



30 October 2012

Mr D V Prasad  
Joint Secretary  
Department of Industrial Policy & Promotion (DIPP)  
Government of India  
Ministry of Commerce & Industry  
New Delhi 110011

**Subject: BSA's Submission on the draft  
National IPR Strategy  
as prepared by the Sectoral Innovation Council on IPR**

Dear Sir,

We are pleased to write to you as BSA | The Software Alliance.

BSA | The Software Alliance ([www.bsa.org](http://www.bsa.org)) is the leading global advocate for the software industry. It is an association of more than 70 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, Sybase, Symantec, and The MathWorks. BSA's member companies invest billions of dollars a year in local economies, creating jobs, and next-generation solutions that will help people around the world be more productive, connected and secure.

We write to you with respect to the *Draft National IPR Strategy as prepared by the Sectoral Innovation Council on IPR* (the 'Draft Strategy'), released for public review and comments. At the outset, we congratulate the Department of Industrial Policy and Promotion (DIPP) for taking the initiative to establish the Council to develop a cohesive national policy dealing with intellectual property issues. The initiative is both timely and significant as local Indian innovators are increasingly seeking protection for their works both in India and abroad. A globally harmonized system will augur well for domestic and international industry.

Given that the policy and implementation of the intellectual property regime in the country is currently governed and/or controlled by a number of different ministries and departments, there has been a lack of cohesion at the national level. In this context, the initiative of DIPP in

developing a national policy relating to intellectual property is of particular importance. Such a policy would aid the development of a competitive intellectual property environment in India that will bolster innovation and economic growth.

The importance of having a robust and cohesive intellectual property regime in the country cannot be underplayed, and as such, BSA is delighted to have the opportunity to submit for consideration its suggestions for development of a national policy on intellectual property.

BSA and its members are particularly pleased that the Draft Strategy recognises the importance of IP literacy and educational campaigns, as well as the need to strengthen the institutional set up to improve enforcement of IP. We agree strongly with these goals.

However, BSA also has some concerns about the content of the Draft Strategy, and believes that there are opportunities to enhance this framework so as to help India fully leverage the potential benefits of intellectual property. We respectfully offer our suggestions in this submission.

## **Concerns and Recommendations relating to the Content of the Draft Strategy**

### **1. Protection and Enforcement of All Forms of Intellectual Property**

BSA is pleased that the Draft Strategy recognizes the need to strengthen the protection of intellectual property. However, in the interest of truly strengthening the protection of intellectual property and enforcing intellectual property rights, BSA strongly recommends that the Draft Strategy deal with the subject in a more detailed and elaborate fashion. While the rate of software piracy in India has come down in recent years, recent studies indicate that it is still at a high rate of 63 percent, representing nearly US\$3 billion in unlicensed software use. This level of piracy undermines the growth of the software industry in India, has negative implications for IT company revenues and results in significant tax losses to the state exchequer. A study conducted by research firm IDC examining the direct and indirect tax implications of software piracy in India found that it cost the State exchequer \$866 million in tax receipts in 2009.<sup>1</sup> Software piracy is also associated with a host of other problems including increased cyber-security risks and productivity losses through piracy.

In light of the considerable damage wrought by piracy to the industry, BSA offers the following recommendations to curb software piracy:

#### **i. Cover Software Piracy under State Anti-Piracy Statutes**

For example, BSA would specifically like to highlight the existing situation with reference to the so-called Goondas Acts to which Paragraph 41 of the Draft Strategy makes reference.

Unfortunately, software piracy does not fall within the purview of these Acts, which have

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<sup>1</sup> IDC Study: Software Piracy In India: Costing Millions To State Exchequer In Tax Losses, 2011.

been passed by a number of states that recognise the link between piracy and organised crime. These statutes have tended to focus on the piracy of films and music, to the exclusion of software piracy.

In view of the rampant piracy prevalent in the country, BSA recommends that software piracy be included under the purview of State Anti-Piracy Acts, on an equal footing with other IP crimes. Such inclusion and due consideration to the menace of software piracy will go a long way in cleaning up the criminal elements involved in this illegal trade, which is hampering the growth of the software industry in India.

BSA recommends that the following acts related to the illegal trade of software piracy be brought under the purview of State Anti-Piracy Acts:

- a. Act of copying and duplicating of pirated or unlicensed software
- b. Act of selling and distribution of pirated or unlicensed software
- c. Act of knowing use of pirated or unlicensed software
- d. Act of giving on hire or rental of pirated or unlicensed software
- e. Act of importing and exporting of pirated or unlicensed software

Given India's global leadership in the field of information technology, the strong implementation of State Anti-Piracy Acts, covering all forms of piracy including software piracy, would encourage good software asset management practices in companies and organizations.

