

FICPI/AIPLA COLLOQUIUM AMSTERDAM – JUNE 8-9, 2007

Lunchtime Speech

D. Huntington, A. Brimelow, E. Lyndon-Stanford, S. Helfgott, J. Doll

	[LUNCH]
HUNTINGTON	Alison Brimelow needs no introduction so I'm simply going to turn the microphone over to her.
BRIMELOW	<p>Do I have to turn it on? No, it is ready. Well, good afternoon ladies and gentlemen, and I do hope that this rearrangement of the program does not lead to you being afflicted with indigestion, having eaten your lunch so quickly to get back. Apologies but it seemed to me probably better to speak in a rather quieter environment of this room than over cutlery and plates clanging in an open restaurant. So thank you very much for indulging me in this and thank you for coming back so very promptly.</p> <p>It is normal politeness to open remarks at a conference by saying thank you so much for inviting me and how delighted I am to be here and what a jolly interesting subject. I have to say on this occasion I really mean it. It is a very timely and relevant event and I have taken a quick look at some of the papers and thought gosh, I'm sorry I'm not going to be here for the whole thing though I am staying until about four this afternoon when I have to rush off. My excuse is entirely domestic -- I am trying to move house for obvious reasons and since it's only me and an elderly cat, she's very helpful in many ways but I don't think she can manage a move. So I have to make sure that things are in the right place. More problematic than it should be because my house is also a building site, but that's another personal and private grief which I won't share with you. But I am very, very glad to be here and I am personally very interested in the theme of quality and that area of business. In 1991 when I first joined the United Kingdom's Patent Office, as it was then, I was appointed to look at issues of quality across the whole UK Patent Office and that was my first engagement, both with the process of quality management and with IP and of course I was told by patent examiners who have since learned a great deal that they had nothing to discuss with me because they were professionals. But that was a very long time ago and indeed the United Kingdom Patent Office was the first government agency to get ISO accreditation -- we're talking about process and that was quite an achievement. And looking at the organization that becomes mine, so to speak, in terms of my responsibility on Sunday the first of July, I can say with great pride and confidence that it has a great track record. It has been seen over thirty years as doing an excellent job in the patent-granting business. One of my tasks, I think, as incoming President, is going to be to make sure that that continues to be the case and I am mindful of the little sentence that the financial regulators insist on putting at the bottom of advertisements in the United Kingdom for financial services, which is that past performance doesn't guarantee future success, and I think that that is something that all of us -- I have to say all of us, not just patent-granting authorities -- all of us in the patent business do need to remember. We have been very good at what we do; how do we stay that way?</p> <p>So thank you very much for asking me to come to this event and I hope that it is a productive learning experience, that we learn from it and that we do better collectively as a result. And somebody asked what I have been doing while I was waiting to become President of the EPO. It's been three and a half years since I left the United Kingdom office and one of the things that I've been doing is traveling around talking to people who use the patent system, not just in Europe, all over the place. And it is very clear to me, and I'm sorry to</p>

<p>BRIMELOW</p>	<p>give you a slightly downbeat thought to add to your indigestion this afternoon -- it is clear to me that nobody in this room, nobody, has any real cause to be satisfied about the state of the patent system and in that context, about quality in the patent system. The invitation to this event highlighted four things : timeliness, quality of search and examination, leading to, in quotation marks, I think, "questionable patents" and wider societal doubts about the quality and value of the patent system, and I have to say in the light of my own empirical journey, it started when I was running the UK office but has continued quite intensively over the last three years and in light of my own empirical experience, those are real and lively problems and there is really no cause for complacency. The fact that we're all here I think means that we recognize that. Now, in one sense the patent system has always had its critics -- Thomas Jefferson amongst them -- but it seems to me that at the moment there are issues which are particularly sharp or sharply focused and the other thing I observed is that the confident and indeed technocratic mind of the patent expert finds it very difficult to respond to what I can only characterize as generalized doubt -- the anecdotal stories about what is wrong with the system. It seems to me that in our culture we are about analytical certainties and we are about precision, and therefore assertions that patents are getting soft are very hard for us to engage with. Because we find it hard to engage with them we end up looking rather arrogant, insensitive or indeed detached and that doesn't help the temper of discussion. It is hard for us to handle soft issues.