



International Chamber of Commerce

The world business organization

Department of Policy and Business Practices

Intervention made by Ivan Hjertman on behalf of ICC at meeting of the WIPO Standing Committee on the Law on Patents (SCP/13), March 23-27, 2009 in Geneva

ICC, the International Chamber of Commerce, represents small and large businesses in all sectors in more than 130 countries all over the world at different levels of development. These businesses can hold IP rights or find themselves in situations where they are confronted by the IP rights of others.

Such businesses, whether large or small, operating locally or in export markets, will require advice from professional advisors to understand how they can act within the limits of their own rights, and without infringing on the rights of others.

For this reason, ICC believes that the issue of client-attorney privilege is an important one as it impacts on the quality of advice given to businesses in all countries by their local advisors or those in the markets where they have activities.

Because of the increasingly international nature of commercial transactions involving IP rights, ICC also believes that there is an important international dimension to this issue and so merits thorough consideration by WIPO. It is an issue which can potentially affect businesses and inventors in all countries, whether because they are faced with the IP rights of others, or because they need to know the limits of their own IP rights.

This issue is also an important one for the IP system in general. Privilege against disclosure of clients and advisor communications plays a key role in the transparency of the IP system which is important for all stakeholders, and also helps to ensure respect for national laws.

The concept of confidentiality of professional advice is not a new concept in civil law countries nor in common law countries. In civil law countries, for example, it may already apply to different professions such as medical doctors, nurses, mid-wives, and attorneys at law. IP professionals provide similar services to legal attorneys but are not subject to this confidentiality obligation in several countries.

Assurance of confidentiality for communications between clients and their local professional IP advisors, including for example professionally qualified patent attorneys who may not be lawyers, encourages full and frank exchange of information and advice between them concerning activities of such clients in their own countries as well as elsewhere. Such full and frank exchanges promote the rule of law by ensuring that clients have accurate and complete understanding of the IP rights that may apply to their activities. Thus, client privilege promotes clear understanding of IP rights and is at least as important, if not more important, to clients confronted by the IP rights of others as to IP rights holders.

Similarly, full and frank exchange of information and advice between a client and a local IP Professional helps ensure better transparency of the scope and validity of IP rights, by ensuring that the client understands what he can or cannot do legally.

The current differences in legal systems in regard to the protection of such exchanges of information and advice between clients and their local professional advisors, has meant that assurance of confidentiality is not available in many

situations. This in turn means that local professional IP advisors are constrained to limit their advice by concerns that it may be disclosed publicly, for instance during litigation in their own country or elsewhere. This situation cannot be considered fully without also recognizing an increasing need for commerce in multiple jurisdictions across the world, with full understanding of all, possibly related, IP rights in all such jurisdictions. Obstacles to such understanding are also obstacles to such commerce at a time when commerce is needed more than ever by all.

Some delegations have expressed concerns about the possibility of client-attorney privilege detracting from the role of the patent system in putting technical information in the public domain. We would like to help clarify this point. Client-attorney privilege, or professional secrecy, applies only to advice given to a client by his or her professional advisor. It does not cover publicly available information such as all the technical and other information relating to patents contained in patent applications.

Client-attorney privilege, or professional secrecy, does not therefore in anyway detract from general patent disclosure requirements or the patent system's important role in putting technical information in the public domain.

To take one example, say that an inventor or business seeks advice if a product he would like to put on the market would infringe a given patent. If there is such risk, the inventor or business seeks advice on the validity of the patent. In that situation, this inventor or business should not be risk to be forced to hand over the advice he has obtained to the patent rights owner in later patent infringement proceedings.

Further information is contained in a document available on the table outside this room.



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This issue is a complex one and ICC commends WIPO for the excellent study it has prepared on this issue. The complexity of the issue however calls for further and deeper analysis to help clarify problems and identify opportunities and solutions. ICC therefore urges this Committee to take its study of this privilege issue further.