## ii. Address Lacunae in Copyright Law

We appreciate the government's recent effort to update and amend the Copyright Law. Some important changes were made during this process that will improve copyright protection for software. However, there are some additional changes that are needed. The Indian copyright law does not deal with issues such as statutory damages, the compounding of offences, and temporary reproduction, which would support the intellectual property owners in protecting the copyright vesting in their software.

- a. **Statutory Damages:** One of the biggest criticisms/drawbacks of the country's justice delivery system is that there is a lack of statutory damages for copyright infringement. Damages may be extremely difficult to compute and, most importantly, prove in a litigation scenario, particularly considering that the infringer maintains no accounts and infringement is most often clandestine. It is in this context that the provision of statutory damages becomes imperative so that the copyright owner merely needs to prove infringement; the statutory damages provided would automatically be awarded.
- b. **Compounding of Offences:** In order for the offence of criminal copyright infringement to be compoundable, the power of compounding must either be provided in the Criminal Procedure Code or in the Copyright Act.

Unfortunately, neither statute does so, and the only option for the infringer and the copyright owner is to approach the concerned High Court for the quashing of proceedings, which is entirely at the discretion of the court. In order to enhance the possibility of cases of criminal copyright infringement being brought to a speedy and logical conclusion, BSA recommends that the law be amended specifically to provide for the compounding of such offences as a matter of right.

- c. **Temporary Reproduction:** Section 52(1)(z) of the Copyright Act envisages the making of ephemeral reproductions of a broadcast, for archival purposes. Further, Sections 52(1)(b) and Section 52(1)(c) refer to the transient and incidental storage of works. As such, Indian copyright law is conscious of ephemeral and transient copies. In the past, one has argued that Indian law makes no distinction in Section 14 between temporary and permanent reproduction and that consequently all forms of reproduction, be it permanent or temporary, are covered. The ideal scenario, however, would be for the law to expressly recognize both permanent and transient reproduction within the reproduction right, and BSA recommends that steps be taken to do so.

### iii. **Take Additional Legal Measures to Combat Piracy (Focusing on Software)**

#### (a) **Changes to the Tax Regime**

- i. *Amend the Indian tax laws to classify software piracy as a form of tax evasion, and define corresponding tax violation rules along the lines of International best practices*

A number of European and Latin American countries have introduced the auditing of intangible assets through tax audit programs. India could take a cue from these programmes so as to ensure that engaging in software piracy is treated in the same manner as tax evasion in India.

- ii. *Empower governmental tax inspectors, external and internal auditors to check and account for genuine software licenses inside public and private limited companies alike*

It is recommended that India adopt mechanisms which allow for the inspection and auditing of external and internal IP audits. Further, such audits must be evidenced in the annual reports of entities, and auditors must be enabled to audit software licenses while tax auditing. An external auditor can ensure compliance with IP laws, and thus avoid having the State exchequer sustain losses. Pertinently, an analogous practice is followed in Germany.

#### (b) **Corporate Disclosure Rules and Software Audits in Companies**

In addition to declaring compliance with copyright laws in their annual reports, BSA

recommends that corporate governance of companies be enhanced by requiring that they also declare genuine software licenses in their annual reports.<sup>2</sup> Existing disclosure requirements are not sufficient to focus board or auditor attention on whether only genuine/original software is being used or on whether such software is used consistently with terms of relevant licenses. Hence, they do not typically result in users instituting internal controls that ensure, in a standardized manner, that these factors are satisfied. Nor do applicable accounting standards provide an adequate impetus to address them.

Enhancing the visibility of software license-related expenditure in annual financial accounts would also lead to self-regulation around usage of licensed and legitimate software, with flow-on effects to the quality and accuracy of financial accounts. It would also lead to increased tax collection by the Government as a result of increased software sales.

Consistent with enhancing these requirements, BSA recommends amending the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply.

