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Intellectual Property Group

BROAD'S CRISPR/CAS9 PATENT EP2771468 REVOKED

The Opposition Division of the European Patent Office (EPO) on 17th January 2018 revoked the first of the Broad's¹ European CRISPR/Cas9 patents, its validity having been challenged by 9 parties² on multiple grounds.

The EPO opposition proceedings first addressed the issue of the priority right under the Paris Convention, a multinational treaty providing a harmonized system for international patent priority rights. Despite the arguments put forth by the Broad at the oral proceedings and its multiple expert declarations and hundreds of pages of written submissions, the Broad failed to persuade the EPO to change decades of consistent EPO law, practice and jurisprudence, and also failed to persuade the EPO that the relevant provisions of the European Patent Convention lack consistency with the Paris Convention. The EPO rejected the Broad's arguments that a radical departure from settled law regarding the right to claim priority was justified, and invalidated 4 of the Broad's 12 priority claims based on its decision to intentionally omit Rockefeller University and its contributing scientist as an applicant of the international application that matured as EP2771468.

Having lost its crucial priority argument, the Broad then conceded that its EP2771468 patent lacks novelty over the prior art, providing no explanation at the hearing as to why a single patent claim – either granted or proposed during the proceedings – was novel over relevant prior publications in this field.

Due to the Broad's lack of success on its Paris Convention argument and its failure to defend any proposed patent claims or even to submit new claims, the three-member Opposition Division, who was joined by a legal representative of the EPO, properly revoked the patent in its entirety as required by the evidence on record and European law.³ The EPO then terminated the proceedings two days earlier than scheduled, a complete victory for the opponents.

The Broad has indicated it will appeal the decision to the EPO Technical Boards of Appeal and continue to seek a change to over four decades of jurisprudence and practice to accommodate its failure to comply with established EPO procedures. However, a change in the settled law would be required for this appeal to succeed, as the Broad acknowledged during oral proceedings.

¹ The patent is co-owned by The Broad Institute, Inc., President and Fellows of Harvard College and Massachusetts Institute of Technology.

² **Grund IP Group represented Opponent 2 in the Opposition.**

³ According to EPO statistics, approximately 4% of granted EP patents are opposed and about a third of those opposed are revoked in their entirety. See: <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2016/statistics/searches.html#tab4>