

Brimelow faces challenges, but comes to office at a promising time

The new president of the European Patent Office will have her work cut out as she tackles a number of high-profile issues. If Alison Brimelow plays her cards right, however, she could find allies at the very top of Europe's political ladder

When Alison Brimelow sat down at her desk on the first day of her new job on 2nd July, she would have seen quite a pile of papers in the in-tray. Not only did the incoming president of the European Patent Office have to deal with issues such as how to manage the growing rift between the English courts and at least one EPO board of appeal with regard to the patentability of computer implemented inventions, but she was also faced with what seemed to be a set of employees in open rebellion. Throw in the ongoing debate over patent quality, as well as Europe's continued inability to devise a cost-effective, transnational and broadly predictable patent system, and Brimelow could have been forgiven for wanting to put through a call to her predecessor Alain Pompidou to see if he wanted to take his old job back.

But the former head of the UK Patent Office and career diplomat is made of sterner stuff than that. She has had to be. Although she attracted most votes in elections during 2003 to find a new EPO president to succeed the German Ingo Kober, Brimelow was unable to take over when Kober stood down in 2004. Instead, she was forced

to wait three years after a compromise deal was agreed which allowed Pompidou – a candidate who the French government had insisted should be given the job – to serve half the president's six-year term.

That Pompidou, a clever politician who was always interested in the big picture, became the most high-profile president the EPO has ever had probably made those three years hard ones for Brimelow. But she did not complain. Instead, she remained very firmly in the background, working on issues such as the EPO Scenarios project and preparing for her term. If she had views on the way Pompidou was handling his role, or on developments at the EPO in general, she kept them very firmly in the private domain.

The EPO versus the UK courts

Now she is at the EPO, however, Brimelow has a lot of work to do. In June, for example, a story broke on the IPJur blog (www.ipjur.com) about an attack made by one of the EPO's boards of appeal on Lord Justice Jacob, the UK's most senior patent judge and a man whose decisions are widely respected across Europe.

In its decision on case T 0154/04 – 3.5.01, concerning a "Method of estimating product distribution", the board – chaired by Stefan Steinbrenner – seemed to question Lord Justice Jacob's understanding of the term "invention". Furthermore, it stated that the judgment he delivered at the Court of Appeal in London in *Macrossan*, a high-profile case relating to the patentability of software, was "irreconcilable with the European Patent Convention"; this after

stating that the "technical effect approach" which the judge endorsed in *Macrossan* was "not consistent with a good-faith interpretation" of the convention.

Putting the rights and wrongs of the legal arguments to one side, such a clash is very bad news for patent owners across Europe. The fact that the board could have a view of the European Patent Convention so diametrically opposed to the one held by a hugely experienced and distinguished English judge demonstrates the fault lines that exist in Europe over the crucial subject of the patentability of computer implemented inventions and software. And the way the European system is currently structured – with European patents granted at the EPO in Munich, but enforced in, and interpreted by, national courts – means there is always plenty of scope for such disagreements; especially in contentious areas such as software.

In June, the EPO held a day-long conference in Brussels designed to bring the many sides in the fractious debate about software patents in Europe together to discuss potential ways forward. The good news was that it was all quite civilised; the bad news was that nothing much happened beyond vague agreement that there was a need for more talking. Under Pompidou, the EPO was a strong supporter of the failed CII Directive but, despite some rumours, the chances of that being resurrected seem remote to say the least. However, something will need to be done at some stage to clarify how the law as it relates to computer

implemented inventions should be interpreted. It is untenable to have a situation in which different parts of what is supposed to be a single market view the same issue in completely different ways. Brimelow has a major role to play in helping to sort this serious problem out.

Examiners in revolt

Another major challenge she faces is close to home. Just before the Pompidou presidency came to an end, an internal EPO report was leaked which described how staff at the office have lost almost all trust in both the office of the president and the EPO's Administrative Council. According to the report, which, the preamble explains,



Alison Brimelow
The new EPO President

Challenges to face, but friends to make

was “submitted by the staff representatives via the President of the European Patent Office”, there is major conflict between Administrative Council members’ roles as guardians of the EPO and the fact that two-thirds of them hold senior positions at national patent offices.

The report reveals a widespread feeling among staff in Munich is that it is in the interests of council members that the EPO is not as efficient as it could be, because such inefficiencies drive applicants to register patents at the national level. Furthermore, the fact that national offices retain 50% of all European patent renewal fees means that they are more interested in the number of patents granted by the EPO and far less concerned about the quality of what is being granted.