Specifically, BSA recommends the following:<sup>3</sup>

- i. **Internal control over purchase/sale under Clause 4(iv) of Companies (Auditor's Report) Order, 2003 (CARO):** the requirement would be extended to include intangible assets, including computer software. Auditors would be required to comment on adequate internal controls over purchase, sale and consumption of software licenses, as well as the presence of unlicensed and/or under-licensed software (which results in lower tax collection revenue).
- ii. **Maintenance of Intangible Asset Register under Clause 4(i)(a) of CARO:** the requirement would be extended to include details of computer software licenses, with details such as the date of acquisition, any applicable validity period, vendor, serial number, number of users, and amount of expenditure incurred.
- iii. **Physical Verification of Fixed Assets under Clause 4(i)(b) of CARO:** The requirement would be extended to require a reconciliation of software license use against license entitlement, with discrepancies being reported to responsible management for appropriate remedial action. In addition,

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<sup>2</sup> BSA has a technical paper on proposed changes that has been submitted previously to the Government and that it will provide to readers of these comments upon request.

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companies would be required to disclose the number of active computers deployed within their operations as part of the notes to the fixed assets schedule in the company's annual report.

- iv. Section 217(2AA) of the Companies Act – Director's Responsibility Statement:** The requirement would be extended to require directors to comment on the software license compliance position of the company. This would make directors responsible for implementing appropriate internal controls around the purchase and use of genuine software. The value of this recommendation is worth noting in light of the criminal liabilities which the Copyright Act, 1957, prescribes under Section 69 – "*Offences by Companies*", holding the officers of the company criminally liable for copyright infringement liable for copyright infringement.

**(c) Establish a National Intellectual Property Enforcement Taskforce**

BSA is pleased that the Draft Strategy recognises the importance of creating a National Intellectual Property Enforcement Taskforce, and would like to voice its wholehearted support for this proposal. The enforcement of intellectual property is currently handled by the State police (local police or State crime branches), the Central Bureau of Investigation (which deals with certain exceptional cases involving high-end crimes), and Customs.

Considering that each of these enforcement agencies operates relatively independently, it is critical that a National Level dedicated IPR Enforcement Task Force be formed. This is especially needed since the operations of those involved in piracy often cross not only state lines within the country but also international borders. The lack of National Level coordination therefore severely impedes the enforcement of intellectual property rights in India.

**(d) Intellectual Property Enforcement Training and Education**

In light of the fact that intellectual property enforcement is a field which sees rapid changes, especially given how closely tied to technological developments it may be, it is essential that those involved at every level of the protection and enforcement of intellectual property rights have proper training and sensitization to the particular issues involved. To realise this end, BSA would like to recommend that measures be taken for:

- a. Specialized training and improving judicial capacity in the field of IP
- b. Establishment of IP education courses in all judicial academies
- c. Independent and neutral expert assistance program to the IP benches
- d. Inter-jurisdiction judges exchange program on IP law

Also, from a software perspective, it is important for the police to be trained to recognise software piracy, and in particular, what is now being termed "high-end

piracy” (where lookalikes of genuine software are sold to customers who sometimes buy it under the impression that they are buying original software).

Without specialised training, it may be virtually impossible to detect differences between legal copies of software and copies which are the products of high-end piracy. As such, with the requisite training, police would have the ability to combat high-end piracy in an effective and efficient manner.

Given that intellectual property crime involves its own set of peculiar features which are unique to it, BSA would like to recommend:

- a. The formation of specialised police teams,
- b. The appointment of special prosecutors, and
- c. The creation of special IP benches in High Courts, and special IP courts.

Such measures would help to ensure that intellectual property crimes could be dealt with efficiently by persons who are familiar with the specific issues involved.

In courts, the dedication of resources to deal with offences relating to Intellectual Property would not only hasten the disposal of cases but would also help to increase the conviction rate.

## 2. A National Intellectual Property Council (NIPC)

In addition to the formation of a National Intellectual Property Enforcement Taskforce, BSA would also like to recommend that a **National Intellectual Property Council (NIPC)** be set up under the Prime Minister’s Office (PMO), with the following terms of reference:

- a. To liaise with the key ministries and key Government agencies under the direction and control of PMO;
- b. To monitor the implementation and execution of the National IPR Strategy;
- c. To commission research reports/papers/commentaries/fact sheets;
- d. To provide advice and guidance to the Government and industry; and
- e. To submit periodic progress reports to the PMO and the Cabinet.

The NIPC could comprise six to eight members — with a maximum term of three years — drawn from industry, the legal community, and academia from across industry by the PMO.

The NIPC would be an advisory organization able to keep track of the implementation of the National IPR Strategy, and help to bring about more coordination and coherence in the intellectual property regime in India, which is currently governed by several different ministries overseeing different intellectual property rights.

