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## Business Software Alliance Reply The Role of Government in Protecting and promoting Intellectual Property

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The Business Software Alliance (BSA) welcomes the opportunity to respond to the All-Party Intellectual Property Group inquiry into "The Role of Government in Protecting and promoting Intellectual Property". The BSA brings together many of the world's most innovative information technology companies<sup>1</sup>. Our members have developed a range of innovations in the UK, spurred by and in reliance on the UK's robust copyright rules.

### What should the objective of IP Policy be?

BSA's view of IP policy is that it should support an environment that fosters innovation in the creative industries. The means by which this can be achieved include ensuring that strong intellectual property protection frameworks are in place, businesses and consumers are protected online, and that trade barriers that stifle growth are removed. A recent publication published by BASCAP and the ICC<sup>2</sup> noted that as "*the 'knowledge economy' advances, more and more of the value that firms and the overall economy achieve will come from high value-added intangibles—including IP in inventions, brands and works. In many companies even now, 80% or more of their market value is attributable to intangibles, including IP. In some small companies, the only value is the intellectual property they own in an exciting new innovation that they have developed. IPR has truly become an 'intellectual currency' helping to promote economic growth, company competitiveness and innovation world-wide<sup>3</sup>.*"

These general themes are reflected in BSA's own industry specific policy aspirations, which include –

- Support for copyright laws, which are essential to the health and growth of the software industry, but opposition to government-mandated

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<sup>1</sup> The Business Software Alliance ([www.bsa.org](http://www.bsa.org)) is the leading global advocate for the software industry. It is an association of nearly 100 world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward. BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, PTC, Quest Software, Rosetta Stone, Siemens PLM, Dassault Systèmes SolidWorks, Sybase, Symantec and The MathWorks..

<sup>2</sup> "*Intellectual Property: Powerhouse for Innovation and Economic Growth*":

<sup>3</sup> The Paper concludes that Intellectual property protection benefits the economy, promotes innovation, helps firms monetize their innovations and grow, helps small and medium enterprises, and benefits consumers and society.

technology standards imposed in the name of copyright protection;

- A commitment to developing a safe and legal online world through market-driven security systems and industry-led standards;
- Support for strong anti-piracy related legislation enforced by deterrent penalties (software theft costs industry billions each year – resources that could otherwise be invested in research and development of new products. Apart from this loss of revenue, such theft can lessen a nation’s industrial competitiveness and economic well-being);
- Support for an industry-led approach to developing technologies to address online content piracy, and opposition to the mandated use of any such technologies (Government’s role is to ensure that legal offerings for digital content services are facilitated); and
- Support for effective data protection legislation that establishes an appropriate national standard on data breach notification, is technology neutral, and creates market based incentives

### **How well coordinated is the development of IP Policy across Government?**

BSA recognises that the development of IP policy across Government requires a high degree of coordination, in that the effective delivery of IP policy requires action from a number of different Governmental bodies. Taking piracy as an example, Government policy should be that piracy is made as difficult, risky and unrewarding as possible, and that those who might (knowingly or unknowingly) use or consume pirated products are aware of the risks. But to be effective, this policy requires action from a number of Government bodies: including Customs (to prevent importation of pirated goods), Justice (to implement an effective civil enforcement regime), Home Office (to prioritise anti-piracy activity by law enforcement), Culture (to raise awareness as to the risks of consumption of pirated goods) and Trade (to ensure that anti-piracy action works to the best effect for consumers and business). This is not easy.

A practical example of the challenges faced by Government in coordinating IP policy was illustrated very recently by a BSA study that ranked countries’ readiness to drive the growth of an integrated cloud marketplace. BSA’s study found that a global patchwork of conflicting laws and regulations is threatening the fast-growing cloud computing market, and that to capture the full economic potential of the cloud, governments must better harmonise their policies to smooth the flow of data across borders.

This phenomenon includes the UK, which ranks seventh out of 24 countries in the BSA Global Cloud Scorecard (behind Germany, France and Italy)<sup>4</sup>.

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<sup>4</sup> The Scorecard evaluates laws and regulations in countries that together account for 80 percent of the world’s information and communications technology, and assesses their policies in seven areas: data privacy, cybersecurity, cybercrime, intellectual property, technology interoperability and legal harmonisation, free trade, and IT infrastructure.

