June 3, 2016

Intellectual Property Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear sir / madam,

RE: BSA COMMENTS ON INTELLECTUAL PROPERTY ARRANGEMENTS DRAFT REPORT

BSA | The Software Alliance ("BSA") appreciates the opportunity to submit comments on the Productivity Commission's April 29, 2016 Draft Report on Intellectual Property Arrangements ("Draft Report"). BSA is the world's leading advocate for the software industry. Our members are some of the most innovative companies in the world.[1] Patents are a key way that BSA members protect their groundbreaking innovations. Ensuring governments around the world adopt patent policies that promote innovation is therefore a critical part of BSA's mission.

BSA supports the Commission's goal of fostering an Australian innovation system that encourages investment in research and development that would not otherwise occur and that facilitates follow-on innovation, competition and access to goods and services. While we share these objectives, BSA strongly disagrees with several of the recommendations in the Draft Report, particularly with respect to patentability of software-enabled inventions and protection of technological measures that are used to adapt products to the needs and requirements of a specific national market, which would not achieve the articulated goals.[2]

Patentability of software-related inventions

Software innovation is a driving force of our global economy. Software-enabled inventions touch upon a wide array of industries. Over the last several decades, we have seen incredible advances in lifesaving diagnostics, advanced mining exploration techniques, and groundbreaking manufacturing processes, to name just a few. And much of the innovation in these fields is facilitated by dramatic advances in software. Software enables creators to develop state-of-the-art innovations with speed and flexibility. Improvements to machinery or processes that, in the past, could have only been implemented by creating a new machine, can now be enabled by installing improved software.

Patents play an important role in spurring these technological advancements. Patents for software-related inventions provide an important incentive for software developers, both big

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[1] BSA's members include: Adobe, Amazon Web Services, ANSYS, Apple, ARM, Autodesk, AVEVA, Bentley Systems, CA Technologies, Cisco, CNC/Mastercam, DataStax, Dell, IBM, Intel, Intuit, Microsoft, Minitab, Oracle, PTC, SAS Institute, Siemens PLM Software, Splunk, Symantec, Tekla, The MathWorks, Trend Micro and Workday.

[2] BSA filed comments with the Australian Council for Intellectual Property on September 28, 2015, addressing the role of the Innovation Patent System. The comments highlighted the view of some BSA members that the Innovation Patent System encourages innovators to differentiate the features available in their products, which ultimately benefits Australian consumers.

and small to invest in research and development. Patent protection gives creators confidence that their investments will not simply be stolen by their competitors. Patent protection enables the software industry to invest billions of dollars in research and development every year.[3]

As discussed above, however, it is not only the software industry that benefits from patent protection for software-enabled inventions. Virtually every industry in the world has seen dramatic advancements because they are using software in ways unimaginable just a few years ago. Ensuring that patent protection is available for all of these fields of technology is vital. Thus, comprehensive and balanced patent protection for software-enabled inventions is key to achieving this goal.

In our view, the Commission's recommendation that Australia should ban the availability of patent protection for software-enabled inventions is based on incorrect assumptions and conclusions. We address these assumptions below.

First, the Draft Report conflates business method patents with patents for software-enabled inventions. Methods of doing business and software inventions are simply not the same thing. While a subset of patents that incidentally include software may relate to business methods, conflating the two terms leads to confusion and inaccurate conclusions. Unfortunately, the Draft Report intermingles the two terms. Business method patents typically include describing a method for conducting some type of business activity. These patents often do not even require that the method actually occur on a computer. By contrast, patents on software-related inventions encompass an unlimited number of technology fields that are intended to function in a computing environment.

While the Draft Report acknowledges that it is difficult to define the term "business method patent" and that software innovations are found in virtually every industry, it ignores these facts when it concludes that Australia should outlaw patents for business methods and software innovations.

It may be accurate that obvious or completely abstract business method patents have been improperly used by patentees to hinder other innovators, but the Draft Report inexplicably extends this conclusion to patents for all software-enabled inventions. Thus, the Draft Report relies on statistics and studies that focus on patents related to business methods to incorrectly conclude that Australia should abolish patents for software innovations.

Second, the Draft Report incorrectly argues that there is a global trend away from allowing patents for software-related inventions. There is actually a growing global recognition of the important role that patents for inventions involving software play in our innovation ecosystem. Europe, the United States, and China, among others, allow for the patenting of software-enabled inventions. While these countries have each, in their own way, limited the patenting of pure business methods, they have all affirmed that software innovations are patentable. As the Draft Report acknowledges, Europe has always allowed such patents so long as the patentee can show a "technical effect." China has a somewhat similar standard. The United States also allows for the patenting of software-enabled inventions, as evidenced by the recent Federal Circuit case *Enfish v. Microsoft.* In this case, the court affirmed that patents related to "self-referential databases" were subject matter eligible. Thus, the global trend is toward awarding patents for software innovations.

