



## Minutes of F13

EFFAB Patent Watch

Tuesday 12<sup>th</sup> September 2017, 15.00 – 16.30 CEST (GoToMeeting)

### Participants:

Erik Mullaart (CRV), Brian Sullivan (CCSI), Urs Schnyder (ASR), Scott Tyack (Aviagen), Johan van Arendonk (Hendrix Genetics), Louisa Zak (Topigs Norsvin), Ingela Velander (SEGES), Jens Raabjerg Olesen (Hoiberg Patent attorney), Matthew McClure (ICBF), Martin Burke (ICAR), Jan Venneman (EFFAB), Cagla Kaya (EFFAB)

### **F13 – Victoria AS Patent Application - 3<sup>rd</sup> Party Observation status**

Jens gives a short introduction to the patent application and the process. It is filed by Agriculture Victoria Services Pty Ltd and in Europe we filed an anonymous Third Party Observation in February. TPO was acknowledged by the examiner. The EPO issued a new communication in July where they stated that the TPO had been taken into account. However, they did not raise any of the objections mentioned in the TPO regarding novelty and inventive step. The examiner's report indicates that only a few amendments are necessary in order to overcome the remaining objection. It would appear that once these amendments are introduced the broad patent will be granted in Europe. The applicant now has a term until 24 November to file their response. However, it is possible to request 2 more months in addition, i.e. until 24 January.

The steps that we could take at this point is either to file a new TPO or wait for the patent to be granted to file an official opposition.

Filing another TPO at this point will probably not be very helpful since the arguments are already filed in the first TPO with the evidence we had and it will be the same examiner who makes the evaluation. However, if we decide to file an opposition after the patent has been granted the decision will be taken by an opposition division board consisting of 3 examiners. In this case it is allowed to provide further arguments and references. The official objection should be filed within 9 months after the publication of the grant of the patent, which will likely be by the end of 2018.

The EPO sets up a committee for cases like this with 3 examiners. Opposition division will have the first examiner and two more new examiners from the division of which one will be chairman of the opposition division. The opposition division will take a new more objective view of the case.

The evidence, we provided to invalidate the patent, was not considered sufficient by the Examiner to show lack of inventive step. In order to succeed with the TPO or opposition, we probably need to have clearer written evidence that the claimed method or similar methods were undertaken before the patent was filed. However, it has proven difficult to identify such references. Scientific papers in this field are often written in a scientific and statistical language which is difficult for the examiner to understand. We therefore need to be very specific and carefully explain the similarities in the prior art, such that the examiner understands our position. This is what we attempted to do in the TPO and we therefore probably need even more direct evidence to show that the patent is not novel or



inventive. In an opposition, we could file the same documents as in the TPO and we can also include new ideas, new arguments, new references and new papers.

Therefore, it is recommendable to wait for the patent to be granted and then within 9 months file an official opposition. The patent is not likely to be granted until mid or late 2018. First, the EPO needs to issue a notice of acceptance, which cannot happen until the applicant has responded to the present examination report. Then there is a 4 month period to acknowledge the acceptance of the patent. When it is acknowledged, the EPO will shortly issue a decision to grant, and inform of the imminent publication of the grant. The publication of the grant triggers the 9 months time limit to file a notice of opposition. Therefore, we will probably need to react by the end of next year. Jens thinks that this would be a better solution than another TPO.

Once the patent has been granted, then the patent is alive and valid. Thus, even if we decide to file an opposition, the patent is still alive. But filing an opposition earlier than 5-6 months is not common, because a European patent must be validated in the individual EP countries within 3-4 months after grant, and it is better to wait and see, which countries are selected for validation. Therefore, it is better to wait at least 5-6 months to see if the patent is validated and this in force in your country as well. It is noted that you can still be infringing while the opposition is pending although national courts may not decide to treat a case, where opposition is pending at the EPO.

Once you get a reply to your opposition it is not possible to file a new opposition but you can appeal the decision if the opposition is denied. If the patent is rejected by the opposition division the applicant could also appeal this decision if they do not agree. The Board of Appeal is completely new and independent from the opposition division. Briefly, there is a possibility to appeal to the decisions taken by the EPO. This is the last step in the process and it might take years all these steps. Once an appeal is filed the process could take 2-3 years until the Board of Appeal draft their own preliminary report and you are summoned by the board to an oral proceeding. During these procedures in theory infringing the patent is possible and you could be held liable to pay the damages. But this also depends on how they enforce their patent.

As a summary, the best is to wait until the applicant replies to the examination report at this point.

In US, the application is still pending and they are more restrictive in the US examination.

In Australia, the patent was accepted and there has been an appeal now.

In Canada the patent was granted last year. And it was the same case in New Zealand. However nothing changed until now.