Whilst the UK has a fairly comprehensive set of cyberlaws in place, and data protection laws are particularly strong, businesses are required to register their data sets with the regulator<sup>5</sup>, which can be an unnecessary burden on business - and may act as a barrier to some cloud services. Thomas Boué, BSA's Director of Government Affairs for EMEA has commented that *"the UK has made great progress in developing a solid policy environment to promote the full potential of cloud computing,"* but cautioned that *"a healthy national market for cloud computing does not necessarily translate into a market that is attuned to the laws of other countries in a way that lets data flow smoothly across borders. We must do more to ensure the development of a healthy global cloud computing system."*

In this regard, BSA has put forward a seven-point policy blueprint for governments around the world to expand economic opportunity in the cloud, which include protecting users' privacy while enabling the free flow of data and commerce; the provision of robust protection and vigorous enforcement against misappropriation and infringement of cloud technologies; and promoting free trade by lowering barriers and eliminating preferences for particular products or companies<sup>6</sup>. This policy – like many other IP policies – can only be delivered if there is an effective means of coordination across Government.

Providing a solution to this challenge is not straightforward, but not overwhelming either. BSA suggests that consideration be given to the published strategy of the US Office of the Intellectual Property Coordinator<sup>7</sup> and assess its value as a model for advancing and delivering UK growth, jobs and revenue. BSA also notes the suggestions made by the Alliance Against IP Theft that responsibility for creation and implementation of IP policy might be moved from the IPO, an Executive Agency, and delivered by the Department for Business, Innovation and Skills; that a Minister for Intellectual Property at Minister of State level with no other major portfolio responsibility should be appointed; regular cross-departmental ministerial meetings, chaired once a year by the Secretary of State for BIS be held; and measurements as to the contribution of IP to economic growth and the economic damage caused by IP crime be undertaken prior to implementing any significant changes to the IP framework.

### **Updating of IP Framework**

The All Party Parliamentary Group on IP observes that "there have been numerous attempts to update the IP framework in the light of changes brought about by the digital environment" and asks how "successful have

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<sup>5</sup> BSA notes that this issue will most likely be examined as part of the review of the EU Data Protection Framework, currently before the European Parliament and the Council of Member States.

<sup>6</sup> The full, 24-country rankings, including detailed findings for the UK and BSA's policy blueprint are available at [www.bsa.org/cloudscorecard](http://www.bsa.org/cloudscorecard).

<sup>7</sup> [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/organization/strategic\\_plan.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/organization/strategic_plan.pdf)

these been and what lessons can be learnt from these for policy developments”?

Over the past five years, numerous further reviews of this type have been conducted at both the UK and EU levels, including the Gowers Review, Copyright: The Future, Digital Britain, Copyright Exceptions, P2P File Sharing, and Digital Economy Act initiatives in the UK. At the EU level, this has included two separate On-Line Content consultations (2006, 2008), a Green Paper on Copyright in the Knowledge Economy (2008), a Reflection Paper on Creative Content in a Single Market (2010), the Digital Agenda and Digital Single Market Act initiatives (2010), and a consultation on review of the e-Commerce Directive (2010). These many consultations have demonstrated that the work of updating IP law to deal with modern technologies has largely been accomplished. Radical change is not needed. What does need to happen is serious, thoughtful work among the UK and EU governments on the short list of priority issues identified by BSA in its Response to the Hargreaves Consultation: in particular, that the UK should make long-awaited fixes to the damage regime to ensure that damage awards deter IP theft; and the UK Government should “lead by example” and adopt a software asset management policy that builds on the UK’s 1999 Central Computer and Telecommunications Agency’s IS Notice No. 96.

The problem – as identified above – is that attempts to reform the IP framework have been conducted in isolation by Government departments. To take the current Hargreaves process as an example – both BSA and the Alliance have drawn attention to the fact that the Hargreaves Report has a large and disappointing blind spot when it comes to both the harm caused by piracy, and the ease with which certain steps could be introduced to reduce this harm. However, were Government to recognise this in its response to the Hargreaves Report, it would require action from a number of Government Departments. This goes to the previously made observation that IP policy can only be delivered effectively if it is formulated with a cross-Government implementation plan.

### **Effectiveness of IPO**

BSA agrees with the Alliance’s view that the IPO should be the pre-eminent champion in Government of intellectual property and the value and contribution IP rights make to the economy and society.