But that’s not all. There is, says the report, a negative feeling about EPO staff from council delegates: “Particularly in the last two meetings of the Council, members of certain delegations have made comments implying, or even explicitly stating, that they consider EPO staff to be, among other things, unprofessional, inefficient, overpaid and malingering ... It has not gone unnoticed by these staff that certain of these comments even appeared to have the implicit support of the Chairman of the Council.”

That there is tension between the EPO and many national European patent offices will come as no surprise to anyone who has spent time in Munich or other EPO offices. One constant theme in many conversations with staff members is how the national offices, through the Administrative Council, are more focused on their own interests than the interests of the EPO. This probably explains the negativity towards the Council in the report; it is unlikely that many who work full-time at the

office – even in some of the most senior positions – disagree with much of what was said. The conflict that does exist could well have the potential to compromise quality and efficiency at the EPO, and it is important that these issues are properly – and openly – discussed. One of Brimelow’s roles over the coming months will be to reassure users of the EPO that quality remains the over-riding goal of everyone connected to the office, and that nothing is being done that will see it being compromised.

Questions of quality

Brimelow, it seems, understands this. In her first interviews after assuming the presidency, she has been very keen to stress the importance of patent quality and has also said that she is worried that there may be too many patents being granted. If it is the case, as EPO staff assert, that the Administrative Council is more worried about numbers than quality, there is certainly the potential for a clash between the president and the council some time over the next three years. Brimelow may need all her diplomatic experience to make sure that any disagreements do not blow up in the open.

Something else the new president has been keen to mention since she took over is what she describes as the world-class job being done by EPO staff. Clearly, there is a morale problem among examiners – the leaked report followed a series of one-day strikes last year which, it was claimed, were all about perceptions that quality was being compromised in the name of management reform. However, such claims do not tell the full story. Adjustments to the way in which pension contributions are made mean that staff now have to pay more from their salaries, while Pompidou also forced through new appraisal systems in

defiance of staff protests. Whether disgruntled staff members are using the issue of quality as a weapon with which to beat the management that has altered working conditions is a moot point, but one that needs to be properly explored. So far, Brimelow has not indicated that she will revisit either the pension or the appraisal issues, so it will be interesting to see how her relationship with such key players as SUEPO (the Staff Union of the European Patent Office) develops over the coming months.

Opportunity knocks

But while Brimelow undoubtedly faces a number of important challenges, she does so against the backdrop of some very welcome developments on the wider political stage. Although Pompidou himself was a consummate politician, despite

sometimes heroic attempts he struggled to get Europe’s really big players to take the subject of patents seriously. All too often they preferred to look at subjects such as the Community Patent, the CII Directive and, latterly, the European Patent Litigation Agreement (EPLA), as technical issues, best left to the experts. Discussing farm subsidies and fishing quotas was deemed much more important.

Because the likes of Jacques Chirac, Gerhard Schroeder and Tony Blair were never persuaded that patents had a vital part to play in the future development of Europe’s economy, there was never much pressure from the very top for progress in any of the talks surrounding the many initiatives designed to make Europe’s patent system less fragmented. Instead, the endless negotiations involved a number

Grants and applications up at the EPO

According to the EPO’s 2006 annual report, both the applications the office receives and the grants that it makes are on the rise. While, at 207,300, there was a 5% rise in applications, the number of grants, at 62,780, increased by 17.9%. This at a time when the percentage of grants made by the USPTO, for example, has fallen significantly – from over 70% of applications just five years ago to 54% now.

Among European countries, Germany once again topped the applications table, with 24,900 (18.4% of the total), followed by France (8,010, 5.9%), and the Netherlands (7,400, 5%). In comparison to 2005, filings rose in most countries, especially in Germany (+1,078).

However, they fell significantly in the Netherlands (-472).

Among non-European countries, growth was marked in applications from the US (34,800 filings, +2,060) and Canada (1,950, +170). Significant increases were also recorded from Japan (22,140, +680), Korea (4,595, +742) and China (720, +181).

The top 10 company applications were as follows:

Philips	4,425
Samsung	2,355
Siemens	2,319
Matsushita	1,529
BASF	1,459
LG Electronics	1,214
Robert Bosch	1,093
Sony	1,088
Nokia	882
General Electric	768

of those with a vested interest in the *status quo*, which earned them a very good living, and so gave them little incentive to push for change.

