intellectual property owners alert Visa to instances of infringement in the system. Visa is not well positioned to identify counterfeit and copyright infringing material on the Internet. Nor is Visa informed of this activity by anyone else. In many instances, consumers know they are purchasing discounted but infringing products and, therefore, do not complain to Visa about this illegal activity – unlike in cases of fraud, where a consumer will complain and seek a credit for the transaction. Accordingly, Visa must be alerted to cases of online infringement by the intellectual property owners if we are to help expel this illegal activity from our system.

#### **D. Coordinated Enforcement Necessary to Make an Impact**

Visa is committed to expelling merchants from the system who are profiting from illegal activities. But, the payment systems can only do so much to disrupt this activity. Because of strong consumer demand for discounted digital content and designer labels, consumers don't report their infringing purchases. And, we cannot permanently

eliminate the problem when unlawful merchants hide behind multiple shell companies and enter into contracts with multiple Acquirers under false pretenses. We think a more effective long-term solution would involve government-to-government discussions that harmonize local legal structures, sustained international cooperation among law enforcement agencies, and collaborative action among intellectual property owners, payment processors, website hosting companies, domain name registries and registrars, ad networks, search engines and others involved in international commerce on the Internet. Unless there is a coordinated attack at every layer, the United States cannot be successful in combating online infringement.

#### **IV. Unintended Consequences to Legislative Action**

We appreciate the Committee's interest in exploring legal mechanisms to combat rogue websites (particularly websites hosted on foreign servers), in addition to the payment systems' existing voluntary procedures. However, imposing a regulatory framework on top of the existing voluntary procedures may have some unintended negative consequences:

- The extraterritorial application of U.S. law may invite retaliation by other countries' governments. If U.S. law effectively makes payment systems instruments of U.S. intellectual property enforcement actions against foreign websites, foreign governments may well do the same. European countries, for example, believe that many U.S. companies infringe European laws concerning geographical indicators. Under European law, only wineries in the Champagne region of France can call sparkling wine "champagne," and only cheese manufacturers in the Parma region of Italy can use the name "parmesan cheese."



European countries could require payment systems to stop processing transactions for U.S. merchant websites that sell products that violate European laws concerning geographical indicators. Similarly, repressive governments could force payment systems to stop doing business with legitimate U.S. merchants that sell books critical of their regimes to residents of their countries.

- Legislation might create an unrealistic expectation that payment systems can permanently eliminate online infringement. However, similar to the “Whac-a-Mole” scenario with domain name registrations, merchants engaged in illegal activity often have accounts with multiple financial institutions under several different shell company names. As soon as one Acquirer stops providing payment services to the merchant, the merchant starts using another account under a different name with a different Acquirer. As noted above, there are over 15,700 financial institutions in the Visa network alone, and other payment processing alternatives to the Visa system. This provides the unscrupulous merchant with many alternatives to stay in business, notwithstanding Visa’s best efforts. The payment systems should not be perceived as an effective substitute for concerted international cooperation among law enforcement agencies against commercial infringers.
- Placing legal obligations on payment systems to cease providing payment services to infringing websites may increase the likelihood of payment systems being subject to conflicting legal obligations. Visa has contractual obligations to Acquirers, which in turn have contractual obligations to provide services to merchants that operate websites. If the payment system or Acquirer was legally

obligated to cease processing transactions between the website and its customers, the merchant might be inclined to sue the payment system or Acquirer in the country where the website is hosted, and where that activity might be considered legal. In the absence of a finding that the website violates that jurisdiction's laws, foreign courts could very well rule that the payment system or Acquirer breached its contractual obligation to provide payments services to the website operator as they did in *AllofMP3.com*. Visa's voluntary process provides us with the flexibility to manage our risk appropriately and respond to issues on a case-by-case basis.

- Legislation that obligates payment systems to prevent certain transactions could have the long-term effect of eroding *Perfect 10 v. Visa*. A private right of action would exacerbate this corrosive effect. Courts could interpret such a private right of action as an indication that payments systems should be secondarily liable for copyright and trademark infringement and result in the reversal of decades of judicial decisions defining the contours of secondary liability. Extending liability to payment systems for infringing acts of merchants would shift legal responsibility to parties far removed from the infringing activity. To protect themselves, Acquirers may become more reluctant to sign innocent, small business merchants, which may unduly hinder international e-commerce.

