Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	) **COMMENTS OF**
Gap in Termination Provisions	) **THE SOFTWARE &**
75 Fed. Reg. 72,711	**) INFORMATION INDUSTRY**
(November 26, 2010)	) **ASSOCIATION**

The Software & Information Industry Association ("SIIA") respectfully submits these comments in response to the U.S. Copyright Office's request for comments on the proposed regulation relating to the "Gap in Termination Provisions" published in the Federal Register at 75 Fed. Reg. 72,711 on November 26, 2010.

SIIA is the principal trade association of the software and information industry and represents over 500 companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment. One of SIIA's primary missions is to protect the intellectual property of member companies, and advocate a legal and regulatory environment that benefits the entire industry.

In the November 26th notice relating to the Gap in Termination Provisions, the Copyright Office made the following statement:

> Based on the comments received, the Copyright Office believes that there are legitimate grounds to assert that, in the case of a grant signed (or, in the case of an oral license, agreed to) before January 1, 1978 regarding rights in a work not created until January 1, 1978 or later, such a grant cannot be ''executed'' until the work exists. Therefore, the Office will record a notice of termination in such a case so long as the notice states that the grant was executed on a specified date that is on or after January 1, 1978. (*emphasis added*)

SIIA is concerned that the above underlined language in the Proposed Regulation could be construed as a merits-based determination, that could be incorrectly used by authors as authority for the applicability of section 203 of Title 17 and the shorter timeframe therein for termination rights as it relates to these "gap grants."

SIIA believes the better practice in this instance is for the Copyright Office to leave any merits-based evaluation to the courts. This would be consistent with the Copyright Office's statements that disputes regarding the sufficiency under the law of any such termination notice shall be determined by a court of competent jurisdiction. *See* Proposed Regulation 37 CFR 201.10(f)(4)

("Any dispute as to whether a document so recorded is sufficient in any instance to effect termination as a matter of law shall be determined by a court of competent jurisdiction.") and Current Regulation 37 CFR 201.10(f)(5) ("However, the fact that the Office has recorded the notice does not mean that it is otherwise sufficient under the law. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met.")

SIIA requests that the Copyright Office place a statement in the Federal Register to clarify its prior "legitimate grounds" statement referenced above. This proposed clarification statement would be to the effect that:

1. the Copyright Office notes that there are also legitimate grounds to assert that in the case of a grant signed (or, in the case of an oral license, agreed to) before January 1, 1978 regarding rights in a work not created until January 1, 1978 or later, such a grant was "executed" on the date such grant was signed and that the termination provisions of section 203 of Title 17 do not apply to any such grants;

2. the Copyright Office was not and is not making any merit-based evaluation of the arguments either way; and

3. Proposed Regulation 37 CFR 201.10(f)(4) simply would act to help preserve the filing party's rights, reserving the ultimate determination of the issue for the courts.

Dated: December 23, 2010

Respectfully submitted by:

Ken Wasch
President
Software & Information Industry Association
1090 Vermont Ave., NW, 6th Fl.
Washington, DC 20005