

which two or more parties are clearly acting together, whether in the provision of the complete parts of the kit and/or subsequent assembly of the finished article. It is not difficult to see arguments arising as to whether a kit is complete or incomplete and whether the provided components can only realistically be used outside the UK for the purpose of putting the claimed product together. If applied strictly this decision would seem to provide that there would be no liability in such cases and it then could be a decision to be distinguished, overruled or potentially require a legislative change.

It will be interesting to observe the outcome of any appeal and whether its potential impact can be largely side-stepped by the provision of tighter patent drafting to meet

the double territorial requirement. For those readers luckily enough in the current economic climate to be comfortably reclining on the aircraft seats in question on a long-haul flight with *CIPA Journal* [Ed.: No such case has been reported to me] in hand, it may be the ideal environment to consider whether the decision has created a potentially damaging doctrine of kit of parts or is very much limited to the Virgin and Contour/Delta dispute.

\*The authors are partners of the Scottish law firm Maclay Murray and Spens; contact: [rbuchan@mms.co.uk](mailto:rbuchan@mms.co.uk).

© Robert Buchan, partner, Maclay Murray & Spens January 2011

## Legal Services Act 2007



By **Crispin Passmore**  
(Strategy Director,  
Legal Services Board)

The **Legal Services Act 2007** fundamentally changed the way that legal services in England and Wales are regulated. Securing independent regulation was at the heart of the Act. Parliament recognised that a system whereby a body could on the one hand represent their members whilst simultaneously acting as their regulator does not have a place in the modern regulatory world. It sends a confusing message to consumers of legal services and creates the perception of regulation being run by lawyers in the interests of lawyers, rather than the wider public. The Act therefore requires that regulation and representation are carried out independently from each other. This applies to all of the Approved Regulators named within the Legal Services Act and is non-negotiable.

The intellectual property Institutes were quick to react by establishing the Patent Attorney and Trade Mark Regulation Boards, to whom regulatory functions have been delegated, and IPReg, to oversee the regulation of both the patent attorney and trade mark attorney professions.

Institutional separation is a significant first step. It also signals fundamental change in the role of the Institutes as professional bodies. A priority for all parties must now be to achieve clarity of understanding of respective roles and the boundaries between them.

The roles are complicated. The Act intentionally provides only general principles and leaves the Legal Services Board to establish a framework for delivering independence through its **Internal Governance Rules**, which were introduced in January 2010. These Rules provide the Approved Regulator with some flexibility in how to achieve in practice the required outcomes.

In summary, Approved Regulators fulfil their obligations by setting up separate regulatory bodies and leaving them to regulate. For the intellectual property Institutes, this means IPReg must be allowed

responsibility to assess the risks that arise from the regulated community, to set a strategy to manage those risks and to assess and deploy the resources to deliver the strategy. The role of the Legal Services Board (LSB) is to provide an important safety net in this process as any party may call on us in our role as oversight regulator at any time if they have concerns about governance, effectiveness or independence. This is on top of the checks built into the system through the LSB's own role in approving changes to the regulatory arrangements, approving the annual practising fee level and reviewing compliance with the Internal Governance Rules on an annual basis. Further checks also happen when the LSB investigates specific areas of regulation where there is evidence that a particular risk or issue may need addressing.

It is tempting for the representative part of the Approved Regulator to create a role for itself of monitoring, evaluating and checking the activities of its independent regulatory body. We believe that this is wrong on two counts. Firstly, this is properly the role of the LSB as oversight regulator and attempts to oversee regulation risk undermining its

independence and effectiveness. Secondly, setting up separate regulatory bodies and then taking an oversight role that goes beyond reviewing variance from settled plans and budgets not only compromises independence but also adds cost.

This, therefore, is the position with regards to the importance of separation, which can act as a vehicle for independent regulation in which the public can have total confidence. This applies across the range of reserved legal activities and across the spectrum of legal services providers.

Some argue that the Act applies, or at least should apply, differently to different types of legal services providers. Some go as far as to say that regulation is optional for some lawyers. We should be clear that this is incorrect: regulation is a statutory requirement for anyone wanting to deliver reserved legal activities. The Act is also clear that all those who are

authorised by an Approved Regulator to undertake reserved legal activities must be subject to regulation that supports the regulatory objectives and other requirements of the Act – there is no halfway house or regulation-lite option. Many authorised persons choose to undertake other activities that are not reserved legal activities and this is a matter for them. This includes solicitors and barristers as well as patent and trade mark lawyers.

The question that needs to be addressed by the Institutes is what now is the role of professional bodies and what will deliver most benefit to their members. This is, most certainly, for the profession to decide and not for regulators. But by delegating regulatory functions entirely and supporting the LSB in overseeing regulation, professional bodies must be better placed to concentrate on assessing their future with their members and focusing on delivering effective professional and representative services.

## Key announcements by EU Commissioners, EPO and OHIM Presidents at the IP Summit 2010

By **François Morel\***



The fourth pan-European Intellectual Property Summit has been held on Thursday and Friday 2-3 December, 2010 at the Hotel Le Plaza in Brussels. This year's edition welcomed more than 500 delegates from 47 countries and 152 speakers present despite the weather conditions.

Warming up the audience with new hopes on the EU patent, European Commissioner for Internal Market and Services **Michel Barnier** took the occasion of his opening address on Thursday 2 December to reiterate his commitment to be 'the last European commissioner to deal with the implementation of the EU patent'.

The EU patent agreement proposal was rejected on 11 November by Italy and Spain during a Council of ministers of the 27. Responding to Umicore Chairman **Thomas Leysen**, also President of the Belgian Industry Federation, and to Director General of Business Europe **Philippe de Buck**, **Mr Barnier** stated during the summit that '23 or 24 countries would have signed the agreement'.

After the initial rejection, several countries such as the UK, Sweden and The Netherlands immediately asked through official correspondence whether the 'enhanced co-operation' procedure could be investigated.

According to the Lisbon Treaty, this procedure allows the European Commission to proceed further in the process of implementing an important reform if a letter is signed by at least ten countries asking for the so-called enhanced co-operation. **Mr Barnier** responded during the IP Summit that:

20-24 member states could go for it. And I've mentioned that companies in Italy or Spain... and all companies in Europe will have the right to use the EU patent the way it will be created.

In addition, countries that will have not signed the agreement initially will have the opportunity to join later.

At mid-December, 12 countries have sent letters to request for the enhanced co-operation: Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, The Netherlands, Poland, Slovenia, Sweden, and the UK. Though the quota has already been reached, Italy and Spain have responded that they would prefer the negotiations to continue towards an agreement commonly accepted by all 27 member states.

Innovation in Europe is notably impeded by the cost of filing a patent, where it is recognized that submitting applications in only half of EU member states is ten times more expensive than in the whole US or Japan, due to the cost of translations.

Facing this situation, institutions and offices such as the European Commission and the European Patent Office are also exploring ways to provide automatic translations of patents.

During his keynote speech at the IP Summit, President of European Patent Office **Benoît Battistelli** backed **Mr Barnier's** statement that the Commission is 'working with the EPO to have automatic translations'.

He further commented on the recent Memorandum of Understanding that his office has signed with Google. For the last ten years, the Web applications provider has been developing an online translation service for more and more pairs of languages, which has been made available to all users of its universally recognized search engine.