## 3. The Use of Legal Software and Best Practices

Currently, although government departments are encouraged to use legal software, there

are no concrete procedures in place to ensure that only legal software is used by the government. Apart from concerns relating to the violation of intellectual property rights involved in the use of pirated software, there are also issues of cyber-security involved. Given the critical and often sensitive nature of governmental operations, it is imperative to ensure that the computer resources and networks of the government are secure. The use of legal software goes a long way in helping to ensure that the necessary security is maintained since legal software is not as vulnerable to cyber attacks as pirated software.

BSA would like to recommend that the Draft Strategy not only recognise the importance of using genuine and legal software but also develop a framework within which the use of such software becomes the norm in both government and the private sector. To this end, BSA recommends that:

- The Draft Strategy contain a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in government, protect government system from security vulnerabilities and send a strong message about the importance of software license compliance to the private sector; and
- The Draft Strategy clearly recognise the importance of implementing Software Asset Management (SAM) best practices in government and of promoting these practices with private enterprises.

BSA and the Department of IT established a roadmap for promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA's new Certified in Standards-based SAM for Organizations (CSS(O)) program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

According to the Information Technology Infrastructure Library (ITIL), SAM is defined as “All of the infrastructure and processes necessary for the effective management, control and protection of the software assets throughout all stages of their lifecycle.” The life cycle includes the stages starting from the acquisition of software, its deployment, its maintenance and its retirement. SAM helps enterprises to enhance productivity, increase security and reduce financial and legal risk and eventually reduces usage of pirated software within the organization. This is especially true in the case of software piracy in enterprises which results from the under-licensing<sup>4</sup> of software, mis-licensing<sup>5</sup> and client-server overuse.<sup>6</sup> SAM enables organizations to ensure that there is a balance between the number of software licenses purchased, the number of users, and the

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<sup>4</sup> Under-licensing software is when an enterprise buys a lower number of original licensed copies of software than they need. In such cases, under-licensing of software may take the form of making illegal copies of software from legal copies or overusing an existing license.

<sup>5</sup> The mislicensing of software involves the misuse of Volume License Keys (VLK) of the software program. For example, a unique key may be issued to customers who enter into volume licensing contracts. Once the company's license key leaks, it is used to facilitate counterfeiting by “unlocking” the software repeatedly.

<sup>6</sup> Client-server overuse involves having more employees on a network simultaneously use a central copy of a software program than the licence the enterprise has acquired permits.

number of actual copies of software installed.

SAM programs range from user-implemented and verified programs, to programs with various levels of rigor by third party auditors. The appropriate level tends to differ depending on the size and complexity of an organization, with the highest level being an ISO-aligned standards-based SAM certification.

#### **4. A Free Market and Non-Discrimination**

It is imperative that efforts to strengthen intellectual property in India are not accompanied by measures that favour some forms of IP or rightholders over others. A free market with a level playing field for all those dealing with IP will help stimulate innovation and India's economy, and in particular, its IT sector, as well as help ensure that Indian consumers have the greatest possible choice of products.

It is with this in mind that BSA would like to highlight Paragraphs 33 and 56 in the Draft Strategy, which appear to 'prefer' open innovation and to conflate open source and open standards, respectively.

The open source and commercial software approaches each have their own strengths and challenges, and can bring to users a number of benefits along with tradeoffs, depending on the circumstances in which they are deployed. In practice, a preference policy interferes with free competition in the market without necessarily bringing about the benefits that may be expected, such as cost savings, and the avoidance of vendor dependence. As such, it is important that the Draft Strategy not discriminate between the various business models employed by members of the industry. Free and fair competition has helped foster innovation and product development.

BSA also notes with concern that Paragraph 33 of the Draft Strategy contains a clear indication that an objective of the IPR strategy is to grant preferential treatment to Indian entities. When this is read with Paragraphs 43 and 55, it appears that there is a thread running through the Draft Strategy which involves the grant of preferential treatment to Indian players in the market. Technology innovation is, however, best accomplished in a healthy, competitive and diverse marketplace that allows companies to develop and grow according to their own strengths and capabilities. In fact, the competition between different providers makes industry especially responsive to the needs of consumers, and ultimately benefits consumers with greater choices and better pricing options.

Non-discriminatory procurement policies of organizations and Governments have a key role to play in maintaining the diversity that is essential to the growth of industry and technology innovation. On the other hand, preference policies stifle innovation that is essential to ensuring the growth of industry.