</p> <p>Can I dispose of one point quite early on? I think it's important to do so before I come to softer issues. Patent examination has always been fallible; there never was a golden age where everything was perfect. Errors occur in search and they occur in substantive examination - we all know that. That is why offices need to be prepared to challenge and to correct, and good patent offices watch and learn. In this context of inevitable fallibility, I think that the development of interest in formal quality systems, whether it's ISO in the US or a European quality system with the European Patent Office, we're starting to move from "well, we're professionals, we get it right", to saying "we have some systems in place to help us get it right consistently". But could I say that a system of quality management is just a system of quality management and the question is what do you do with it and what do you use it for? Simply having systems in place guarantees very little in terms of performance in my experience, and I think that is an axiom that most people who think about quality would concur with. So, you know, it's not that we've slid from a golden age necessarily but we're facing a set of new challenges and I want to turn to them now.</p> <p>Can I start by trying to clarify what it is we are talking about? I've got four headings here : The first is the problem of quality may be caused by pressure to actively increase output. Soft formulation for that in quotation marks is "grant at any price". The second problem is that of issues in quality caused by the acceleration of technical change, particularly what I call "disruptive technologies". Now these, I think, pose challenges for the examination system -- getting your mind around what is involved, and fuel societal doubts because patent offices are very often a lightning conductor for poorly formulated emotional responses to what people see as Frankenstein science. "Science is threatening", "science is immoral", "science is doing things</p>
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<p>BRIMELOW</p>	<p>we're not comfortable with". That is incredibly hard to deal with because in the cold light of day it's not particularly rational and we are, as I've already said, by definition very rational people. The third problem of quality is that caused by our backlogs. I talk about backlogs a lot in public; I think they are having a profound effect, probably irreversible, on the nature and performance of the patent system and certainly they lead to ambiguity, and I have to say that patents and ambiguity really should not cohabit. The fourth problem is problems with quality caused by the new behaviours enabled by our large backlogs. I'm talking about games in standard setting; I'm talking about -- "rich man's poker" is the phrase I use -- numbers games for commercial advantage, and trolls, of course, particularly on the other side of the Atlantic. It seems to me there is loss of quality in the context of the value and probity of the system as it was defined by its founders, and I see there really quite significant drift. Let me go through the four in slightly greater detail.</p> <p>Grant at any price -- I do hear from some examiners, even in the EPO, that they do cave in sometimes to applicant pressure, and I'm not surprised. I'm sure it happens from time to time. It's not creditable; I think it is predictable and it seems to me that it is something that the management of a patent office should be managing. There is also though a parallel assertion, a related issue, which is that certainly in the EPO we give "more credit" for a patent granted by an examiner than for a patent refused. I hear this very regularly. I'm told, I'm sure -- I've asked questions about this -- that this is no longer the case. All I can say is an organization of six and a-half thousand people like the EPO, myths have a very long half life and there is I think a very lively sense still that they -- the managers -- are much more interested if you get the case off your desk, granted, than if you slow things up by saying no. That needs to be addressed as well, but I think the lesson is entirely clear for us. As managers in the EPO, please be careful what you measure because that is what you will get. It's axiomatic in management that you need to choose your measures carefully and if you concentrate on patent grants, that is what you will get, and the consequences may be really quite uncomfortable. There are also tensions between getting the backlog down -- we certainly want to do that -- and we want high quality -- yes, we want that as well. We need both and I have to say that late and discreditable patents are absolutely no good to anyone in the long run.</p> <p>Can I also at this point make a parenthetic comment on something that I hear from critics outside fairly regularly, which is the suggestion that the EPO is driven to perform in a certain way because it wants the money; that we grant a patent because it is financially advantageous for us. I have to say this is soft logic; in fact, it's not logic at all. Patent renewals matter to us in our current system of funding. We need therefore to grant robust patents because if they are not robust, they will not have a long shelf life and we won't break even on the process. It is absolutely clear that our financial interests as well as our proper job is to grant good patents and refuse to grant weak patents. I think I have to say in this context, too, and I've said it in public before, we need to reflect on whether, looking out ahead, it is rational to expect the patent system to be funded by renewals. I see pretty good arguments for saying we're moving to an age where we have to charge what it costs to examine patents (and you can expect managers like me to accept the need to get this cost down but hoping</p>
