



December 20<sup>th</sup>, 2017

**Opinion concerning “Interim Report on Discussion towards Promotion of Data Utilization”**

BSA |The Software Alliance

BSA | The Software Alliance (“BSA”)<sup>1</sup> welcomes this opportunity to provide its comments concerning the “Interim Report on Discussion towards Promotion of Data Utilization” (the “Report”) issued by the Unfair Competition Prevention Sub-Committee, Intellectual Property Committee, Industrial Structure Council under the Ministry of Economy, Trade and Industry (“METI”).

BSA applauds the efforts taken by METI to issue the Report which proposes the amendment of provisions in relation to the circumvention of technological restriction measures (“TRMs”) under the Unfair Competition Prevention Act (the “UCPA”). BSA fully supports the direction of the amendment to the UCPA described in Chapter 2 of the Report, “Protection via Technological Restriction Measures,” and offers the following comments regarding specific sections of the Report in more detail.

BSA members invest billions of dollars in research and development every year and are leading the digital economy on a global basis. This investment fuels an ecosystem of innovation and

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<sup>1</sup> BSA | The Software Alliance ([www.bsa.org](http://www.bsa.org)) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA’s members include: Adobe, Amazon Web Services, ANSYS, Apple, Autodesk, AVEVA, Bentley Systems, CA Technologies, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Intel, Microsoft, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, The MathWorks, Trend Micro, Trimble Solutions Corporation, and Workday.

manufacturing that benefits individuals and organizations at all levels of the economy around the world. Intellectual property protection for software products and services is a vital part of this ecosystem and BSA members strongly rely on the protection of intellectual property to continue innovating and contributing to the further development of the digital economy.

## **Chapter 2 Protection via Technological Restriction Measures**

### **Section 1 Necessity**

As the Report correctly points out, the business model of the software industry has evolved since provisions regarding the protection of TRMs were implemented in the current UCPA in 1999. Previously, software was made available exclusively on physical media (such as floppy disks or optical disks). However, these days, software is increasingly acquired on-line, wherein the user downloads the executable files that install the software on the user's device(s).

Many software companies adopt license authentication mechanisms to verify that the user is using a lawfully acquired version of the software. Such license authentication methods confirm the right of legitimate licensees to access and use the software through technical means known as TRMs. TRMs are important for many software companies because they support the ability to provide tailored options at different price points (including free of charge, in some instances), while protecting software developers' investments in innovation and software solutions. For example, some versions are tailored to students or academic institutions. Others are introduced as trial versions which require payment upon the expiration of the trial period.

Considering these circumstances, it is vital that the rules on the protection of TRMs be updated in accordance with advancements in the business models and related technologies utilized by the software industry.

### **Section 3 Clarifying the Subject of Technological Restriction Measures**

BSA agrees with the proposal in the Report that the definition of TRMs under the UCPA should be clarified to ensure the inclusion of TRMs using an activation method.

Although the technical details of how various authentication methods identify different software versions (e.g. trial versions, full function versions), usage periods, and the legitimacy (or authenticity) of the product key itself differ from company to company, the activation method referred to in the Report is adopted in the above-mentioned license authentication methods in general.

There are numerous offerings on e-commerce sites – mainly over Internet auction sites – of serial codes and software-cracking programs<sup>2</sup> that circumvent license authentication systems. These offerings enable the unauthorized use of software. Thousands of such offerings are available monthly on Internet auction sites monitored by BSA, and these are just for BSA member software. The software industry suffers significant damage due to such offerings.

To fight against the sale of software-cracking programs, BSA member companies have filed complaints with police departments in Japan for criminal violations of the UCPA or have sought damages against sellers of cracking programs. Several criminal judgments finding violations of the UCPA and civil judgments awarding damages to rights holders have been issued.<sup>3</sup> However, investigations of such claims often remain undeveloped, leaving the sale of such circumvention technologies to remain unpenalized. The reluctance of enforcement bodies to investigate and prosecute is due, in part, to overly narrow interpretations of the definition of TRMs in the UCPA.

Therefore, BSA expects that the above-mentioned enforcement issues will be resolved and that rights holders will be able to fully protect their rights by clarifying that activation methods are included in the revised definition of TRMs under the UCPA based on the direction suggested in the Report.

Furthermore, we request the Government of Japan to continuously review the definition of TRMs to ensure that such definition does not become obsolete again, and that it will instead take technological advances into consideration and ensure the interpretation of the UCPA allows for the development of new authentication systems which will be adopted by the software industry in the future.

### **Section 5 Act of Providing Information for Disabling Technological Restriction Measures**

Articles 2(1)(xi) and (xii) of the current UCPA define “acts of providing programs having only

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<sup>2</sup> Software-cracking programs enable users to activate (or maintain activation of) installed software, for example by rewriting code to prevent the software from initiating the connection to the server for authentication, creating falsified data which has the same characteristics as valid authentication data, and storing it on the device.

<sup>3</sup> Judgment issued by Utsunomiya District Court on December 15, 2014; judgment issued by Kobe District Court on September 8, 2015; judgment issued by Nagasaki District Court on January 12, 2016; judgment issued by Osaka District Court on December 26, 2016.

such function [i.e. the sole function of enabling...the running of programs...which are restricted by technological restriction measures] through an electric telecommunication line” as acts of unfair competition. However, selling the authentication codes themselves is not currently considered an act of unfair competition.

Upon investigations conducted by rights holders, sellers of serial codes have been found to obtain serial codes by wrongful means. For example, these sellers may acquire the keys via unauthorized access to company information. When a serial code is entered by an unauthorized user, the authentication system recognizes the authentication request as a legitimate request from a licensed consumer, and the system will activate the relevant version of the program. The inability to penalize the sellers of such codes allows this behavior to proliferate and results in significant use of unlicensed software and damage suffered by right holders.

Accordingly, we agree with the proposals set forth in the Report which amend the UCPA and stipulate the act of making serial codes or other license activation codes available without being authorized by the rights holder as an act of unfair competition.

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