Viscount Younger
Minister of Intellectual Property
BIS
1 Victoria Street
London
SW1H 0ET

10 October 2013

Dear Lord Younger,

We are writing to thank you and your staff for your time yesterday, but we were very disappointed by the lack of any 'outcome' from the meeting, given the commitments made by your predecessor in his meeting last November to ourselves (SMEIA), CBI, FSB, BCC, ICA, Intellect, UKTI and the TSB. The IP Bill created after November's constructive meeting is currently before the House of Commons but does **not** address the concerns raised in November that we **ALL** agreed should be urgently tackled. The two most critical issues are the failure of the UKIPO to deliver its stated "patent protection" for SMEs and the lack of any penalties whatsoever for patent infringement, which obviously leads to economic loss from the UK - something all other competing countries address. It is a shame you had not been briefed on that meeting and for that reason we are writing in the hope that you may have taken some time to reflect on what had been put forward for action last year and that we might be able to pull a more positive outcome from yesterday's efforts.

We also felt that you were concerned about the representative nature of SMEIA, and so we have added at the end of this letter some detail to clear up points that were obviously not made clear to you beforehand.

We believe that our meeting yesterday revealed some uncomfortable facts for the UKIPO. We were also struck by the very different attitude of the UKIPO and BIS on matters concerning IP by comparison to conversations with have had with BIS and HMT on other matters relating to economic growth. The Growth Agenda is not our agenda; it is government policy with which we strongly agree. We think it only reasonable to therefore expect the above patent rights issues to be dealt with ***now*** in the current IP Bill as they actually prevent growth from the very high-tech SMEs that the Prime Minister and other Ministers regularly identify as crucially important to growth ("the next Google, Twitter, Amazon, Microsoft etc").

The UKIPO should not be allowed to obfuscate with the belated excuse you reported to us yesterday that it needs to commission a project to attempt to discover if German criminal penalties for wilful patent infringement act as a deterrent. Yesterday, the UKIPO accepted that it has not performed any similar study to justify its proposals to introduce criminal penalties for intentional Design Right infringement; proposals that **are** in the IP BIll. It should be assumed, exactly as you said in the House of Lords on 22 May 2013 *"The sanction would act as a deterrent and provide proportionate punitive measures."* Moreover, you made it clear yesterday that UKIPO are the lead agency of government on IP policy. It is not our job to research things for them to create the evidence base for policy formation, that is their task, it should be on-going work, they should know these things. That is why we are critical of UKIPO, and also wonder if there is some other, delaying motive behind the need for further 'studies'.

Another statement you made to the House was that "*Extending criminal sanctions to registered designs would create a coherent approach to enforcement and protection. Infringers do not divide up the rights they plan to steal.* " Given that there are numerous reports covering decades of abuse from wilful patent infringement against UK SME patented inventions, particularly valuable ones, an outstanding question from our meeting is therefore: why does the IP Bill not contain similar patent right provisions to those now offered for design right holders? Your statement above makes little sense without extending criminal sanctions for patent infringement.

We were surprised when you said words to the effect that 'many SMEs are happy with the UKIPO and UK patent policy': this is simply not something we recognise. Nor is it recognised by the

findings of the All-Party Parliamentary IP Group who this year reported that the Government needs to “get a grip on IP Policy”, adding that the UKIPO has lost the respect of the majority of IP rights holders by regularly making similar unfounded claims. Our own FOI requests have also failed to elicit the names of any such supporters following UKIPO claims previously made to us.

As you are gradually learning the issues in a complex and demanding role, mainly of course from your UKIPO staff, we do not criticise you for inevitably at this stage erring towards their long-standing views. However you must realise that your UKIPO staff do not go to patent courts as litigants (and are therefore excluded from seeing a great deal of infringement and validity documentation labelled by lawyers as “confidential”), they do not commission patent attorneys to write and lodge patent applications, they do not write business plans for high tech companies, they do not bid for and obtain grant funding or bid to investors for cash to perform R&D and build new companies, they do not assure investors that the company holds patents. They do not go on sales trips to sell or licence their products and experience false promises that lead to wilful infringement and a loss to the UK economy, nor do they put their own cash into businesses, and risk the financial safety of their families in order to pursue technologies that they believe in.

