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**Datasheet for the decision  
of 4 May 2007**

**Case Number:** T 0446/04 - 3.3.09

**Application Number:** 93924999.1

**Publication Number:** 0667746

**IPC:** A23G 1/00

**Language of the proceedings:** EN

**Title of invention:**

Reduced fat confectionery products and process

**Patentee:**

HERSHEY FOODS CORPORATION

**Opponent:**

Mars Incorporated  
NESTEC S.A.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

"Basis of decision - patentee (no agreement with the text)"

**Decisions cited:**

T 0601/98, T 0836/97, T 0073/84

**Catchword:**

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Case Number: T 0446/04 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 4 May 2007

**Appellant I:** Mars Incorporated  
(Opponent) 6885 Elm Street  
McLean, Virginia 22101-3883 (US)

**Representative:** Goddar, Heinz J.  
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**Appellant II:** NESTEC S.A.  
(Opponent) Avenue Nestlé 55  
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**Representative:** Marchant, James Ian  
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**Respondent:** HERSHEY FOODS CORPORATION  
(Patent Proprietor) 100 Crystal A Drive  
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**Representative:** Hansen, Bernd  
Hoffmann Eitle  
Patent- und Rechtsanwälte  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
5 February 2004 concerning maintenance of  
European patent No. 0667746 in amended form.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** N. Perakis  
K. Garnett  
J. Jardón Álvarez  
W. Sekretaruk

## Summary of Facts and Submissions

- I. Mention of the grant of European patent No 0 667 746 in respect of European patent application No 93924999.1 in the name of HERSHEY FOODS CORPORATION, which had been filed on 22 October 1993 claiming a US priority of 30 October 1992 (US 968927), was announced on 2 June 1999 (Bulletin 1999/22). The patent was entitled "Reduced fat confectionery products and process".
- II. Oppositions were filed against the patent by Mars Incorporated (Opponent I) and Nestec SA (Opponent II) on 2 March 2000.
- III. With an interlocutory decision announced orally at the oral proceedings held on 15 October 2003 and issued in writing on 5 February 2004, the Opposition Division decided that the patent in the form as amended met the requirements of the EPC (Article 102(3) EPC).
- IV. Against this decision Opponents I and II (Appellants I and II) filed notices of appeal on 31 March 2004 and 24 March 2004, respectively, paid the fee for appeal on the same dates and filed Statements of Grounds of Appeal on 15 June 2004 and 11 June 2004, respectively. They requested that the decision be set aside and that the patent be revoked in its entirety.
- V. In a letter dated 20 April 2007 the Patent Proprietor (Respondent) stated:
- "The patentee no longer approves of the text in which the patent was granted and will not submit an amended text."

## Reasons for the Decision

1. The appeals comply with Articles 106 to 108 and Rule 64 and are admissible.

The EPO can decide upon the European patent only in the text agreed by the proprietor of the patent (Article 113(2) EPC). Such an agreement cannot exist if the proprietor expressly no longer approves the text of the patent as granted and declares that it is not willing to submit an amended text.

2. In such circumstances, a substantive requirement for maintaining the patent is lacking. Although there is no specific provision allowing the proprietor of a European patent to surrender his rights to a European Patent, Article 113 EPC provides a legal basis for the Office to draw the legal consequence from this situation, which otherwise could be a source of legal uncertainty concerning industrial property rights. It is established case-law that in these circumstances, since a requirement *sine qua non* to maintain the patent is lacking, the revocation of the patent is to be ordered without consideration of any further issues (see for examples: T 601/98 and T 836/97 neither of them published in the OJ EPO); T 73/84 OJ EPO 1985, 241).

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The European Patent is revoked.

The Registrar:

The Chairman:

C. Moser

P. Kitzmantel