**Re: CIPA, ITMA, IPReg & the Money Laundering Regulations 2007**

**Advice**

1. We are instructed on behalf of the Chartered Institute of Patent Attorneys ('CIPA') and the Institute of Trade Mark Attorneys ('ITMA') to advise as to whether the Money Laundering Regulations 2007 ('MLR 2007") apply to its members; in short, whether Patent Attorneys and Trade Mark Attorneys are necessarily within the regulated sector for the purposes of Part 7 of the Proceeds of Crime Act 2002 ('POCA').

2. We cannot provide a definitive answer. Only a court may do that.

**Background**

3. The Intellectual Property Regulation Board ('IPReg'), having hitherto taken the view that MLR 2007 did not apply to members of CIPA and ITMA, has recently (autumn 2014) reversed its position;

   *'IPReg considers that, in the course of providing legal services, Patent and Trade Mark Attorneys fall within the scope of the Regulations because they participate in transactions involving the management of client assets. Patent and Trade Mark Attorneys 'participate in a transaction' where they assist in the planning or execution of a transaction or otherwise where they act on behalf of a client in a transaction involving client assets, which would include patents or trade marks. 2014 guidance from the recently-formed National Crime Agency defines criminal property to include intangible and incorporeal property'* [1]

4. The guidance referred to above as emanating from the National Crime Agency ('NCA') is neither new nor to the point, as it does no more than restate S.340(9) POCA;

   *Property is all property wherever situated and includes –*
   - *(a) money;*
   - *(b) all forms of property, real or persona, heritable or moveable;*
   - *(c) things in action and other* ***intangible or incorporeal property*** (emphasis added)

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[1] IPReg website 'Anti-Money Laundering Guidance'. Underpinning this reversal is the opinion in writing of James Ramsden of counsel, a link to which appears on the website.

5. If IPReg attributed significance to this guidance from the NCA in the belief that it represented some sort of new approach by the successor to the Serious Organised Crime Agency ('SOCA'), then in our view it has misdirected itself.

6. Similarly, we consider that there is nothing of relevance to be inferred from the replacement of SOCA by the NCA; by the replacement of the Financial Services Agency by the Financial Conduct Authority; or that responsibility for guidance and supervision of the MLR 2007 has extended from HM Treasury to include HMRC.

7. In short, as far as CIPA and ITMA are concerned, the regulatory landscape has not changed since the coming into force of MLR 2007 on 15 December 2007.

**Regulations 3(1)(d) and 3(9)**

8. Regulation 3 lists persons subject to MLR 2007.

9. Regulation 3(1)(d) includes 'independent legal professionals' upon the list.

10. By Regulation 3(9), 'independent legal professional' means, inter alia;

*..a firm or sole practitioner who by way of business provides legal .. services to other persons, when participating in financial or real property transactions concerning –*
....

*(b) the managing of client money, securities or other assets*
...
*and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.*

11. Significantly, what constitutes 'managing' for the purposes of 3(9)(b) is not defined.

**The Genesis of MLR 2007**

12. MLR 2007 gives partial effect to Directive 2005/60/EC dated 26 October 2005 ('2005 Directive').

**The Purpose of MLR 2007**

13. The Explanatory Note to MLR 2007 includes this passage:

*The Regulations provide for various steps to be taken by the financial services sector and other persons to detect and prevent money laundering and terrorist financing. Obligations are imposed on "relevant persons" (defined in regulation 3 and subject to the exclusions in regulation 4), who are credit and financial institutions, auditors, accountants, tax advisers and insolvency practitioners, independent legal professionals, trust or company service providers, estate agents, high value dealers and casinos.*

**14.** This passage should be read in conjunction with Recital 19 of the 2005 Directive:

*Directive 91/308/EEC brought notaries and other independent legal professionals within the scope of the Community anti-money laundering regime; this coverage should be maintained unchanged in this Directive;* ***these legal professionals****, as defined by the Member States,* ***are subject to the provisions of this Directive*** *when participating in financial or corporate transactions, including providing tax advice,* ***where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing.*** (emphasis added)

**15.** Regulation 3(9) is, on its face, apt to include most if not all commercial activity[2] conducted by a lawyer on behalf of a client. Such an outcome is clearly not contemplated by the Directive.