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[3] http://www.strategyand.pwc.com/global/home/what-we-think/innovation1000/rd-intensity-vs-spend-2014

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Page **2** of 4

Third, the Draft Report awkwardly tries to draw a distinction between embedded and non-embedded software, drawing the incorrect conclusion that embedded software may be patentable but non-embedded should not. As an initial matter, there is not a true distinction between the two categories of software implementation. In today's world, even machines that contain embedded software will also have the ability, and will oftentimes need to have this software updated or replaced. Furthermore, this argument in the Draft Report highlights one of the great innovative features of today's software. No longer do we need to physically design a machine so that it operates for a single purpose and cannot be changed without physically replacing its circuitry. Today's software enables machine operators to change or improve the operation of the machine by improving the software instead. This can save large amounts of time and resources for machine operators. Hindering incentives to innovate in this area by eliminating patent protection would have serious negative consequences throughout the economy, and thus would not be limited to the software industry alone.

Fourth, the Draft Report argues that small- and medium-sized enterprises (SMEs) do not need patent protection. In reality, patent protection is often essential for the survival and growth of SMEs. Without patent protection, SME's have no ability to prevent larger competitors from using their innovations without permission. Larger competitors often have a greater ability to get to market faster, they have an existing customer base, and they can produce the innovation at a large scale in a relatively quick manner. These advantages already make it very challenging for an SME to compete. Eliminating an SME's ability to protect its innovations, due to the lack of patent protection, could be devastating to the SME.[4]

The Draft Report makes several other assumptions that are not borne out by the facts, and which contribute to a recommendation that could significantly harm innovation and consumer welfare in Australia. For instance, the Draft Report concludes that patents for software-enabled inventions hinder incremental innovation, despite the innovation that has clearly been occurring over the last decade.[5] The Draft Report also asserts that trade secret and copyright protection are sufficient to fully protect software innovations, even though patents provide the protection that stimulates the research and development in software.[6] Finally, the Draft Report criticizes the gap between what Australians pay to license software from overseas and what they receive from licensing software. But consumer software licenses are focused on copyrights and trademarks, and therefore are inapplicable to patent protection.

Geoblocking Promotes Adaptation to the Needs and Requirements of a Market

Licensing-based distribution models, and the adaptation of products to the needs and requirements of a specific national market, provide substantial consumer benefits. This adaptation helps businesses ensure that their products and services comply with the laws of each country in which they do business. For instance, customers in Australia legitimately expect information technology suppliers to ensure that their products and services comply with local

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[4] Patents increase a startup's fund raising ability, which makes it more viable. Venture capitalists are likely to assign a higher valuation to startups that hold patents. Ronald J. Mann & Thomas W. Sager, Patents, Venture Capital, and Software Start-ups, 36 Research Policy 193 (2007).

[5] The Report uses the example of six full new versions of the Android operating system being released between 2008-2015. This fact alone undermines the concept that incremental software development has been impeded by the wide availability of patents for software-enabled innovations.

[6] Society benefits from the public disclosure required under patent law, while it does not get the same advantage from trade secrets that, by definition, must be kept confidential. Further, copyright protects only the exact expression, not the functionality of an invention.

laws, such as consumer laws, export- or import-control rules and applicable privacy laws, and with sector-specific regulatory requirements (e.g., in the healthcare or education sectors). In order to assure this compliance with regulatory and legal requirements in various countries, however, companies must have the ability to restrict certain versions of products and services to specific markets.

Because these practices can be difficult to enforce, companies often adopt technological measures as a means to protect the integrity of their licensing and product localization efforts. Rules that prohibit users from circumventing such technology give businesses greater confidence that their licensing and localization efforts will be respected, and thus promote greater flexibility and choice in licensing-based business models and greater consumer access to online content and services. If users are free to circumvent, rights holders will lose their ability to control effectively the distribution of localized versions of their works, and many of these consumer and economic benefits could disappear.

The net result of rules making it easier to circumvent such technologies would be less innovation and fewer choices—the opposite result of what the Draft Report seeks. Indeed, Australia's recognition of the benefits of these technologies are reflected in various international trade agreements to which Australia is a party, including the U.S.-Australia Free Trade Agreement and the WIPO Copyright Treaty, as well as the pending Trans-Pacific Partnership Agreement. BSA therefore opposes the recommendation for a blanket exception to permit circumvention of geoblocking technologies.

Conclusion

BSA appreciates and supports the Commission's objectives. The IP system works best when it encourages and rewards inventions and creativity in a manner that facilitates follow-on innovation, competition and access to goods and services. In our view, representing some of the most innovative companies in the world, the Draft Report's recommendations on patentability of software-enabled inventions and geoblocking would not achieve these objectives. We look forward to working with the Commission to promote an IP system in Australia that encourages innovation and provides the best products and services to Australian consumers.

Yours faithfully,

Boon Poh MOK
Director, Policy – APAC
BSA | The Software Alliance