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<p>BRIMELOW</p>	<p>that renewals will keep us afloat given what people are doing with patents has a very limited shelf life indeed. Lots of problems flow out from that, not least how you handle SMEs, but I have run this up the flagpole several times. I think we're operating under a funding model that is coming to the end of its useful life moving to charging what it costs may or may not effect demand, but it seems to me justifiable, too, in the sense that it becomes a much more transparent process. You can throw a rock at me about that later if you like, but I offered the thought to you.</p> <p>Second point, acceleration of technology. We're all in our offices examining technologies that weren't around when our senior staff were studying or indeed recruited to become patent examiners. Now, we all know that faced with new technology patent offices tend to grant broadly and reclaiming lost ground is very difficult. In this context I would strongly endorse better cooperation between patent offices globally in assessing what we think the patentability problems of new and disruptive technologies are. I think we need to share information; I think we need to share experience and we also need to share what we scent coming on the wind, the "wind of change". It might help us to address things like the sudden increase in voluminosity, particularly in a sector like biotech which took us by surprise. It's certainly easier to be overwhelmed by new technology. I have still fresh in my mind the comment of a major applicant whom I visited saying they had applied at the EPO and got the reply "we can't search that -- it's far too complicated". Now, for an office that is proud of its tradition of quality and competence, we probably ought to be able to do better. Another issue of course is the problem of the new and increasing interrelationships of technologies. We need to learn as patent examining authorities to work cross technological barriers; being competent in one area is increasingly not going to be enough and may be an active handicap. Innovation is becoming much more complex and patent offices have to learn how to keep up. And back to my point, I think that patent offices globally will do better at that game if they talk to each other, and actively consider new and threatening problems rather than struggling on alone. We're doing a lot more collaboratively -- a little bit late I think but given that innovation is now global, I strongly welcome that. Such collaboration would improve transparency, and I think that is important because it helps to address criticism that I have to characterize as "techno-scepticism" in society. And if you are confined to an ivory tower you won't understand why people are techno-sceptics -- you have to get out and move around more, pursue things in collaboration. An example I suppose is the peer-to-peer initiative, which is running strongly in the United States and which the EPO is interested in and which the United Kingdom has also taken up. Now, I have no idea where the peer-to-peer is really going to help in terms of quality or not but I am hugely encouraged that the vivid problem of patentability in a very difficult sector is being addressed in a much more open and collaborative way. I think that is an important development. This particular initiative may work, may not, I don't know, but if it doesn't work something else will. As I have said elsewhere in public, it also signals the end of an omniscient, all-knowing patent office, and that is a major change, a sea-change for us in offices I think.</p> <p>On the problem of techno-sceptics there is a great wail that goes up on a regular basis of "if only they understood" what emanates from</p>
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<p>BRIMELOW</p>	<p>the patent literate when faced with scepticism or hostility in wider society. I think wailing about this is pretty pointless and little pinpricks of publicity exercises may help a bit but are not actually going to make more than a marginal difference. However, I look with interest at what's happening in Japan, "a nation based on IP", appears to be rolling quite effectively. But I think that the rest of us probably need to accept that we are not trusted by many and as a result we need to demonstrate very clearly why we are safe and in the classic phrase from examination questions, "be prepared to show our workings". Talking to people who aren't really interested in what you perceive as the truth can be depressing, but it doesn't mean you shouldn't try.</p> <p>Next point, number three, backlogs and the remark I made which was that ambiguity and patents should not cohabit. It's a brief and rather important point I think -- long delays self-evidently create uncertainty; people don't know what is lurking in the system and I don't need to remind you that one of the key defences of the merits of the patent system, and it's inherent in the word patent or patent, is that it places invention before the world -- it adds to knowledge. That is the key justifier for our existence and that is why I am so worried about backlogs and see backlogs as a failure of quality. I note that many of you in this room will argue that delay suits lots of applicants and lots of sectors. I know, and I'm sorry to have to say I don't care. We have a wider interest to defend as patent offices and I would regard us as failing in that duty if we allowed ourselves to be seduced by a sectoral argument that don't worry, delay doesn't matter here very much and okay, ten years to grant, ten years in opposition, public benefit, query, query, query? You know, we delude ourselves if we think that this is not a pressing problem. I think it is; I think at this stage it's really a moral issue and we need to