Cross-border aspects of Client-Attorney Privilege

The Swiss Perspective

Presentation by the Delegation of Switzerland

Standing Committee on the Law of Patents
Geneva, 5th November 2014
Structure

The Swiss Approach

The Dilemma

A Possible Way out
SITUATION UNTIL JULY 2011

Swiss Criminal Code – Article 321 Section 1
Breach of professional confidentiality
Any person who in his capacity as … lawyer, defence lawyer, … or as an auxiliary to any of the foregoing persons discloses confidential information … is liable on complaint to a custodial sentence … .

Swiss Civil Procedure Code – Article 166 Section 1
Any third party may refuse to cooperate:
b. To the extent that the revelation of a secret would be punishable by virtue of Article 321 SCC
SITUATION AS OF JULY 2011

Swiss Criminal Code – Article 321 Section 1
Breach of professional confidentiality
Any person who in his capacity as … lawyer, …, patent attorney …

Swiss Civil Procedure Code – Article 160 Section 1
Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty:
b. to produce the physical records, with the exception of … correspondence between a party or a third party and a lawyer …, or with a patent attorney …
REMAINING PROBLEMS

Legal Uncertainty

Users of the Patent System Affected

• Patent Applicants/Holders
• Patent Advisors
## DIFFERENT OPTIONS

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<th>Option</th>
<th>Advantage</th>
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<td>Recognition</td>
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<td><strong>Soft Law</strong></td>
<td>• Acceptability</td>
<td>Degree of Predictability and Enforcement</td>
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<td>• Suited for Different Legal Backgrounds</td>
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<td><strong>Multilateral Agreement</strong></td>
<td>Maximum Predictability</td>
<td>Too Far-Reaching</td>
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THE SOLUTION FOR SCP

Non-binding Soft Law

Non-binding and thus acceptable to greatest number of countries

Template for national laws or for bilateral agreements

Appropriate remedy in the context of a large group of interested countries with varying backgrounds

→ WIPO Recommendation?
Draft for a Recommendation Next Time

- Different legal background
- Preliminary involvement of competent authorities
- Still a draft, so not binding in any way
Thank you for your attention

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