

# Report Q199

## Client Privilege in IP Professional Advice - CIPPPA

by Michael DOWLING

### Names and Functions of Committee Members

Chairman	Michael DOWLING	Australia
Co-Chairman	Steven GARLAND	Canada
	Wouter PORS	The Netherlands
Secretary	Fabienne MARTIN	Switzerland – GS
Members	The following NRGs are members: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Malaysia, Mexico, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, USA, Venezuela (please also see the AIPPI website – thank you)	
Responsible Reporter	Jochen BÜHLING	Germany

### Summary and deadline for action

The focus of Q199's work is the lack or loss of the protection of clients against forcible disclosure of IP professional advice. That problem and how it arises is the main subject of the WIPO Report SCP13/4 on Client Attorney Privilege (CAP).

In relation to this problem, AIPPI's principal objective is to achieve through WIPO the establishment and harmonisation of laws protecting clients from forcible disclosure of their IP professional advice, both in relation to litigation and legal advice in the absence of litigation.

In the course of the meeting of the WIPO Standing Committee on Patents in Geneva in March 2009, the delegates of the Member States identified a number of issues (see below) relating to the SCP13/4 Report. The delegates agreed to continue the study of CAP and required further information.

The next meeting of the SCP will be held in Geneva in November 2009. Those interested in the CAP issue have been invited by the Director General of WIPO, Francis Gurry, to make Submissions to WIPO on the SCP13/4 Report by 31 August 2007. AIPPI has prepared a substantial Submission to WIPO on the issues raised by the delegates of the Member States in March. AIPPI will submit that there is now sufficient information on the need for change and that potential remedies should now be studied.

### Action recommended

AIPPI's near term objective is to persuade the Member States in the SCP to move on from its current study of the problem of CAP to studying potential remedies for that problem.

Q199 recommends that AIPPI be strongly represented at the November meeting of the SCP. The details of AIPPI's representation at that meeting need to be decided by the Bureau by about the end of September.

The Chairman of Q199 has already been asked by the Bureau to attend and will do so but AIPPI certainly needs some Bureau representation at that meeting. This representation is needed to enable AIPPI to effectively communicate its views and assist WIPO, the delegates of the Member States and the representatives of other international IP NGOs at the meeting.

### **Report of the Committee's activities**

The ultimate objective of AIPPI in relation to remedies is the adoption by the Member States of WIPO of minimum standards for national laws protecting clients from forcible disclosure of their IP professional advice, agreed internationally.

Since Boston (September 2008), the Committee of Q199 has been assisting AIPPI's efforts to have the WIPO Standing Committee on Patents (SCP) study CAP. Working together with other international IP NGOs (principally ICC, FICPI and APAA), the SCP was persuaded by AIPPI and others in its meeting in Geneva in March 2009, to continue its study of CAP. At the March 2009 meeting of the SCP, the delegates of the Member States (or some of them) called on the General Secretariat of WIPO to expand the Report SCP13/4 to deal, or to deal more expansively with particular issues (see below).

AIPPI was strongly represented at the March 2009 meeting of the SCP by Jochen Buehling, Thierry Calame, Alain Gallochat and Michael Dowling. The outcome of that meeting of the SCP agreeing to continue the study was both positive and pleasing. We do not underestimate the substantial input and support of the General Secretariat of WIPO – in particular by Director General Francis Gurry and Head of Patents, Philippe Baechtold, in achieving that outcome.

By the time of the EXCO meeting in Buenos Aires in October for which this Report is prepared, AIPPI's Submission to WIPO referred to above will have been sent to WIPO. The Submission requires, of course, support from the Bureau to be sent to WIPO. The Submission will, we expect, be published on the AIPPI website. It will also be supplied by the Chairman to each of the IP NGOs with which AIPPI is co operating on this issue. AIPPI benefited substantially from this co-operation in achieving the continuing study of the issue by the SCP.

The authors of the Submission to WIPO are principally Steve Garland (Canada), Wouter Pors (Netherlands) and Michael Dowling (Australia). They have referred a draft of the Submission to AIPPI President Thierry Mollet-Vieville, Reporter General Jochen Buehling and the PTF representatives for comments in advance of its finalisation. The authors acknowledge with gratitude the input which they have thus received and to which they have reacted in settling the Submission. Many PTF representatives have responded positively to the draft proposal; none has responded negatively.

The issues raised by the delegates of the Member States in relation to the SCP 13/4 Report which are dealt with by the AIPPI Submission, are as follows.

- Expanded commentary on civil law protection.
- Expanded commentary on common law protection.
- Civil law and common law protections compared.
- Scope of protection by common law privilege explained.
- Justification of the 'public interest' in the protection of clients from forcible disclosure of their IP professional advice being paramount.

- The relevance (if any) of Articles 2(3) of the Paris Convention, Article 3 of TRIPS, and GATS Mode 4.
- The potential for expansion of privilege to other professionals, if it is applied to IP professional advisors.
- Exceptions to the application of professional secrecy and privilege.
- Effect (if any) of privilege on free assistance offered by National Offices to users.

**Intellectual Property Society of Australia and New Zealand (IPSANZ) Conference in Auckland, 12 - 13 September 2009**

Michael Dowling has been invited to speak on Privilege at the Conference of IPSANZ referred to in the heading. Whilst invited in his personal capacity, the opportunity to advance the views of AIPPI in relation to the development of the law on privilege as it affects clients of IP professionals, was a strong factor in the Chairman accepting this invitation. The IPSANZ programme indicating topics and speakers is attached for convenience.

**Recommendation**

The Committee presently has no recommendation beyond that under the heading "Action Recommended", above.