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**Datasheet for the decision  
of 15 December 2022**

**Case Number:** T 1436/20 - 3.3.08

**Application Number:** 13816635.0

**Publication Number:** 2872680

**IPC:** C12N15/10, C40B40/06

**Language of the proceedings:** EN

**Title of invention:**

DNA-ENCODED LIBRARIES HAVING ENCODING OLIGONUCLEOTIDE LINKAGES  
NOT READABLE BY POLYMERASES

**Patent Proprietor:**

X-Chem, Inc.

**Opponent:**

Nuevolution A/S

**Headword:**

DNA-encoded libraries/X-CHEM

**Relevant legal provisions:**

EPC Art. 113(2), 116(1)

RPBA 2020 Art. 12(8)

**Keyword:**

Basis of decision - text or agreement to text withdrawn by  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

**Decisions cited:**

T 0073/84

**Catchword:**

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**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1436/20 - 3.3.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 15 December 2022**

**Respondent:** X-Chem, Inc.  
(Patent Proprietor) 100 Beaver Street, Suite 101  
Waltham, Massachusetts 02453 (US)

**Representative:** Carpmaels & Ransford LLP  
One Southampton Row  
London WC1B 5HA (GB)

**Appellant:** Nuevolution A/S  
(Opponent) Rønnegade 8  
2100 Copenhagen (DK)

**Representative:** Aamand, Jesper L.  
Jesper Levin A/S  
Jægersborg Allé 93  
2820 Gentofte (DK)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 April 2020 concerning maintenance of the  
European Patent No. 2872680 in amended form.**

**Composition of the Board:**

**Chair** T. Sommerfeld  
**Members:** B. Claes  
A. Bacchin

## **Summary of Facts and Submissions**

- I. The patent proprietor (appellant I) and the opponent (appellant II) lodged an appeal against the interlocutory decision of the opposition division finding that European patent No. 2 872 680 as amended according to auxiliary request 3 met the requirements of the EPC.
- II. The appellants reciprocally replied to the other appeal.
- III. Appellant I requested that the decision under appeal be set aside and the opposition be rejected (main request) or, alternatively, that the patent be maintained with the set of claims of one of the filed auxiliary requests.
- IV. Appellant II requested that the decision under appeal be set aside and the patent be revoked.
- V. The board summoned the parties to oral proceedings in accordance with their requests and annexed to the summons a communication pursuant to Article 15(1) RPBA 2020.
- VI. With a letter dated 30 September 2022 appellant I withdrew the appeal.
- VII. With a subsequent letter dated 21 October 2022 the patent proprietor (now respondent) informed the board as follows:

*"The patentee withdraws its approval of the text of EP 2872680 under Rule 71 EPC. The patentee will not be filing any further requests.*

*In the absence of a text agreed by the patentee, the proceedings relating to this patent are terminated following Article 113(2) EPC. In such situations, the proceedings are terminated by a decision ordering the revocation of the patent without reference to the substantive issues (see, e.g., decisions T 1111/10 and T 1536/14, cited in the Case Law of the Boards of Appeal of the EPO (9th Edition), section IV.D.2, and Guidelines for Examination in the EPO, D-VIII, 1.2.5)."*

VIII. After the board had invited the respondent to clarify its earlier requests, it informed the board in a further letter dated 8 November 2022 as follows:

*"The patentee confirms that, in addition to its withdrawal of the approval of the text of EP 2872680, all auxiliary requests are also withdrawn."*

### **Reasons for the Decision**

1. The appeal of the opponent complies with the requirements of Articles 106 to 108 EPC and the further provisions referred to in Rule 101 EPC and is admissible.
2. Pursuant to Article 113(2) EPC the European Patent Office shall examine, and decide upon the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.

3. Since the text of the patent is at the disposition of the patent proprietor, their patent cannot be maintained against their will. In the present case the patent proprietor withdrew its approval of the text of the patent as granted. By withdrawing their auxiliary requests, they also unequivocally withdrew their approval of the text of the patent as amended according to any of these requests. Consequently, there is therefore no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC.
4. It is established case law that in the present circumstances the patent must be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022, section IV.D.2). The board has no reason to deviate from this consistent approach of the boards of appeal, with the consequence that the patent is to be revoked.
5. Revocation of the patent complies with the request of the appealing opponent. The present decision can therefore be taken without holding oral proceedings (Article 116(1) EPC and Article 12(8) RPBA 2020).

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chair:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated