

Day One – 13th January 2020

Half a day was set aside for the Oral Proceedings today, from 1pm. The room, in the EPO Isar building in Munich, quickly filled up with the Board, the Parties involved, and members of the public. Present were representatives of the Patentees, and Opponents 1, 2, 4, 7, and 9.

The Board had already stated in their preliminary opinion that they wanted to devote today to clarifying the parties' requests, and asked the parties to bring their requests along in writing for the beginning of the proceedings. These requests were duly shared and discussed. It was agreed that any requests regarding deciding questions for sending to the Enlarged Board of Appeal would be considered if and when the Board decides that sending questions would be appropriate. It was also agreed that the Board would follow an "all in" approach, admitting all documents filed that relate to the priority situation, including documents D310 to D315 that were filed only last month.

Finally, the Board informed the parties that they intended to start, as suggested by some Opponents, with a discussion of priority and, in particular, the Patentees "Argument II". The Patentees stated that they would prefer to address their arguments in order, as they were filed that way for a reason, but they nonetheless accepted the Board's preference.

"Argument II" is focused on the wording of Article 87(1) EPC. Article 87(1) EPC states (emphasis added):

Any person who has duly filed, in or for

(a) any State party to the Paris Convention for the Protection of Industrial Property or

(b) any Member of the World Trade Organization,

an application for a patent, a utility model or a utility certificate, or his successor in title, shall enjoy, for the purpose of filing a European patent application in respect of the same invention, a right of priority during a period of twelve months from the date of filing of the first application.

The Patentees' "Argument II" is that the use of "Any person" above must be interpreted to mean that where more than one person has filed the application for the patent, any of them can claim priority in the subsequent European application. This would mean that there is no necessity that the applicants of the subsequent application must have the priority rights of each and every one of the people that filed the earlier application, as each person has the ability to exercise their priority right individually. Note that this is contrary to the body of case law that has developed over the years at the EPO, which case law provides that when more than one person has filed the priority application, there is a "legal unity" for the priority rights, such that the filer(s) of the subsequent application must have ownership of the priority rights of each and every person in that "legal unity", otherwise the priority claim is invalid.

The Board asked the parties to restrict their arguments today to the linguistic arguments regarding the meaning of "any person", i.e. as opposed to any arguments that rely on what the context of the term or the purpose of Article 87(1) EPC might imply.

According to standard protocol, the representatives for the Patentees began their oral submissions first, followed by the Opponent's representatives, in numerical order of the Opponent they represent.

In the linguistic arguments, much attention was given to the original language version of Article 4(1) of the Paris Convention, since it is from this that Article 87(1) EPC is taken. In the original French, the “any person” is provided as “celui qui”. Arguments were provided for how this phrase is ordinarily used in the French language, with associated examples, though, not unexpectedly, no clear consensus was reached between the representatives of the Patentees and Opponents. Reference was also made to the many declarations, from eminent former judges and legal scholars, that have been filed in the proceedings, as well as EPO case law.

The arguments did frequently stray beyond the purely linguistic arguments, despite the Board’s request, into arguments as to the *context* of the use of the term “any person”, and as to the *purpose* behind both the reference to “any person” and the legal concept of the entitlement to priority, generally. The Patentee, in particular, presented arguments on these aspects in their last round of submissions; the Board have promised the Opponents an opportunity to respond tomorrow.

The Board adjourned the proceedings at just after 5.30pm, with the expressed intention of hearing arguments tomorrow that are focused on the *purpose* of the use of “any person”. An Opponent requested that the *context* be considered first, or in conjunction, in accordance with the instructions in the Vienna Convention as to how law should be interpreted. The Board said they would consider this overnight.