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**Datasheet for the decision
of 29 November 2018**

Case Number: T 1691/13 - 3.3.01

Application Number: 06751990.0

Publication Number: 1877553

IPC: G01N33/53, C12N11/08,
G01N33/543, G01N33/544,
G01N33/547, G01N33/532,
G01N33/533, G01N33/20,
G01N33/42, C12M1/00, A61K31/74

Language of the proceedings: EN

Title of invention:
POLYMER CONJUGATE ENHANCED BIOASSAYS

Patent Proprietor:
ANP Technologies, Inc.

Opponent:
BioMérieux

Headword:
Polymer enhanced bioassays/ANP TECHNOLOGIES

Relevant legal provisions:
EPC Art. 113(2)

Keyword:

Basis of decision - text or agreement to text withdrawn by
patent proprietor - patent revoked

Decisions cited:

Catchword:



Beschwerdekammern
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Chambres de recours

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Case Number: T 1691/13 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 29 November 2018

Appellant: ANP Technologies, Inc.
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Newark, DE 19711 (US)

Representative: Bohmann, Armin K.
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Respondent: BioMérieux
(Opponent) Chemin de l'Orme
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Representative: Sarlin, Laure V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 June 2013
revoking European patent No. 1877553 pursuant to
Article 101(2) EPC**

Composition of the Board:

Chairman A. Lindner
Members: T. Sommerfeld
M. Blasi

Summary of Facts and Submissions

- I. Appeal was lodged by the patent proprietor (appellant) against the decision of the opposition division to revoke the European patent No. 1877553 under Article 101(2) EPC. With the statement of grounds of appeal, the appellant requested that the patent be maintained as granted (main request), or alternatively, that the patent be maintained in amended form according to auxiliary request 1, filed with the grounds of appeal.
- II. With its letter of reply to the statement of grounds of appeal, the opponent (respondent) requested that the appeal be dismissed.
- III. Summons to oral proceedings before the board were issued, followed by a communication providing the board's preliminary opinion on some issues.
- IV. With subsequent letter, the appellant *inter alia* submitted auxiliary request 2.
- V. During oral proceedings, the appellant stated that it withdrew the consent to the text of the patent as granted and that it withdrew auxiliary requests 1 and 2. At the end of the oral proceedings the chairman announced the decision of the board.

Reasons for the Decision

1. Under Article 113(2) EPC the European Patent Office must consider and decide upon the European patent only in the text submitted to it, or agreed, by the patent

proprietor. This principle is part of the common provisions governing the procedure and is therefore to be observed also in opposition appeal proceedings.

2. In the present case the patent proprietor withdrew its approval of the text of the patent as granted and withdrew the auxiliary requests, with the consequence that there is no text of the patent on the basis of which the Board can consider compliance with the requirements of the EPC.
3. While the procedure for revocation pursuant to Articles 105a and 105b EPC is not available during opposition and opposition appeal proceedings (Article 105a(2)EPC), it is the consistent jurisprudence of the boards of appeal that, if the patent proprietor states that he no longer approves the text in which the patent was granted, withdraws all pending requests and does not submit any amended text, the patent, as a consequence of Article 113(2) EPC, is to be revoked without substantive examination as to patentability, which becomes impossible in the absence of a valid text.
4. The Board has no reason to deviate from the consistent approach of the boards of appeal, with the consequence that the patent is to be revoked.
5. In the circumstances of the present case, the patent had already been revoked by the decision of the opposition division. Hence, the board dismisses the appellant's appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated