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Business Software Alliance Response to the UK's Consultation on Copyright

The Business Software Alliance (BSA) welcomes the opportunity to respond to the UK Government's Consultation on Copyright. The BSA brings together many of the world's most innovative information technology companies.¹ Our members have developed a range of innovations in the UK, spurred by and in reliance on the UK's robust copyright rules.

BSA members share the view that:

- **There is a strong link between copyright protections and creativity, innovation and economic growth.** This conclusion is borne out by the direct experience of our companies. It is also buttressed by numerous studies that have shown that effective, balanced IP protections, such as those in the UK, help create economic opportunities and drive competitiveness.²

- **The UK's existing copyright regime strikes an appropriate balance between facilitating innovative behaviour and protecting the resulting innovations. We thus see no need for major reforms.** Our member companies have conducted R&D and commercialised their innovations in the UK for decades. They view the UK's copyright regime as among the best in terms of promoting business growth and enabling innovators to bring their ideas to market. As a direct result of the regime's effectiveness, the UK IT industry is a dynamic sector that

¹ The Business Software Alliance (www.bsa.org) is a trade association for the software industry, working in 80 countries in and outside of Europe to expand software markets and create conditions for innovation and growth. BSA's member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected and secure. BSA members include Adobe, Altium, Apple, Asseco Poland S.A., Attachmate, Autodesk, Autoform, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, CNC/Mastercam, Dassault Systèmes SolidWorks Corporation, DBA Lab S.p.A., Intel, Intuit, Mamut, McAfee, Microsoft, Minitab, NedGraphics, O&O Software, PTC, Progress Software, Quark, Quest, Rosetta Stone, SAP, Scalable Software, Siemens, Sybase, Symantec, Synopsys, Tekla, and The MathWorks.

² See, e.g., World Economic Forum Global Competitiveness Report 2009-2010 at <http://www.weforum.org/document/CFR09/index.html> (confirming that the strength of a country's IPR regime is linked to economic competitiveness), Cavazos Cepeda, Lippoldt, Senft, *Policy Complements to the Strengthening of IPRs in Developing Countries*, OECD Trade Policy Working Paper No. 104 (Sept. 14, 2010), available at http://www.oecd-ilibrary.org/trade/policy-complements-to-the-strengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en ("A strengthened IPR framework can create spillovers, incentivise innovation, increase trade and trade-related investment, and boost intellectual property intensive economic activity . . ."). For a compendium of relevant studies demonstrating the link between IP and innovation, see ICC, *Intellectual Property: Powerhouse for Innovation and Economic Growth (2011)* available at [http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20\(2\).pdf](http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf)

now supports nearly 600,000 high-skill, high-wage jobs and contributes billions of pounds in taxes each year.³ More broadly, the UK's creative sector -- also heavily dependent on IP -- is thriving. As illustrated by the Department of Media, Commerce and Sport's December 2011 "[Creative Industries Economic Estimates](#)," the UK's creative industries experienced growth of nearly 5% in 2010, with over 106,000 creative enterprises now calling the UK home.

• **While the UK's copyright laws are balanced, their enforcement needs improving.** We are disappointed that the Government's copyright consultation explicitly states that it will not address issues relating to the enforcement of copyright. Our own experience, supported by third party economic analysis, confirms the link between vigorous IP enforcement and innovation and economic growth. We strongly urge the UK Government to consider how enforcement can be improved. Among the reforms that merit consideration, we recommend that:

- **The UK should make long-awaited fixes to the damage regime to ensure that damage awards deter IP theft.** Rather than deterring piracy, damages rules in the UK create incentives to infringe. For example, it is currently possible for software infringers to purchase a license for software *after* the infringement has been discovered, and avoid the payment of a penalty – meaning that software piracy is effectively risk-free. Although the Ministry of Justice indicated in 2007 that it would address this issue, no progress has been made to date.
- **The UK should also ensure that civil ex parte searches are affordable by all.** UK 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 UK to eliminate this requirement, or to replace it with a less expensive option such as the use of bailiffs during searches.
- **We also encourage the UK Government to “lead by example” – and specifically to adopt a software asset management policy that builds on the UK's 1999 Central Computer and Telecommunications Agency's IS Notice No. 96.** Government-endorsed policies regarding proper use of software can help

³ See IDC/BSA study, “The Economic Benefits of Reducing Software Piracy”, UK country profile, 2010, available at: http://portal.bsa.org/piracyimpact2010/cps/cp_uk_english.pdf.

reduce computer software piracy by setting an example for industry and individual citizens.

