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**Datasheet for the decision
of 26 January 2007**

Case Number: T 0725/06 - 3.3.08

Application Number: 98113378.8

Publication Number: 0895085

IPC: G01N 33/574

Language of the proceedings: EN

Title of invention:

Immunoassay for determination of PSA-ACT

Patentee:

BAYER CORPORATION

Opponents:

BioMérieux
Abbott Laboratories

Headword:

Immunoassay/BAYER

Relevant legal provisions:

EPC Art. 111(1), 113(2)

Keyword:

"Failure to agree with the text of the patent - revocation"

Decisions cited:

T 0073/84

Catchword:

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Case Number: T 0725/06 - 3.3.08

DECISION
of the Technical Board of Appeal 3.3.08
of 26 January 2007

Appellant: BioMérieux
(Opponent) Chemin de l'Orme
F-69280 MARCY L'ETOILE (FR)

Representative: Guerre, Dominique
Cabinet Germain & Maureau
12 rue Boileau
F-69006 Lyon (FR)

Respondent: BAYER CORPORATION
(Patent Proprietor) 100 Bayer Road
Pittsburg, PA 15205-9741 (US)

Representative: Burkert, Frank
Bayer HealthCare AG
CAO Law and Patents
Patents and Licensing
D-51368 Leverkusen (DE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
14 March 2006 concerning maintenance of
European patent No. 0895085 in amended form.

Composition of the Board:

Chairman: L. Galligani
Members: F. Davison-Brunel
C. Heath

Summary of Facts and Submissions

- I. European patent No. 0 895 085 with the title "Immunoassay for determination of PSA-ACT" was granted with twelve claims on the basis of European patent application No. 98 113 378.8.
- II. Two oppositions were filed under Article 100 (a) to (c) EPC. One of the opponents later withdrew its opposition.
- III. In its decision dated 14 March 2006 pursuant to Article 102(3) EPC, the opposition division maintained the patent in amended form on the basis of the set of claims 1 to 12 received on 1 October 2004.
- IV. On 12 May 2006, the appellant (opponent) lodged an appeal against this interlocutory decision. The appeal fee was paid on 23 May 2006 and a statement of grounds of appeal was submitted on 11 July 2006.
- V. With its fax letter dated 1 December 2006 (received on 16 January 2007), the respondent (patentee) informed the board that it no longer agreed to the claims as granted by the opposition division.
- VI. The appellant requested that the decision under appeal be set aside and that the European patent be revoked. Oral proceedings were also requested in case the board was not minded to revoke the patent.

Reasons for the decision

1. The appeal is admissible.
2. The respondent informed the board that it no longer agreed to the claims on the basis of which the patent was maintained by the opposition division and did not submit any further claim request. Consequently, the board has no basis on which to make a decision on patentability as would be required by Article 113(2) EPC.
3. In accordance with Article 21 EPC, the boards of appeal shall be responsible for the examination of appeals from, in particular, decisions of the opposition divisions. Here, the decision of the opposition division was appealed by the opponent who requests the revocation of the patent as maintained by the opposition division. This appeal is admissible. A decision must, thus, be taken.
4. According to the established case law of the boards of appeal (cf. eg. T 73/84, OJ EPO 1985, 241), if the proprietor of a European patent states in opposition or appeal proceedings that he no longer approves the text in which the patent was granted and does not submit an amended text, the patent is to be revoked. In the board's judgment, this finding applies in the present case. The patent is, thus, revoked.
5. Summoning oral proceedings is not necessary as the decision is in line with the appellant's request.

Order:

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar

The Chairman

A. Wolinski

L. Galligani