**Interim Report issued by Legislative and Fundamental Issues Subcommittee
under Agency of Cultural Affairs**

Comments of BSA | The Software Alliance
January 5, 2019

BSA | The Software Alliance (**BSA**)[1] welcomes this opportunity to provide our comments with respect to the draft interim report (Interim Report), published by the Legislative and Fundamental Issues Subcommittee under the Agency of Cultural Affairs.

Introduction:

The software industry's business model has shifted from offering packaged software on physical media (such as floppy disks or optical disks) to acquiring licensed software online, where a user downloads the execution files to install the software on the user's device(s). Many software companies have come to adopt license authentication mechanisms to verify the user is using a legally acquired version of the software. These license authentication mechanisms confirm the right of the legitimate licensee to access and use the software through technical means. The technical means are important for many software companies because they support the ability to provide users tailored options at different price points, including free access, while protecting software developers' investment in innovation and software solutions. As obtaining legitimate licenses online is becoming the standard practice these days, the unauthorized use of software is caused mainly by the distribution of crack programs (e.g. software designed to circumvent, or "crack", authentication mechanisms) or serial or other authentication codes through auction sites, etc.

To adequately respond to this issue, the amended Unfair Competition Prevention Act enacted on May 23, 2018 (**UCPA**) revised the definition of technological restriction measures to clarify that the activation methods (e.g. license authentication mechanisms) are included within the concept, and therefore legal protections, of technological restriction measures. The amended UCPA also newly prescribed that offering serial codes which disable technological restriction

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measures is an act of unfair competition. We agree with the approach of the Interim Report whereby the Copyright Act will be also amended in the same way as the UCPA in light of the changing circumstances and trends. We provide more specific comments as follows.

1. Revision of the Definitions of Technological Use Restriction Measures and Technological Protection Measures

BSA agrees with the approach indicated in the Interim Report (page 73), whereby the Copyright Act will be also amended (deleting the phrase "along with" in the definition,[2] which causes ambiguity) so that it is more clear that commonly used activation methods are included in the concepts of "Technological Use Restriction Measures" and "Technological Protection Measures" (collectively, "**TPMs**"), as it has been with the revisions to the UCPA and discussions thereon. The Interim Report suggests revising the definition of TPMs to clarify that the circumvention of an activation method or the distribution of machines or programs which do so to the public will be prohibited, ensuring software rights holders' interests are protected. We appreciate such direction since software rights holders rely on the copyright system to protect their investments in developing innovative software and software-enabled services.

2. Distribution of Serial or Other Authentication Codes

The Interim Report also suggested that distributing serial codes, or other authentication or activation codes, will also be prohibited based on the UCPA's revision and discussions thereon. BSA agrees with that direction. In this regard, the amended UCPA states that offering "illicitly generated or illicitly obtained serial codes" is an "act of unfair competition" (see pages 105 and 106 of the explanatory text of the UCPA, issued by the Intellectual Property Policy Office of the Ministry of Economy, Trade and Industry),[3] since there are many cases where serial codes or decryption keys are offered to users to illicitly circumvent technological restriction measures applied to software. Furthermore, not only is offering illicitly generated serial codes be subject to the restriction, but also, illicitly offering legitimately-generated serial codes is prohibited as an act of unfair competition under the amended UCPA. The Interim Report seemed to suggest that the amended Copyright Act will similarly prohibit offering such serial codes in the same way as the UCPA's revision. If this understanding is correct, we fully support this approach. We are concerned, however, the expression of "offering illicit serial codes" in the Interim Report could be misleading, in that, it may not include cases where serial codes have been legitimately generated, but illicitly obtained or offered. Accordingly, we recommend that the final Interim Report will articulate that, not only will offering illicitly generated serial codes be subject to the restriction, but also, illicitly offering legitimately-generated serial codes will be prohibited as well.

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[2] Current Copyright Act requires that codes used for license authentication mechanisms be recorded on media or transmitted <u>along with</u> that particular software. This may mean "at the same time" or "on the same place" and causes a doubt that some commonly used license authentication mechanism would not be included in the definition of TPM under the Copyright Act.

[3] http://www.meti.go.jp/policy/economy/chizai/chiteki/pdf/20181129chikujyokaisetsur.pdf

Conclusion:

BSA appreciates the opportunity to submit our comments on the Interim Report. We hope this opinion will be useful in finalizing the Interim Report, but also more generally, we would be happy to continue to collaborate with the Agency for Cultural Affairs and other relevant agencies on copyright legislation. Please let us know if you have any questions or would like to discuss these comments in more detail.

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