



International Chamber of Commerce

The world business organization

Consultation on the Commission Report on the enforcement of intellectual property rights

ICC is making this submission in response to the consultation concerning the Enforcement Directive 2004/48/EC, although only in respect of one issue, privilege, on which ICC has been active since 2008, first in relation to a proposed WIPO instrument, and then in relation to the proposed EEUPC.

Legal professional privilege is seen in common law countries as an important counterpart to powers of discovery (or “disclosure”) by the Court. The Directive requires those states that did not already have discovery or disclosure to afford discovery on application by the claimant (rights owner). The materials or communications discovered would be those of the defendant (alleged infringer).

It has been suggested by others that the Directive should –

- (i) provide for legal professional privilege for the claimant (rights holder), and
- (ii) provide for legal professional privilege for the defendant (alleged infringer),

the former suggestion (3 (i)) being made despite the fact that this would apparently not be intended to remedy any mischief in the Directive.

ICC recognises that the Commission would have to consider carefully the appropriateness of amending the Enforcement Directive to deal with privilege (as suggested by others). However, if the Commission does decide to do so, as others have suggested, then ICC would urge as a model one or both of -

- (a) the provisions proposed by ICC in relation to a possible WIPO Treaty (ICC documents 540/1040 and 540/1049, attached); or
- (b) the provisions proposed by ICC and the IP Federation in relation to a possible European and European Union Patents Court (ICC letter dated 16 November 2010 and IP Federation document PP06/10).

The underlying principles of (a) and (b) are identical, but in the former case the detailed proposals relate to individual national Courts and in the latter case they relate to a single (European) Court.

ICC is at the Commission’s disposal to discuss these matters in the event that the Commission does decide in the Directive to address the issue of privilege.