The UK IP Office’s programs for training and awareness raising among SMEs and the public more generally with respect to various aspects of intellectual property are of vital importance. The UK’s SME-related web-based sites and other IPR information programs are world class, and should be championed elsewhere. The training programs that the IPO has offered for SMEs in particular, as to how the IP system works and how to protect their innovations, are of particular value. However, public understanding of the reasons and importance of IP for the economy, innovation and society more generally needs to be improved, through co-operative campaigns among the

IPO and various IPR-dependent sectors.

### **International Coordination**

The IPO has a published position regarding international coordination, being "The UK's International Strategy for Intellectual Property" (published in May, 2011). BSA awaits with interest the outcomes and outputs of this strategy.

The All Party Group notes that "*UK IP policy sits within European and supranational agreements*", and asks how the UK government "*should coordinate its policy at an international level and what should it do to promote IP abroad to encourage economic growth?*" In this regard, we would like to express our concern regarding one specific Government policy, which BSA believes will not only undermine creativity in the UK, but is also inconsistent with EU legislation.

The issue concerns public procurement, and the Government's efforts to define "open standards". Despite the withdrawal of PPN 3/11 on open standards, the UK government has opened a public consultation aiming at defining what open standards are. Worryingly, the Consultation includes as a starting point a definition of "open standard" that includes a mandatory royalty-free attribute.

BSA supports the Government's goal of obtaining the best value for money when purchasing IT software and technology products. However, it has deep concerns with the procurement policy's definition of "openness", which, if adopted, will require industry to give up its intellectual property. The desire to reduce public procurement expenses in the UK does not justify the adoption of a policy which will undermine the value of intellectual property and stifle innovation. This policy threatens IP-intensive jobs at home and abroad - it will cost jobs for UK companies who rely on their IP, and threaten UK companies abroad if foreign governments emulate similar policies. IP protection is as important for SMEs as it is for large companies.

Such a policy would set a harmful precedent that could be emulated by other countries. The Chinese government suspended a similarly harmful procurement policy (the 'NIIP' or Notice on the 2010 National Indigenous Innovation Product Accreditation Work) following public opposition from the US and the EU. The proposed UK policy is likely to reignite the NIIP debate in China.

The policy also runs counter to national and international standardisation efforts, and is arguably inconsistent with EU legislation – the overwhelming majority of technology standards currently in use by the Government and developed by UK and international Standardization bodies (including BSI and ISO) fail to meet the UK Procurement Notice criteria. EU legislation - and in particular the proposed EU Regulation on the ICT standardization - specifically recognises the importance of FRAND licensing. The UK Government should do likewise.

## Enforcement

The All Party Group observes that “protecting, and enforcement of, the IP framework often sits in very different departments to those that develop IP policy and those that have responsibility for the industries most affected. What impact does this have and how can it be improved?”

As mentioned above, it can have a major impact. Damages are a perfect example of how the absence of any coordination has entrenched the harmful rates of piracy (and unacceptable levels of less attendant on those rates) for a number of years. The Enforcement Directive specifies that “remedies shall be effective, proportionate and dissuasive”<sup>8</sup>. This includes “damages” remedies, which a court may award to an intellectual property rights (“IPR”) owner if that owner’s rights are infringed. In turn, this reflects the 1996 TRIPS Agreement, which required that such “remedies [should] constitute a deterrent to further infringements”<sup>9</sup>. In 2006, a UK Government backed review of intellectual property issues<sup>10</sup> took the view that “damages awards should act as a disincentive to infringement”, and recommended that a review be undertaken to ensure that an effective and dissuasive system of damages existed for all civil IP cases. This review took place following the UK Government’s implementation of the Enforcement Directive. Since then, nothing meaningful has taken place. This is despite a UK Parliamentary Committee recognising that the “deterrent effect of the present law in this respect is near zero: it should be substantial, as are some of the illicit profits being made”<sup>11</sup>.

The Government should also ensure that civil ex parte searches are affordable by all. Civil procedure rules require that supervising solicitors be present at ex parte civil searches. This requirement drives up the cost of civil searches, and puts the remedy beyond all but the largest right holders. We encourage the Government to remove this requirement, or to replace it with a less expensive option such as the use of bailiffs during searches.

BSA would welcome the opportunity to discuss any of the issues raised above.

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<sup>8</sup> Enforcement Directive, Article 3(2)

<sup>9</sup> WTO TRIPS Agreement, Article 41(1)

<sup>10</sup> 2006 Independent Review into Intellectual Property (Gowers Review)

<sup>11</sup> Culture, Media and Sport Select Committee, 2007