However, there are signs that this is no longer the case. Over the last few months, the political guard has changed in Europe. The German Chancellor Angela Merkel has been joined at the top table by a new French president, Nicolas Sarkozy, and Gordon Brown, the man who has succeeded Tony Blair as UK prime minister. All three have given reason to believe that they have a much more developed view of intellectual property, and patents, than their predecessors.

In April, for example, Merkel addressed an EPO-organised conference in Munich. In her speech, the German leader – who holds a doctorate in physics and worked as a scientist before entering politics – stressed the importance of the EPLA, as well as ratification of the London Agreement, which would limit translation requirements in European patents, so making them much cheaper to obtain than they are now. The six-month German EU presidency, which ended on 30th June, was characterised by attempts to get both initiatives moving.

Progress in France

Up to now the London Agreement has not entered into force because the French, under Jacques Chirac (and despite very strong lobbying from Alain Pompidou), claimed to be worried that its introduction would mean the marginalisation of the French language. Indeed, France has been witness to the bizarre spectacle of the CNCPI, the French Patent Attorneys' Association, lobbying against the agreement; despite strong support for it from the French Employers' Association (MEDEF).

The attorneys explain they are worried that the agreement will mean that there will be

substantially less applications filed in French because such filing would no longer be compulsory. This, they say, would create significant uncertainty for French companies. What they don't say is that it could also mean significantly less translation work for them; which is presumably why MEDEF, which represents so many of their clients, is such a strong supporter.

Under Chirac the CNCPI was assured of a sympathetic hearing. With Sarkozy now in charge, this is not the case. In the run-up to the presidential elections in May, Sarkozy stated that he wanted France to ratify the London Agreement, something that would see it enter into force. In a newspaper interview given in July, two government ministers – Valérie Pécresse, who is responsible for higher education and research, and Jean-Pierre Jouyet, the secretary of state for European affairs – stressed that the agreement remains a priority. Despite last-minute lobbying from the CNCPI, the betting in Paris is that France will sign up by the end of this year; something that will be welcomed by companies across Europe and beyond.

For his part, Gordon Brown has already shown his IP credentials when he was the UK's Chancellor of the Exchequer. In 2005, he appointed Andrew Gowers to review the UK's IP framework and to suggest ways in which it could be improved. While the final report that Gowers produced was not in itself a groundbreaking piece of work, the fact that it had been commissioned in the first place was significant. To emphasise the importance he gave to the role of IP in the UK, on becoming prime minister, Brown created a new government department – the Department for Innovation, Universities and

Skills (DIUS) – within which the UKIPO (the former UK Patent Office) now operates. Also, and for the first time ever, the UK got a government minister with IP in his job title; this when Lord Triesman was appointed Parliamentary Under Secretary of State for Intellectual Property and Quality.

Friends in high places

While it would be overstating things to claim that IP is now at the top of the agenda in Europe, it does seem clear that, probably for the first time ever, the leaders of the countries which are commonly regarded as the three main movers inside the EU are people who have a working knowledge of IP issues and an understanding of their potential importance. The significance of this should not be understated.

For progress to be made in improving Europe's patent infrastructure, it has always been necessary for big political hitters to get involved. For too long, the running in patents – or the lack of it – has been left to people who do not have the clout to see changes through in the face of opposition from those with a vested interest in the way things are at the moment. Once leaders start getting involved, however, obstructing progress towards a cheaper and more efficient way of obtaining and litigating patents in Europe is much harder to sustain. After all, knowing that the chancellor, the president or the prime minister might start asking questions if negotiations are not progressing does concentrate the mind wonderfully.

All of which is excellent news for Alison Brimelow, as well as for all those in industry that want to see Europe's patent system reformed. The EU now has a set of leaders who, at a minimum, give every impression of being willing to give them the time of day and to listen to their

arguments. And, if the arguments are strong enough, there is much more chance than ever before of things happening as a result.

For a president of the EPO facing more than a few local difficulties, having potential allies at the very top of the European tree is a gift. If Brimelow can use her skills as a diplomat to harness their support, there is every chance she could have a remarkably successful three years. The in-tray may well be full at the moment, but there is no reason why it cannot be tackled. Alain Pompidou would not be human if he did not cast a few envious glances in the direction of his successor. ■



Alain Pompidou
EPO president
until 30th June 2007

*Envious
glances at his
successor*