



HEARING ON 2019 SPECIAL 301 REVIEW

Prepared Testimony of Joseph P. Whitlock
Director, Policy, BSA | The Software Alliance

February 27, 2019
Washington, DC

BSA thanks the Special 301 subcommittee of the Trade Policy Staff Committee for the opportunity to testify today. Your work under the Special 301 statute is invaluable. Today, I will discuss:

1. BSA member contributions to US innovation leadership and growth; and
2. Opportunities and challenges in foreign markets.

Those opportunities and challenges are, respectively, model trade and intellectual (IP) policies on the one hand, and digitally protectionist and discriminatory policies in foreign markets that are harming US IPR holders and innovation, on the other.

BSA Member Contributions to US Innovation Leadership and Growth

BSA members provide primarily enterprise software solutions¹. We are at the forefront of the global development of cutting-edge enterprise software innovations – from artificial intelligence, to machine learning and data analytics, to smart devices, to cloud computing. We are among the most innovative IPR holders in the world, as summarized below:

- Based on data from the US Patent and Trademark Office, BSA members accounted for nearly 50% of all patents issued in 2018 to the top 10 US patent holders.
- As regards copyright, BSA members are responsible for developing the world's most valuable and transformative software solutions.
- Software also accounts for \$63 billion in annual Research and Development (R&D) expenditures - nearly 20% of all US private sector R&D.

The software industry accounts for over \$1 trillion in US GDP, and 11 million American jobs, each year.² Software is a powerful catalyst for continued US innovation leadership and growth. In short, BSA members rely heavily on your work to ensure open access to US trading partners' markets and IP frameworks that promote the progress of science and the useful arts.

¹ BSA's members include: Adobe, Akamai, Apple, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, Siemens PLM Software, Slack, Splunk, Symantec, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

² Software.org, The Growing \$1 Trillion Economic Impact of Software (Sept. 2017), available at: https://software.org/wp-content/uploads/2017_Software_Economic_Impact_Report.pdf

Model Trade and IP Policies

BSA conducts a biannual review of dozens of countries, as reflected in the Cloud Computing Scorecard.³ This scorecard measures each country's legal framework relating to IP, trade, privacy, and cybersecurity, among other areas. Countries that historically score well include Germany, Japan, Singapore, the United Kingdom and the United States. This is due to these countries' forward-looking innovation policies, namely policies that promote:

- Cross-border data transfers;
- Protection and enforcement of IP with appropriate exceptions and safeguards;
- Clear copyright rules permitting commercial data analysis and providing protections from liability for unlawful content posted by third parties;
- The use of innovative technology in the public sector;
- Recognition of electronic signatures in commercial transactions;
- Interoperability and adherence to internationally-recognized standards relating to ICT, cybersecurity, personal data protection, and other areas;
- Frameworks to resolve conflicting legal requirements on cloud and service providers (for example – in relation to data stored overseas); and
- Clear, predictable and non-discriminatory cybersecurity and supply chain security rules.

Those are also policies that deter digital protectionism by prohibiting:

- Source code or algorithm disclosure requirements and other forced technology transfer mechanisms;
- Data localization requirements;
- Customs requirements on electronic transmissions; and
- Discrimination in favor of state-owned enterprises (SOEs).

Digitally Protectionist and Discriminatory Policies that Harm US IPR holders and Innovation

US software innovation leadership is under a rising threat from digital protectionism, coercive technology transfer, and discrimination against foreign software. I outline a few key issues below and refer you to BSA's submission for a more comprehensive discussion.

Cross-Border Data Flows and Data Localization: BSA members, and US companies in all sectors that use our technologies, depend upon cross-border data transfers to realize a return on investments in R&D and to commercialize their IP. Unfortunately, data-related market access barriers take many forms and are increasing and accelerating around the globe. The situation is urgent.

Markets including China, India, Indonesia, and Vietnam have adopted or have proposed rules that prohibit or significantly restrict companies' ability to offer enterprise software from outside their national territory. Some countries cite security concerns to justify trade barriers and industrial policies. Others use other justifications.

Voluntary, Internationally-Recognized Standards Setting: Technology standards also play a vital role in facilitating innovation and trade in software. Unfortunately, some countries use mandatory, country-specific standards to favor local software companies. This not only excludes US IPR holders from the market. It also impacts the cost and quality of software technologies available in those markets.

³ BSA, 2018 Cloud Computing Scorecard, available at <https://cloudscorecard.bsa.org/2018/index.html>

Copyright and Artificial Intelligence: The digital environment requires not only effective copyright protection and enforcement tools, but also legal frameworks suited to innovation in rapidly evolving 21st century technologies. These frameworks must not unreasonably prejudice the legitimate interests of copyright holders, and must be limited to special cases that do not conflict with a normal exploitation of the work.

At the same time, the establishment of such frameworks is critical to future US leadership in artificial intelligence, which the White House identified as a strategic priority in its February 11, 2019 Executive Order on Maintaining American Leadership in Artificial Intelligence. In this regard, we note that a few countries have followed the US lead in developing IP frameworks to promote artificial intelligence. They include Japan, Singapore and the European Union.

This is an important objective for US government advocacy, which should promote national policies to permit data analytics of lawfully accessed data in the context of Artificial Intelligence.

Frameworks for ISP Liability and Safe Harbors: As noted above, BSA members also rely on the development of ISP liability and safe harbor frameworks, and consider this an important IP policy priority.

Software License Compliance/ Government and SOE Legalization: The use of unlicensed software by enterprises and governments is another major commercial challenge for BSA members. According to BSA's Global Software Survey, the commercial value of unlicensed software globally is at least US\$46 billion.⁴ The use of unlicensed software by governments and SOEs is particularly challenging to BSA members.

Patents: It is critical that countries provide effective patent protection to eligible computer-implemented inventions, in line with their international obligations.

Trade Secrets and Other Proprietary Information: BSA members rely on the ability to protect valuable trade secrets and other proprietary information. US trading partners that fail to implement and enforce strong rules to protect and enforce trade secrets against misappropriation or unauthorized disclosure put BSA members' business operations at risk and deny them core legal remedies when misappropriation or unauthorized disclosure occurs.

Procurement Restrictions: Finally, governments are among the biggest consumers of software products and services, yet many are imposing significant restrictions on foreign suppliers' ability to serve public-sector customers. Not only do such policies eliminate potential sales for BSA members, but they also deny government purchasers the freedom to choose the best available products and services to meet their needs.

Conclusion

Thank you again for the opportunity to testify and I look forward to your questions.

⁴ See BSA Global Software Survey – In Brief (June 2018), available at: https://gss.bsa.org/wp-content/uploads/2018/06/2018_BSA_GSS_InBrief_US.pdf