• With regard to the specific areas covered in the consultation, we offer the following perspectives:

- **Extended collective licensing.** The consultation recommends that the UK adopt a system of extended collective licensing (ECL). The consultation does not catalogue the works to which this system would apply, however. For avoidance of doubt, extended collective licensing should *not* apply to software. Excluding software from such licensing is consistent with the approach in markets that have ECL regimes, such as Sweden. Because software rights are managed individually in a transaction that takes place directly between the right holder and the user, this approach makes sense. BSA would welcome clarification that software will be excluded from any ECL regime.
- **New exceptions.** The EU Computer Programs Directive (1991/250) exclusively determines the copyright exceptions applicable to computer software. These exceptions are limited, and available for a narrow set of activities that include decompilation, the making of back-up copies, and observation, study and testing. The Computer Programs Directive's exceptions are implemented in the UK's Copyright, Designs and Patents Act. As such, any new exceptions introduced in UK law -- including an exception for private copying -- should *not* apply to computer software. This principle is reaffirmed by the express terms of the EU's 2001 Copyright Directive (2001/29/EC), which provides that "*Articles 5 and 6 of [the Computer Programs] Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.*"

With respect to copyright exceptions more generally, the BSA welcomes the Government's decision to focus on simplifying and clarifying existing exceptions already permissible under EU law. BSA members innovate in markets throughout Europe, operating as both licensors of their own technologies and licensees of third party content. In their experience, the existing system of exceptions set out in the Computer Programs and Copyright Directives strike the right balance between incentivising creativity and allowing third party uses. We see no need to 'reinvent the wheel', introducing new exceptions that could give particular companies or commercial sectors unwarranted free access to the

material of others, or reopening EU legislation for major battles over exceptions. Indeed, the international success of UK software and other copyright-based sectors has demonstrated concretely that the UK and EU copyright system is already largely fit for purpose.

- **Private copying.** The priority issue for technology vendors in the context of any proposed private copy exception is avoiding the adoption of a private copy levies. We strongly endorse the Government's decision not to adopt a private copy levies scheme. We very much agree with the conclusion in the Government's Impact Assessment that levies "are not a very accurate reflection of actual harm caused by copying," and we share the Government's concerns about distribution mechanisms for levies and about the efficiency of the distributors. Private copy levies are in effect a blanket royalty collected from consumers that has little if any connection to the degree equipment is used for copying works, the value of the works involved, or the economic harm that the copying causes to authors. Instead of choosing this form of rough justice, the UK instead should clearly define the parameters of any private copy exception in a manner that does not require such a royalty to be collected.

- **Interference with contract.** The consultation suggests that the UK's specific regime for exceptions to copyright in software (CDPA Art. 296A) -- under which exceptions override any contractual terms that might license the use of copyright material in any way differently -- should be extended to other copyrighted works. We would recommend a more cautious approach, which reflects the fact that the market in the vast number of cases is working well through license agreements that have been freely entered into between copyright owners and users.

Indeed, contractual usage terms for copyright material – often implemented through technological usage rights – are the precise mechanism by which the options available to users can be made more varied, offered under different usage models, and made available at different price points. By contract, copyright owners can offer different numbers of particular types of copies at different prices, monthly usage rights at a flat price, or temporary usage rights for free, for example. Rather than overriding such useful competitive market offerings with mandatory rules for unlimited or a particular level or type of use, it would be more appropriate to respect and uphold agreed licensing terms, and

leave exceptions to work as a reasonable default when the usage terms and conditions have not been defined by contract..

- **IPO/Copyright Notices.** If the UK moves forward with plans to empower the Intellectual Property Office (IPO) to issue copyright Notices, one area that would benefit from clarification relates to damages. As the Ministry of Justice concluded in its 2007 consultation paper on the Law on Damages, UK law can be interpreted to permit an infringer to acquire a licence for a computer program *after* the infringement has been discovered, and as a result avoid the need to pay damages to the right holder (because the purchase of a licence post-infringement compensates the right holder for the harm suffered). This interpretation effectively means that there is no deterrent to software theft; instead, the economically rational approach is to infringe, with the only potential downside being the need to purchase a licence at a later date if caught. To address this issue (which the MoJ promised to do in 2007), the IPO should move quickly to clarify that acquisition of a license post-infringement does not eliminate the obligation to pay damages. This clarification would bring the UK in line with its obligations under the EU IP Enforcement Directive (2004/48/EC) to provide “dissuasive” remedies against infringement, and would also help deter software theft. In 2010, 27% of installed software in the UK was pirated; reducing this figure even modestly would help to stimulate spending throughout the economy.⁴

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

For further information, please contact Thomas Boué, Director, Government Relations EMEA, thomasb@bsa.org or +32.2.274.1315.

⁴ For an analysis of the potential benefits of reducing software theft, see IDC, “The Economic Benefits of Reducing Software Piracy,” *supra* note 2.