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**Datasheet for the decision  
of 7 February 2013**

**Case Number:** T 2276/09 - 3.3.08

**Application Number:** 05075170.0

**Publication Number:** 1553174

**IPC:** C12N 9/54, C11D 3/386

**Language of the proceedings:** EN

**Title of invention:**  
Enzymes and detergent compositions

**Patentee:**  
Novozymes A/S

**Opponent:**  
Henkel Kommanditgesellschaft auf Aktien

**Headword:**  
Mutated subtilisin protease/NOVOZYMES

**Relevant legal provisions:**  
EPC Art. 113(2)

**Keyword:**  
"Basis of decision - patent proprietor no longer approves the text of the patent"

**Decisions cited:**  
T 0073/84, T 0186/84, T 1526/06, T 1663/08, T 0902/08

**Catchword:**  
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Case Number: T 2276/09 - 3.3.08

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.08  
of 7 February 2013

**Appellant:** Henkel Kommanditgesellschaft auf Aktien  
(Opponent) Henkelstrasse 67  
D-40589 Düsseldorf (DE)

**Representative:** Stevermann, Birgit  
Henkel AG & Co. KGaA  
VTP Patente  
D-40191 Düsseldorf (DE)

**Respondent:** Novozymes A/S  
(Patent Proprietor) Krogshøjvej 36  
DK-2880 Bagsvaerd (DK)

**Representative:** Stevens, Ian Edward  
Potter Clarkson LLP  
The Belgrave Centre  
Talbot Street  
Nottingham NG1 5GG (GB)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on  
24 September 2009 rejecting the opposition  
filed against European patent No. 1553174  
pursuant to Article 101(2) EPC.

**Composition of the Board:**

**Chairman:** M. Wieser  
**Members:** P. Julià  
D. S. Rogers

## **Summary of Facts and Submissions**

- I. An opposition was filed against European patent No. 1 553 174. The opposition was based on the grounds of Articles 100(a), (b) and (c) EPC. The opposition division considered the Main Request (claims as granted) to fulfil the requirements of the EPC and, accordingly, rejected the opposition.
- II. The opponent (appellant) filed a notice of appeal and a statement setting out its grounds of appeal, wherein all grounds of opposition were maintained. The appellant requested the board to set aside the decision under appeal and to revoke the patent. As an auxiliary measure, the appellant further requested oral proceedings.
- III. The patent proprietor (respondent) replied to the appellant's grounds of appeal and requested the board to dismiss the appeal. Oral proceedings were also requested as an auxiliary measure.
- IV. The board expressed its preliminary opinion in a communication pursuant to Article 15(1) of Rules of procedure of the Boards of Appeal. The parties were summoned to oral proceedings.
- V. With a letter dated 1 February 2013, the patent proprietor/respondent withdrew its approval of the text of the patent as granted and did not submit an alternative text.

## **Reasons for the Decision**

1. Since in its letter of 1 February 2013, the patent proprietor/respondent withdrew its approval of the text of the patent as granted and did not submit any alternative text, there is no text on the basis of which the board can consider the appeal.
2. Under Article 113(2) EPC the European Patent Office shall consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle applies in opposition and opposition appeal proceedings.
3. Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against the proprietor's will. If - as in the present case - the patent proprietor explicitly withdraws during appeal proceedings its approval, expressed before the first instance, of the text of the patent as granted and declares that it does not submit any alternative text, it may be inferred that the patent proprietor wishes to prevent any text of the patent from being maintained.
4. The patent proprietor cannot however terminate the proceedings by informing the EPO that he surrenders the European patent, since this is not provided for in the EPC. Thus, it would only be able, as far as national law permitted, to surrender the patent vis-à-vis the national patent offices of the designated Contracting States under the relevant national law (see e.g. Legal Advice No. 11/82 of the European Patent Office, OJ EPO 1982, page 57).

5. At the same time, the proceedings ought to be terminated as quickly as possible in the interests of legal certainty. The only possibility in such a case is to revoke the patent, as envisaged for other reasons in Article 101 EPC and Rule 82 EPC.
  
6. In decision T 73/84 (OJ EPO 1985, page 241) the board decided that, 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 will not submit an amended text, the patent has to be revoked. This approach was confirmed *inter alia* by decisions T 186/84 (OJ EPO 1986, page 79), T 1526/06 of 11 July 2008, T 1663/08 of 19 January 2012 and T 902/08 of 24 April 2012.
  
7. The board, in the present case, has no reason to deviate from the case law developed by the Boards of Appeal in the decisions mentioned above.
  
8. Under these circumstances, oral proceedings are not necessary.

**Order**

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

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

Registrar:

Chairman:

A. Wolinski

M. Wieser