## **V. Combating Online Infringement and Counterfeiting Act**

Last Congress, Chairman Leahy and other members of the Judiciary Committee introduced the Combating Online Infringement and Counterfeiting Act (COICA), S. 3804. COICA empowers the Department of Justice to pursue *in rem* actions against

domain names associated with websites “dedicated to infringing activities.” Once the court determines that the website is dedicated to infringing activities, if the domain name has a foreign registry and registrar, the Department of Justice can serve the court’s order on a financial transaction provider (FTP). The FTP then would have to take measures designed to “prevent or prohibit its service from completing payment transactions between its customers located within the United States and the Internet site using the domain name....”

Visa is supportive of COICA’s objectives – namely, targeting and expelling websites dedicated to infringing activities. Further, we believe that our own voluntary procedures have the same objective and that COICA and Visa’s procedures are complementary.

Last Congress, we suggested that the Committee consider a few technical changes to COICA and appreciate the Committee’s willingness to address some of those concerns in the bill reported out of the Committee in November, 2010. In particular, the changes to the savings clause and the required actions by FTPs decrease the likelihood of COICA having unintended consequences on payment systems and exposing Visa to conflicting legal obligations. If COICA is reintroduced in substantially the same form, there are some technical concerns that we feel still need to be addressed, and are hopeful we can find common ground.

- ***An FTP should be permitted to authorize the continued use of its trademark on foreign sites in accordance with its contractual obligations.*** COICA requires an FTP “to cause notice to be provided to an Internet site using the domain name set forth in the order that the site is not authorized to use the trademark of the

financial transaction provider.” FTPs would expect that the website would no longer be accessible from the U.S. pursuant to the DNS server operator’s obligations under COICA. However, the merchant’s website would still be accessible to foreign consumers. In cases where a foreign merchant sufficiently demonstrates that its business is legal in its country of operation, we request the subsection be flexible to permit the continued use of the FTP’s logo on the merchant website. Indeed, contracts between Acquirers and merchants allow for merchants to display an FTP’s logo if the merchant is engaged in legal activity in its jurisdiction. The subsection as written would create conflicting legal obligations for FTPs and would require Acquirers to breach their contracts with merchants outside of the U.S.

- ***A financial transaction provider (FTP) should not be required to modify its systems to comply with an order issued under COICA.*** COICA provides that an operator of a domain name system server shall not be required “to modify its network or other facilities to comply with” an order under this section. This provision clarifies that a DNS server operator’s obligation to “take technically feasible and reasonable steps” does not include the modification of its network or facilities. FTPs would like the same protection. An FTP is required to take “reasonable measures” to prevent its service from completing certain payment transactions. We would request that the provision make clear that “reasonable measures” do not include an FTP modifying its service or systems. This clarification is particularly necessary in light of the language provided for DNS server operators.

With the two technical amendments we propose above, Visa would be supportive of COICA as currently structured.

## **VI. Conclusion**

Visa prohibits the use of its network for the online purchase of counterfeit and copyright infringing goods. To promote growth in e-commerce, to protect the Visa brand and because it is the right thing to do, Visa goes far beyond any legal requirement to prevent the use of its payment system to sell infringing material.

Visa works with Acquirers and intellectual property owners to ensure that rogue merchants are expelled from the system. Visa offers a simple, fair and expeditious procedure to address intellectual property owner's complaints about merchants engaged in the sale of counterfeit and copyright infringing products. We think payment systems' voluntary efforts can help to disrupt online infringement, but are not well positioned to identify online infringement, nor eliminate the problem completely. Visa continues to believe that cooperation among governments (including harmonization of intellectual property laws), law enforcement agencies, intellectual property owners, payment systems and others involved in international electronic commerce is the only way to respond effectively to the constantly changing tactics of these rogue merchants.

We understand the Committee's interest in exploring legal mechanisms to combat rogue websites in addition to the payment systems' existing voluntary procedures. Imposing a regulatory framework on top of the existing voluntary procedures may have some unintended negative consequences, and some additional risk to the payment systems. Nonetheless, Visa is supportive of COICA's objectives and believes that COICA and Visa's procedures are complementary.

Visa is committed to continuing to work with the Committee to protect American intellectual property and to help fight this global menace.

February 16, 2011