



FICPI OPEN FORUM MUNICH 2010

G3/08: “Brimelow Questions”



BRIMELOW

- FICPI Amicus curiae brief (EXCO/US09/CET/1701)



BRIMELOW

Art. 112(1) (b) EPC:

- In order to ensure uniform application of the law, or
- if a point of law of fundamental importance arises

the President of the EPO can refer a point of law to the Enlarged Board of Appeal for decision where two Boards of Appeal have given different decisions on that question.



BRIMELOW

Refferal:

“In the absence of guidance from the law and its preparatory documents, and in view of the existence of divergences of opinion regarding how the computer program exclusion should be applied, it is considered appropriate at this stage to refer the questions set out in the previous section to the Enlarged Board of Appeal for its opinion.”



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Refferal:

“Currently there are concerns, also expressed by national courts and the public, that some decisions of the Boards of Appeal have given too restrictive an interpretation of the breadth of the exclusion.”



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FICPI amicus curiae brief:

“In summary, all four questions have to be rejected as inadmissible as in a previous referral of the President under case number G 3/95. No divergence between the cited different Appeal Board decisions can be recognized, which, by the way, are all from the same Board of Appeal 3.5.1.“



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Decision by Enlarged Board of Appeal on 12 May 2010:
(7.2.7)

“Given its object and purpose, the right of referral does not extend to allowing the President, for whatever reason, to use an Enlarged Board referral as a means of replacing Board of Appeal rulings on CII patentability with the decision of a putatively higher instance. For example, a presidential referral is not admissible merely because the European Parliament and Council have failed to adopt a directive on CII patenting or because consistent Board rulings are called into question by a vocal lobby.”



BRIMELOW

Decision by Enlarged Board of Appeal on 12 May 2010:
(7.2.4)

“Hence the Enlarged Board does not rule on abstract points of law, but only ever on real issues arising from the cited differing decisions, as well as on specific legal questions adduced in the referral”



BRIMELOW

Decision by Enlarged Board of Appeal on 12 May 2010:
(7.3.8)

“Hence the President has no right of referral under Art. 112 (1) (b) EPC simply in order to intervene, on whatever grounds, in mere legal development if on an interpretation of the notion of ‘different decisions’ in the sense of conflicting decisions there is no need for correction to establish legal certainty”



BRIMELOW

Decision by Enlarged Board of Appeal on 12 May 2010:

- Referral was rejected as inadmissible
 - Existing case law of TBA was confirmed (technical means-technical problem approach (*Hitachi*))
- Intended clarification of the law was indeed achieved



THANK YOU!