We do not say this as a criticism of civil servants or politicians, but we do ask that they recognise that they simply do not have ‘coal-face’ experience. It is very galling for us to find ourselves in a discussion which is assertion and counter-assertion, when we are the only people who have the actual relevant exposure.

Patent enforcement in the UK is undeniably the weakest in the developed world for SMEs – this is recognised by the majority of innovators. If something goes to court then the commercial opportunity is simply lost to an SME. There is no element of punitive damages so an infringer has absolutely nothing to lose from infringement - in the UK it is entirely without any risk whatsoever. They can even challenge the “validity” of the patent. It was agreed yesterday that a patent examiner’s judgement on the details within a patent (drawings, specification and claims) should be 100% accepted after he or she has rejected or accepted suitable amendments. There should be no excuse for allowing these decisions to be reviewed by far less qualified people in a gladiatorial court environment when legal opinions we all know are often retailed. Prior art, we accept, needs further work at the UKIPO. If a UK SME cannot enforce a patent in its home market and home legal jurisdiction, then it will not have the cash to enforce overseas. Court action is not a commercially effective first resort in order to establish patent rights. These things are self evident to SMEs with high-tech expertise. We accept that the IPEC deals more efficiently with low value cases but IPEC rules exclude high value cases by imposing a limit of £500K on past royalties - euphemistically referred to as “damages”. Most important technology of tomorrow starts in an SME, it is the accepted, practical, business model and thus the continual justification from both UKIPO and the courts that SMEs only have patents of minor value is simply not sustainable.

The current best-case outcome for a company taking on patent infringement in the UK, assuming an SME could afford the years to wrestle with High Court procedures, delays and costs, is to receive some of the royalties that would have been due if the infringer had actually taken out a license on friendly terms. The SME therefore loses the technology anyway by being forced to accept a license payment. They will probably have gone into liquidation however, before being able to fund the litigation that far. No UK growth and no “next Twitter, Google, Amazon, Microsoft “ etc.

We and the UKIPO agree that patents are intrinsically more difficult than design rights. However the UKIPO argument appears then to be that patents are so difficult they simply cannot do anything of real use to improve enforcement. We do not believe that that is an acceptable position and we do not believe that an agency of government with such an important role is properly serving businesses or taxpayers if it fails to act. We also pointed out that if the UKIPO position is that patents are too 'difficult' then they must stop mis-selling them to SMEs such as their web-site headlines: *“Patents protect the features and processes that make things work. This lets inventors profit from their inventions”.* The banks are currently paying back £Billions for mis-selling protection insurance, while UKIPO management hides behind a statutory position to ironically protect them from legal challenge.

Stated government policy is that the economy needs rebalancing away from services towards high technology and manufacturing. We agree. High technology needs IP and IP enforcement for UK

patents which have the greatest relevance in supporting high technology. IP enforcement for SMEs is weakest; it is not just us saying this.

If the current IP bill is not radically amended which is a ball very much now in your court, then it is the current coalition that will have lost a massive opportunity, and we believe, based on all the comments from other departments about the reliance upon our sector, that, at best, growth can then only be very modest. We are very willing to help resolve the issues given more time and, of course, proper consideration of the needs of UK SMEs working in innovation.

Yours sincerely AND

John Mitchell
Chairman - SME Innovation Alliance

Tim Crocker
Committee - SME Innovation Alliance

cc the Prime Minister,
Vince Cable, Minister BIS
George Osborne, Chancellor of the Exchequer
Mike Weatherley MP,
John Hemming MP,
Lord Clement-Jones,
John Whittingdale MP,
Pete Wishart MP,
Jim Dowd MP,
John Alty, UKIPO
Sean Dennehey, UKIPO
Rosa Wilkinson, UKIPO
Philip Horswill, UKIPO