**16.** We consider it unlikely that a court will look at Regulation 3(9) in isolation, but rather will give it a purposive construction.

**17.** Therefore a critical factor in determining whether the members of CIPA and ITMA are caught by MLR 2007 is an assessment of the risk attaching to the work carried out by those members.

**Patent Attorneys & Trade Mark Attorneys**

**18.** CIPA and ITMA have issued a joint statement in the following terms[3]:

*CIPA, in partnership with the Institute of Trade Mark Attorneys, takes the position that the overwhelming majority of work undertaken by UK Patent Attorneys and UK Trade Mark Attorneys in private practice is the filing and prosecution of Patent, Trade Mark and Design applications in the UK, Europe and overseas,*

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[2] Subject to the de minimis exception in Regulation 4(2).

[3] Published on their respective websites.

*together with associated legal advice and contentious matters such as opposition and litigation. Where 'transactional' work (i.e. transferring intellectual property rights from party A to party B) is carried out, it is most often in co-operation with a solicitor as part of a wider transaction, where the IP is merely a part of an overall package. It is extremely rare, if it happens at all, for a Patent or Trade Mark Attorney to hold client money in escrow for completion of a transaction. In practice, transactional work makes up a very small proportion of the overall work of a Patent and Trade Mark Attorney.*

**19.** In our opinion, it is at least arguable that much of the work of a Patent and Trade Mark Attorney does not involve the management of - and therefore 'managing' - client assets

**20.** To the extent that this is correct, then MLR 2007 does not apply.

**21.** If there is work that may properly fall under the rubric of 'managing', then such work seems in reality to run little risk of being used as a vehicle for money-laundering or terrorist financing.

**22.** Indeed, such scenarios as have been put forward[4] do not reflect the experience of CIPA and ITMA. It is perhaps significant that our research has not uncovered a single reported instance of identified or suspected money laundering in this sector.[5]

**23.** Of course, a member of CIPA and ITMA is liable to commit a money laundering offence if he deals in any way with criminal property and does not, without reasonable excuse, make an authorised disclosure in respect of it. In this regard, the member is in no different position to that of the public at large.

**24.** But simply because the *possibility* exists that a member might commit such an offence in the course of his business is in our opinion insufficient of itself to place all members within the regulated sector.

## Conclusion

**25.** We do not agree that the work undertaken by Patent and Trade Mark Attorneys necessarily leads to the conclusion that they are subject to MLR 2007.

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[4] see para 23 Ramsden Note of Advice supra

[5] cf. banks, bureau de change, casinos etc. CIPA have told us of a case reported by James Ramsden of two nightclub owners who intentionally registered the same name for their respective establishments so as to conduct collusive litigation leading to a collusive settlement. In this and similar cases (if there are any) it is the litigation that leads to money laundering. The bogus *casus belli* is of little importance.

**26.** We think it is at least arguable that most such attorneys are not subject to MLR 2007.

**27.** However, whether any given attorney or firm is so subject will be case-specific to that attorney or firm.

**28.** We are fortified in this conclusion by the view of HM Treasury in 2009:

*It doesn't seem to us that the patent and trade mark-related activity carried out by patent or trade mark attorneys is within the type of transaction envisaged in the Directive or the Regs – it is not a particularly natural construction to talk of 'managing' clients' patents and trade marks in the context of a financial transaction...*[6]

**29.** In our opinion, nothing of substance has changed. HM Treasury's eminently commonsensical view is as sound today as it was in 2009.

Andrew Campbell-Tiech QC
Gavin Irwin
12 December 2014

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[6] Email of 18 March 2009 from Keith Davis (Policy Adviser, Money Laundering, Financial Crime Team, HM Treasury) to Peter Kiernan (on behalf of CIPA and ITMA)