It is therefore critical that the Draft Strategy not discriminate between various players in industry whether on the basis of the business model they follow, on the basis of their place of origin, or on the basis of the type of technology they employ.

## 5. Intellectual Property Awareness and Sensitisation

BSA is pleased the Draft Strategy calls out the need to increase awareness of the importance of protecting intellectual property rights. We recommend this be done not only through the incorporation of the subjects in educational institutions, but also through the conduct of campaigns to bring awareness of intellectual property rights throughout society including amongst:

- Businesses, including MSMEs, so that they are able to leverage and exploit their intellectual property assets in the best possible manner;
- The judiciary and enforcement agencies to enhance effective protection and enforcement of intellectual property rights in India;
- Academia, in particular, to encourage the licensing of intellectual property and technologies developed in institutions; and
- The general public, to increase awareness relating to intellectual property rights, and, specifically with relation to software, to increase awareness relating to the importance of using genuine copies of software to avoid both legal and security risks.

Presently, a large number of organizations and consumers are not familiar with the various legal, financial and security threats that can arise due to the use of pirated software. Piracy reduction campaigns can only be successful by co-ordination between departments. The ultimate objective is to get larger numbers of people to use legal software so that in time it becomes a norm to do so.

The promotion of public awareness may be achieved by conducting campaigns in which the public and private sectors cooperate. Such campaigns conducted under the public-private partnership model would ensure that inputs are taken from all the players involved.

## 6. Utility Models

BSA is concerned about the proposal to introduce a utility model system into India. Even though Paragraph 48 of the Draft Strategy recognises that sectoral exemptions may be adopted, we are concerned that the merits of introducing a legal framework for Utility Models in India may be outweighed by the potential of such a framework being abused. For the following reasons, we suggest that the adoption of a Utility Model system may not be ideal for India at this stage.

- i. If the Utility Model system is implemented in India, the Indian Patent Office would be challenged in dealing with the influx of applications due to manpower constraints. Even if the Utility Model system did not require a substantive examination of applications but required merely novelty for registration, there would still be a need to conduct prior art searches to assess novelty. This in

itself is a gargantuan task which would require considerable time to be expended in studying the relevant material including prior art.

- ii. Discarding the “non-obviousness” requirement of patent law could lead to almost every aspect of technology being covered by some form of proprietary right. Consequences of this could include hampering the course of future scientific progress, *inter alia*, by the resultant shrinkage of the “intellectual commons”.<sup>7</sup> This is because each technological component would become proprietary, and need to be separately licensed.
- iii. Introduction of Utility Models could lead to a situation where incremental innovations to technologies patented under the Patents Act, 1970, could be protected through the Utility Model route.<sup>8</sup> This may not only contribute to the shrinkage of the “intellectual commons” referred to earlier, but also facilitate the circumvention of restrictions inherently associated with other forms of IP, such as the non-patentability of incremental innovations under the Patents Act. Thus, the adoption of the Utility Model system in India could create a new right which may not be challengeable either before or after its grant, in the manner in which the grant of patents is challengeable. Therefore, the adoption of a Utility Model system may not be ideal for India at this stage.

## 7. Patentability of Software

Software *per se* is not patentable in India; Section 3(k) of the Indian Patents Act, 1970 explicitly states that “a mathematical or business method or a computer programme per se or algorithms” cannot be patented. In practice, this has been construed to mean that software may never constitute a patentable constituent even if it forms part of a patentable system. In other words, the ingenuity of the invention shall not lie in the use of the software. However, the implementation of this interpretation is not entirely clear. It is pertinent to note that the underlying object flows not from the Patent Manual but from the Patents Act which expressly bars the grant of patents to protect software *per se*. One of the primary reasons why India is considering bringing in a Utility Model system is to spur domestic industry. Considering that software is a cornerstone of the Indian economy, BSA would like to submit it would be worth according adequate functional protection to software as well. Pertinently, TRIPS allows countries to explore their own solutions to provide incentives to innovation in all spheres, and as such, such steps would not be beyond the scope of India’s ability to structure its own law in accordance with its obligations under international law.

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<sup>7</sup> Technology which is available for public use free of cost and proprietary restrictions.

<sup>8</sup> This is evidenced from the Chinese and Taiwanese experience.

## **Conclusion**

The recommendations outlined above can help to significantly curb piracy. We respectfully urge you to consider incorporating these recommendations into the Draft Strategy.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Lyn Boxall', written in a cursive style.

(Mrs) Lyn Boxall  
Managing Director, APAC