

The day's session started with some excitement because the Chair immediately announced that it is the current intention of the Board to send questions regarding priority to the Enlarged Board of Appeal. They said that they envisage sending three questions (at least) based on "Argument I" (the EPO should not be assessing priority entitlement), "Argument II" ("Any person" does not require legal unity), and "Argument III" (US law should be used to determine "Any person who has duly filed" in this case), presented by the Patentees.

The likely referral of questions to the Enlarged Board is significant in this case because it would mean that there would be a delay, probably of at least a few years, before a final decision could be issued for this Patent. Also, a referral of such questions to the Enlarged Board would mean that there would be a chance that the way priority is assessed at the EPO could change. This could affect many European patents in, essentially, any field, not just those relating to CRISPR technology.

It is perhaps not surprising, then, that the Opponents strongly objected to the idea of the referral. They also pointed out that if the Board does want to refer questions, then in order for the questions to be deemed admissible by the Enlarged Board, this Board will need to first identify the specific point of law that is of fundamental importance, then state that they can't come to a decision on that point of law in this case, and then establish that the same specific point of law would also affect a significant number of other cases. The Board agreed, with this in mind, to continue hearing the presentations for "Argument I" and "Argument III" (of course, "Argument II" was heard on days 1 and 2), so that they can identify if there is a point of law that they cannot decide, and what it is, and then hear submissions regarding whether the point of law should form a basis for a question for referral.

The arguments concerning "Argument I" began after lunch. However, the Board obviously has the requirements for the admissibility of any questions clearly in mind. Therefore, as an introduction to the session, the Chair of the Board stated that as no-one was questioning the effectiveness of the executed assignments that did transfer the rights of the sub-set of inventors, the Board would need to be convinced as to the relevance of assessing priority entitlement to these particular proceedings.

In the first "round" of arguments, the Patentees simply referred to the written arguments they have submitted during the appeal proceedings (see the [EPO register](#), and the documents dated 1<sup>st</sup> August 2018, 17<sup>th</sup> May 2019, and 17<sup>th</sup> December 2019). Opponent arguments in response included:

- The suggestion that since we are all here to discuss this matter, the EPO must be able to consider and assess who the "any person or successor in title" is;
- Ownership of patent (entitlement) and right to priority are two separate matters that the Patentees are conflating, and it is clear that the EPO can assess the latter but not the former;
- EPO has both the right, and the duty, to assess priority, i.e. who ("any person"), what (same invention), when (effective date), where (Paris Convention or WTO country) and what (patent or utility model) was duly filed, why should the EPO be expected to check only 4 of these, and not the fifth ("who")? The EPO are given the necessary tools to check the "who", including the ability to add a legal member to a Division or Board if they feel it necessary to do so;
- If the EPO does not assess the "any person or their successor in title" then this would invite abuse and diminish the reputation of the EPO for granting quality patents, and would mean parties would only be able to rely on national courts to assess the effective date and so whether the invention is novel and inventive;

- The case law shows that the EPO *can* routinely assess this, and the law is aligned on this point with no compelling reason to change it;
- It can't be argued that the EPC does not tell the EPO to check this, because it also does not tell the EPO to check for novelty, instead, it just states that the claimed subject-matter must be novel, i.e. requirements are listed and it is implied that the EPO will assess for conformity with them;
- You can't just accept the word of an Applicant or Patentee that their priority claim is valid, when that claim is key for determining the effective date of their invention; and
- The requirement for assignment evidence to record a transfer shows that the EPO has been instructed to check at least some chain of title evidence.

Patentees' arguments in response included:

- Combination of [Articles 60\(1\) and 60\(3\) EPC](#) tells the EPO that Applicant is automatically deemed to be entitled and stops the EPO from assessing inventorship;
- The patent bargain society makes is all about a new invention and when it was first disclosed, not who the inventor is, and this is what validity should be based on;
- If the wrong person files then the entitled person should have the chance to acquire that right (e.g. through national courts) – why is priority entitlement treated differently to patent entitlement in this respect? The provision of “any person or successor in title” is there to protect the entitled person, not to destroy the priority right so no-one has it;
- The “any person or successor in title” tells you the person to whom the priority right property belongs, and should not be treated as a qualifier of the priority rights; and
- If the requirement (as shown in the case law) to consult multiple foreign legal systems, to check for “successor in title” to a priority right, was foreseen, then why wasn't it legislated for telling the EPO how to assess it (when, for example, there was legislation for how to check priority claims made later than 12 months after the first application was filed).

Opponents were given, and took, the opportunity to complete this second round with rebuttal comments. Then Patentees asked for, and permitted, the opportunity to make one further brief comment, namely pointing out that [Article 90 EPC](#) and [Rule 57\(g\) EPC](#) don't refer to non-entitlement to priority as a way to lose priority.

The Board then adjourned the proceedings, until 9am tomorrow, when “Argument III” will be discussed (i.e. the Patentees' argument that in this case “Any person who has duly filed” should be assessed under US law because the priority application is a US provisional application).