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AKTENZEICHEN neues Az. (WIPO SCP)

DATUM Berlin, 04. August 2011

BETREFF: WIPO Circular C. 7999, dated June 28, 2011, following SCP 16

Dear Sir or Madam,

thank you very much for sending us Circular C. 7992, dated June 28, 2011, pursuant to SCP 16.

Further to your request, we are pleased to provide to you information on the legal situation of the Confidentiality of Communications between Clients and Patent Advisors under German law.

Under German law, a Patent Attorney admitted to the bar is, according to sec. 39a, para. 2 of the German Act on Patent Attorneys (Patentanwaltsordnung), obliged to keep confidentiality on any information gathered within his professional activity. Corresponding to this obligation, the Patent Attorney has the right to refuse testimony before the courts (sec. 383 para. 1 No. 6 of the German Civil Procedures Act (Zivilprozessordnung), applicable in proceedings before civil, labour, administrative and social courts; sec. 53 para. 1 No 3 of the German Penal Procedures Act (Strafprozessordnung), applicable in penal proceedings; sec. 102 para 1 of the German Act on Charges (Abgabenordnung), applicable in financial court proceedings). This connection between the Patent Attorney's obligation to keep confidentiality and his corresponding right to refuse testimony creates the Client – Patent Attorney Privilege for German Patent Attorneys admitted to the bar, because it is acknowledged, that the right to refuse testimony serves the Client's interest in confidentiality. As both the obligation on confidentiality and the right to refuse testimony are restricted to Patent Attorneys, this privilege does not exist for mere Patent Advisors that are not admitted to the bar.

However, the right to refuse testimony under the provisions cited depends on the existence of a legal obligation to keep confidentiality. Due to this relation, any foreign Patent Attorney or Advisor, that is under the applicable jurisdiction of his place of business obliged to keep confidentiality, has the right to refuse testimony and is within the scope of the same privilege as a German Patent Attorney. Thus, the cross-border effect of the privilege therefore depends on the existence of a secrecy obligation in the state of origin of the foreign Patent Attorney or Advisor.

In the practice of German court proceedings, these principles are generally respected. Problems in relation to cross-border aspects of confidentiality and respect for the Patent Attorney/Advisor-Client-Privilege have not been reported. Therefore, remedies or other measures to further raise the respect for the Patent Attorney/Advisor-Client-Privilege do not appear to be necessary and have not been subject of discussion in either practice or science.

Yours sincerely,

Dr. Stefan Walz
Head of Unit of Patent Law