take it seriously. But and it's one big but and this is a trial balloon -- a '<i>ballon d'essai</i>' for you : I find myself wondering whether looking at that backlogs and their consequences we are looking at really a structural and irreversible change in the nature of the patent system. Clearly people want more patents; they are still piling in through the doors though I'm not sure for what purpose they may be using them. If we don't catch up, and I have to say I've heard Jon Dudas in the States say pretty clearly in public at IPO in Chicago last October that he wasn't going to catch up -- if we can't catch up, are we perhaps moving from a system built on a proxy for certainty, a good presumption of validity, to a system which is more about balance of probability. If that is the case, can I just float the question :what is the role of a patent office in the system which is about balance of probability rather than a proxy for certainty?</p> <p>Fourth point -- problems of quality caused by new behaviours. I commented on the problem of societal scepticism. I think that we are sliding away from the declared value and probity of the patent system which evolved from the late 19th century and into the post-war era -- post second war era -- and I think this is another aspect of quality and it should concern us. But if you define quality as fit for purpose, then perhaps the purpose we are meant to be fit for is evolving and we can all relax and just say "this is what happens", perhaps. But for the moment we face a lot of noise and a lot of hostile noise and for some reason which I don't understand, headlines about IP tend to be negative. Therefore not many positive headlines about IP and the reputation of IP, for example in the United Kingdom, the public sense that legislation stops you getting cheap designer jeans in</p>
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BRIMELOW	<p>supermarkets, patents lead people to die unnecessarily in Africa, and copyright turns your teenager into a criminal for downloading music. That's what IP is in the eyes of the citizen. It's a gross and negative simplification, but that is how they think and they have votes. So I see transition and change certainly and looking at what is happening in the patent world.</p> <p>I have to comment that markets solve problems and that is the intrinsic strength of capitalism. And the market is solving the problem of backlogs in very, very creative ways and people are making a lot of money at it. Does this matter? The response to the ambiguities caused by our backlogs, by our failure of quality and timeliness are creating excellent opportunities for commercial success. I'm not sure I admire all of them, but what's 'admire' got to do with it? "Rich man's poker" is making some rich men even richer. Whether it is doing more than enrich the already rich and confident, I'm not certain and I think there is an unanswered question about whether it is really promoting innovation in the way we console ourselves that the patent system really does. But it's certainly a neat economic game that's going on. And I think we ought to note that competitive advantage is not a perfect proxy for successful innovation. And I hate it -- I really hate it when rhetoric and reality diverge; it shows I'm not a politician. We have I think a growing gap between the language that we use about what the patent system is for and what is actually happening and people are already pointing out that there's a gap and there's no point in pretending that it doesn't exist. I would argue there is no point in pretending that it doesn't matter.</p> <p>My final remarks -- what next? Brimelow has a number of axioms and one of them is that in patenting you can't go backwards so even if you think there's a lost golden age, it's there and that's not a direction in which you can move. Looking ahead I think patent office managements need to run competent examining offices; I'm sorry to put it bluntly but that's what we're there for and are meant to do it well. Things like ISO will help; competent, confident patent examiners need to be deployed to deal with our problems. The European Patent Network is also looking at the question of "raising the bar", looking at what a man skilled in the art might be expected to know now that he has access to Google. Offices around the world need to engage with each other much more proactively in thinking about what constitutes "doing a good job" in patent search and examination and this is not something we can do on our own. And we certainly need to learn how to take advantage of other people's searches. We have started that within Europe and it's a Trilateral agenda item as well. I think it would be nice if we moved from talk to action, but that is symptomatic of how I behave. We need continuing empirical analysis, critical analysis, economic analysis of whether the system is actually doing what it says on the package. I am very, very happy to support and engage with economists who are looking critically at what's going on, because I think that's how we learn and improve. And finally, I think we have to take to heart a remark I think originally made by me but also adopted possibly without credit to the original by Giorgio Armani, which is "less is more".</p>
HUNTINGTON	I think --
BRIMELOW	I spoke for too long.
HUNTINGTON	No, no -- no, you didn't. It was all very interesting. Are you willing to -- and I've been watching John Doll from the U.S. Patent Office to see

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HUNTINGTON	what his reaction was as you were talking -- but would you be willing to entertain a couple of questions?
BRIMELOW	Yes.
HUNTINGTON	Anyone have something they'd like to ask?
