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**Datasheet for the decision
of 17 October 2012**

Case Number: T 0949/09 - 3.3.08

Application Number: 99936809.5

Publication Number: 1105529

IPC: C12Q 1/68, B01J 19/00

Language of the proceedings: EN

Title of invention:
Arrayed biomolecules and their use in sequencing

Patentee:
Illumina Cambridge Limited

Opponent:
Helicos Biosciences Corporation

Headword:
Arrayed Biomolecules/ILLUMINA

Relevant legal provisions:
EPC Art. 63
EPC R. 84(1), 100(1)

Keyword:
"Termination of appeal proceedings after lapse of patent in the absence of a request for continuation by the appellant/opponent within the period prescribed"

Decisions cited:
T 0749/01, T 0606/10

Catchword:
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Case Number: T 0949/09 - 3.3.08

D E C I S I O N
of the Technical Board of Appeal 3.3.08
of 17 October 2012

Appellant: Helicos Biosciences Corporation
(Opponent) One Kendall Square
Cambridge MA 02139 (US)

Representative: Nash, David Allan
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Bristol BS1 6HU (GB)

Respondent: Illumina Cambridge Limited
(Patent Proprietor) Chesterford Research Park
Little Chesterford
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Essex CB10 1XL (GB)

Representative: Baldock, Sharon Claire
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
4 November 2008 concerning maintenance of
European patent No. 1105529 in amended form.

Composition of the Board:

Chairman: M. Wieser
Members: T. J. H. Mennessier
J. Geschwind

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal against the interlocutory decision of the opposition division dated 4 November 2008, whereby European patent No. 1 105 529, which had been granted on European application No. 99 936 809.5 (published under the international publication No. WO 00/06770), was maintained in an amended form on the basis of the first auxiliary request (claims 1 to 27) filed with letter of 23 January 2007.
- II. The appellant filed its statement of grounds of appeal on 12 March 2009.
- III. In its reply to the statement of grounds dated 23 January 2009, the respondent refuted the appellant's objections and requested that the appeal be dismissed or that the patent be maintained on the basis of one of auxiliary requests I to III, filed with letter of 14 August 2008, and auxiliary request IV filed with its reply.
- IV. With letter of 19 March 2010, the appellant filed additional submissions and requested that the decision under appeal be dismissed and the patent be revoked.
- V. On 23 July 2012, the Board issued a communication under Rule 100(2) EPC. The parties' attention was drawn to the fact that the opposed European patent had lapsed in the course of the present appeal proceedings (Article 63 EPC). In view of Rule 84(1) EPC which was applicable *mutatis mutandis* in opposition appeal proceedings (see Rule 100(1) EPC) and the case law

cited in T 606/10 of 12 May 2011, point 1.3), the opponent was asked to inform the Board within a period of two months after notification of the communication whether it requested a continuation of the opposition/appeal proceedings.

- VI. The appellant did not reply within the time limit of two months but confirmed with a letter dated 9 October 2012 that it did not request a continuation of the opposition/appeal proceedings.

Reasons for the decision

1. Rule 84(1) EPC provides that *"If the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse"*.
2. The EPC contains no specific provision concerning continuation of appeal proceedings in case a European patent has been surrendered or has lapsed.
3. Hence, based on Rule 100(1) EPC, Rule 84(1) EPC applies *mutatis mutandis* to appeal proceedings. It follows *inter alia* that, if the European patent has lapsed in all the designated States, the appeal proceedings may be continued at the request of the appellant/opponent filed within two months as from a notification by the competent Board of the lapse. According to an interpretation *argumentum a contrario* of these

provisions, it further follows that the appeal proceedings are to be closed if the appellant/opponent does not submit such a request within the period prescribed (cf. in particular decision T 749/01 of 23 August 2002).

4. In the present case, the notification of the lapse within the meaning of Rule 84(1) EPC was sent to the appellant/opponent on 23 July 2012. Thus, the period of two months for requesting the continuation of the appeal proceedings ended on Tuesday 2 October 2012. The appellant did not reply to the Board's communication during that period. This is interpreted as an indication that the appellant is not willing to request continuation. The appellant has indeed confirmed with letter dated 9 October that it does not request a continuation of the opposition/appeal proceedings. Hence, the appeal proceedings are closed.

Order

For these reasons it is decided that:

The appeal proceedings are closed.

The Registrar

The Chairman

A. Wolinski

M. Wieser