<u>How and why SMEIA was formed in 2009 and who SMEIA represents</u>

We think that you had also been briefed yesterday with attempts to discredit SMEIA and there was an issue also with the term SME. As we described, SMEIA was formed by a collaboration of the East of England and Southwest SMART Clubs, the only two remaining, after formation in the 1990s by the DTI in the days of SMART (Small and Medium sized enterprise Award for Research into Technology). SMEIA also picked up award winners from other areas. In their day, the SMART Clubs were the only bodies which allowed any meaningful dialogue between government and the high technology SME sector. SMEIA and the SMART Clubs before them have members who have been ***winners*** of grants for R&D. Overwhelmingly their principals have very strong R&D backgrounds, drawn from universities, private sector research institutes or even government. These are people who have set themselves up in business precisely to take their R&D expertise to the commercial world. Almost all our members are multiple patent owners. When the SME sector is discussed it statistically is mainly 'butchers, bakers....' i.e. small, none technical companies, and these companies comprise the bulk membership of the larger small business organisations (FSB and FPB). Many of our members however may also be members of these organisations. We often sit alongside them when making representations to government, and we think they acknowledge that our expertise is more specialist e.g. at the November meeting with Lord Marland.

It was the present government that disbanded the RDAs. Whilst one or two were good, some were definitely not, with most being very average: we share the government's general critique of the RDAs. What may not have been communicated to you is that the RDAs largely took over the roles of the SMART Clubs, but, and this is very important, these organisations gained a public sector ethos. The feedback to government may have been more comfortable listening, but it was heavily filtered and led to may of the policy distortions that the present government says it is trying to rectify.

Thus, SMEIA is a small, specialist organisation, representing a very well defined selection of companies. We have difficulties recruiting, for the simple reason of our resources, and also the

very sceptical nature of our potential membership, many of whom simply have given up on government listening to SMEs and acting accordingly (such as the All-Party Parliamentary IP Group reported about the UKIPO in less than glowing terms). We asked the UKIPO for assistance in locating SMEs working in innovation (going as far as to use FOI requests when no sensible responses were forthcoming) but the UKIPO states that it has no records for SMEs working in innovation. Make of that what you will.

However SMEIA membership is growing steadily as we get the word out despite the lack of assistance to fill the void identified to us by HM Treasury in March 2009 which was our trigger to form SMEIA. The commonality of our member's views and experience is extraordinary. Our input to other parts of government has normally been well received, and it is on the critical issue if IP where our views seem least welcome. We are enjoined by stated government policy to learn from our more successful competitor nations, and one thing should be noted: in these countries the interface between government and the high technology SME community is most often semi-statutory, with the role we seek to play being carried out with some government funding and logistical support: exactly the model that the Government Offices were using in the days of the SMART Clubs. SMEIA is not an organisation seeking to be another pressure group, we are seeking a collaborative structure in which government can get honest, independent and unfiltered feedback from the companies that comprise the high tech SME sector.

Thus, whilst clearly we are now an independent organisation, and certain are, at one level, a pressure group, we do not see our prime role as that of seeking sectional gain for our members. We try to bring real experience, 'from the coal face', something that all branches of government have said they know they need, and find hard to get. We are again struck by the by the very different attitude of UKIPO and BIS on matters around IP.

The Growth Agenda

This is not our agenda, it is government policy which we strongly agree with. An aspect of this, which is well recognised and widely discussed, that the UK is failing to build a strong base of growing high technology companies, and lacks the equivalent power house of the Mittelstand in Germany, an issue that, for example, Will Hutton has spoken to us about. Many people have said that this is to do with weak access to risk finance, and also structural problems in our workforce and work places.

It is possible that it was Tim Crocker, in his evidence on behalf of SMEIA to the HoC S&T Committee “Valley of Death” enquiry first identified that this might also be related to the fact that SME held patents that really only have realisable value when sold to big corporations. This comment was based on experience, reason, observation and anecdote. Many have subsequently said to us that this makes sense. Certainly a 'trade' sale is the most common exit route when small high technology companies bid to investors, and certainly patent attorneys draft patents with this in mind. It is an observation that deserves further investigation and the development of an evidence base. However our members are very clear that this investigative work should be done by BIS, HMT and their agencies. It is not our job to gather evidence for policy, it is our job to help identify matters that need reviewing.