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March 10, 2000

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, D.C. 20002-8002
Attention: Public Information – Public Comment

Re: **Second Revised Proposed Amendment to Implement the NET Act**

Dear Commissioners:

Thank you for the opportunity to submit these supplemental comments on the second revised proposed amendment to implement the NET Act. Consistent with the comments submitted by the Business Software Alliance and the International Anticounterfeiting Coalition, Microsoft supports Option 4, provided that the following amendments are adopted by the Commission:

1. **Application note regarding digital or electronic copies:** Option 4 should contain an application note that expressly excludes digital or electronic copies of an infringed item from the offense level decrease provided under (b)(2)(C), which pertains to infringing items that are substantially inferior in quality or performance. As noted in BSA's previous comments, digital or electronic reproductions of an infringed item are, by definition, identical to, or substantially indistinguishable from, the infringed item.
2. **Omit offense level reduction for greatly discounted merchandise:** There is no justification for an offense level reduction for greatly discounted merchandise, as provided in (b)(2)(B). Digital and electronic copies of software can be sold profitably at a "greatly discounted" price because the price of genuine software primarily reflects the cost of research and development, as opposed to the cost of manufacturing CD-ROMs or other media. In the case of digital and electronic copies, the price of the pirated media is by no means indicative of inferior quality or an obvious fake. To the contrary, digital and electronic copies are, as noted in paragraph 1, perfect or near perfect reproductions of the copyrighted work. Moreover, counterfeit copies are very often manufactured and marketed to compete with, and thus displace, sales of genuine software.

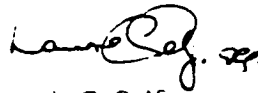
This sentencing guideline could very well result in offense level reductions for high-volume distributors of counterfeit software (which, in many cases, have ties to organized crime) vis-a-vis relatively low-volume resellers that distribute counterfeit product to consumers. As with any distribution network, the price of counterfeit product is increased as

it moves through the distribution channel. High-volume counterfeiters are able to sell copies at a "greatly discounted" price because such copies are produced in massive quantities. As these copies are resold through the distribution channel, the price increases to the point where ultimate consumers may realize a relatively low reduction in the retail price.

For example, Microsoft is now investigating a huge counterfeiting operation, in which the counterfeit wholesale distributor is able to purchase near-perfect counterfeit copies of Office 2000 for \$30 per copy and Windows 98 for \$13 per copy (in both cases, well below 25 percent of the retail price), and to sell them for \$50 and \$24 per copy respectively. In contrast, the ultimate reseller is likely to offer counterfeit copies for many times the wholesale price. If paragraph (b)(2)(B) were to be applied in this case, the wholesale counterfeit distributor (which is the more serious criminal offender) would qualify for an offense level reduction, whereas the reseller would not. This example vividly illustrates that, in the era of digital and electronic piracy, pricing bears little or no relation to the economic harm caused by the pirate or incurred by the copyright owner.

In addition to these amendments, Microsoft once again urges the Commission to adopt a specific offense characteristic for "organized schemes". The Department of Justice, FBI and U.S. Customs Service have all acknowledged the growing presence of organized crime in U.S. counterfeiting operations. We urge the Sentencing Commission to do the same and implement an SOC that complements and supports the efforts of federal law enforcement to deter organized counterfeiting operation through increased penalties.

Very truly yours,



Laurie C. Self
Counsel to Microsoft Corporation