LYNDON-STANFORD	My name is Edward Lyndon-Stanford and I'm speaking for CNIPA. Thank you very much, Ms. Brimelow -- that was fascinating. I'd just like to ask one question: We have welcomed in certain quarters the interest that the European Patent Office takes in what happens once you've got your patent. We cannot just ignore the litigation system (<i>tape distortion</i>) of having a patent. Would you like to just make a few comments about that? Thank you.
BRIMELOW	Yes, and I gather it's come up already. Self-evidently and one of the problems of patent offices is that they think that the life of a patent ends when they've said yes or no. I take it you wish me to comment on the pickle we are in in Europe, yes? Okay. Well, we have excellent intentions and as those of you who are native English speakers will know, we say in English the road to hell is paved with good intentions. We are finding it singularly hard at this phase of our European adventure to get our act together in the area of litigation, despite the fact that the EPLA is a competent piece of work and is seen by many, though not all, as a useful project to take us forward to something which is better than the status quo. The problem with all good ideas is if you leave them half finished or unachieved, they start to grow mould and they go past their sell-by date and I am a little bit worried that having worked very hard for the last five years or so to pursue EPLA that we're running out of relevance with it as well. I don't know what will emerge next in this area and I suppose there is a case for saying, well, we seem to get by reasonably enough. Can I say that we're struggling very much for a variety of reasons but partly to do with public confidence in Europe with real doubts about what ought to be patented? Look at how we implemented the biotech directive and the problems that causes for the EPO. And absent a desire to make things better, we're not going to get things to move and inevitably the formulation of policy in Europe is a horse trading process and the right horses are not yet in the market as far as I can tell. Do I think this is satisfactory? No, I do not. Do I think it can be altered quickly? I doubt it very much. Do I think we will have to make do with what we've got for the moment? Yes, I do. Is that alright, Edward?
HUNTINGTON	Sam Helfgott?
HELFGOTT	Sam Helfgott, ABA. You mentioned at the end an objective of making more use of the search results from other patent offices through the Trilateral. This has come up earlier and it's going to be on the agenda later on -- the use of PCT. It was pointed out by one of the presenters that of late the EPO is making less use of the search results of other organizations of the PCT. Many of us feel that PCT is perhaps a here and now, the searches are available and I wonder if you can comment on your view of making use of the search results of other organizations within PCT?
BRIMELOW	Yes, I can, but can I ask -- is it true -- are we making less use panel?
HELFGOTT	No, perhaps that's true. It is the PCT examination which was called in the past Chapter 2 which is not used.

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BRIMELOW	Okay. I mean, it's possibly a slight definitional problem. I am reminded of a contribution by the man who succeeded me as head of the UK Office, when we were sidling up to the question of whether you could use other searches. It was just, "oh look, I've been an examiner; of course you use other people's searches", and I think that was a strong voice of reality. An examiner faced with a heavy workload will take a real interest in work that's been done by anyone else regardless of what the proper framework is, which leads me to say let's have a proper framework for it. There is a huge amount of prior art out there and getting a handle on what is there is something that you have to do with the help of others. I haven't yet mentioned the problem of accessing Chinese prior art but that is the "elephant in the room" in terms of quality for us. And I think that it is rational and desirable that competent patent offices make effective use of work which has been done elsewhere. I see no alternative for an effective future.
HUNTINGTON	One more -- yes, John?
DOLL	Hi, I'm John Doll from the USPTO.
BRIMELOW	Hi John.
DOLL	Congratulations and welcome. I couldn't agree more with your comments; I think your speech was right on point. The United States looks forward to working with you in the future. I do have one question with respect to application quality. What I'd like to ask is your views on applicant doing a prior art search before drafting and filing the application, especially in view of the limited resources in the United States and in the EPO, how valuable it would be for us if the prior arts search was done and the claims are drafted with a focus on exactly what the invention is.
BRIMELOW	We're certainly thinking along those lines in the context of the European patent network and I heard what Chris Mercer had to say, using the British office in that way, though indeed for some people this may be too expensive. Oh dear, aren't we good at why not? As I say it is actively being worked on in the context of the European patent network. I mean, come on, and it was a theme out here in Chicago last October as well. We are talking along the same lines; could we please move from talk to action?
HUNTINGTON	With that, thank you very much.