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**Datasheet for the decision
of 20 September 2024**

Case Number: T 2101/21 - 3.4.02

Application Number: 12008381.1

Publication Number: 2573609

IPC: G02B21/00, G02B21/02, G02B9/60,
G02B15/163, G02B21/33

Language of the proceedings: EN

Title of invention:

Immersion microscope objective and laser scanning microscope system using the same

Patent Proprietor:

Olympus Corporation

Opponent:

Carl Zeiss Microscopy GmbH

Headword:

Relevant legal provisions:

EPC Art. 113(2)

Keyword:

Basis of decision - text or agreement to text withdrawn by patent proprietor - patent revoked

Decisions cited:

T 0073/84

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
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Case Number: T 2101/21 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 20 September 2024

Respondent: Olympus Corporation
(Patent Proprietor) 2951 Ishikawa-machi, Hachioji-shi,
Tokyo 192-8507 (JP)

Representative: Schicker, Silvia
Wuesthoff & Wuesthoff
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Appellant: Carl Zeiss Microscopy GmbH
(Opponent) Carl-Zeiss-Promenade 10
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Representative: Ridderbusch, Oliver
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Landsberger Straße 155, Haus 1
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
29 September 2021 concerning maintenance of the
European Patent No. 2573609 in amended form.**

Composition of the Board:

Chairman B. Müller
Members: A. Hornung
F. J. Narganes-Quijano

Summary of Facts and Submissions

- I. At the end of the first-instance opposition proceedings, the opposition division decided to maintain European patent No. 2573609 in amended form on the basis of the claims according to a second auxiliary request filed during the oral proceedings as "Auxiliary Request 1, 14:55" (see minutes of the oral proceedings before the opposition division, points 88 and 145).
- II. The patentee lodged an appeal against the interlocutory decision of the opposition division. It requested that the patent be maintained, as a main request, on the basis of the claims according to the main request filed with a letter of 4 December 2020 (which is identical to the main request underlying the appealed decision and was filed again with the statement of grounds of appeal; see statement of grounds of appeal, section IV, point 1) or, as auxiliary requests, on the basis of the claims according to:
- a new first auxiliary request filed for the first time with the statement of grounds of appeal,
 - a second auxiliary request filed for the first time during the oral proceedings before the opposition division as "Auxiliary Request 1, 14:55", on the basis of which the opposition division maintained the patent, and filed again with the statement of grounds of appeal as "Auxiliary Request 2", and

- a new third auxiliary request filed for the first time with the statement of grounds of appeal (based on "Auxiliary Request 3, 13:15" filed during the oral proceedings before the opposition division and not addressed in the appealed decision).

- III. The opponent likewise lodged an appeal against the interlocutory decision of the opposition division and requested that the decision under appeal be set aside, and that the patent be revoked.

- IV. In a communication annexed to a summons to oral proceedings, the board informed the parties about its provisional and non-binding opinion.

- V. In a letter dated 3 April 2024, the patentee withdrew its appeal. In a further letter dated 6 August 2024, the patentee confirmed the withdrawal of the appeal and stated that "all requests on file (in particular, the claims sets of the Main Request/all Auxiliary Requests and the request for Oral Proceedings) are withdrawn as well" (highlighted in the original).

- VI. The board then cancelled the oral proceedings.

Reasons for the Decision

1. According to Article 113(2) EPC, "[t]he European Patent Office shall examine, and decide upon, [...] the European patent only in the text submitted to it, or agreed, by [...] the proprietor of the patent".

2. An examination of the patent is generally required when an opponent files an appeal requesting revocation of the

patent. However, the patentee withdrew all claim requests, including the second auxiliary request ("Auxiliary Request 1, 14:55"; see above, points I and II), on the basis of which the opposition division maintained the patent. As a result of this withdrawal, there is no longer any text of the patent submitted to the board on which it can consider the appeal.

3. Under these circumstances, it is settled case law that the appeal proceedings are terminated and that the patent be revoked without further substantive examination (see decision T 73/84 and Case Law of the Boards of Appeal, 10th edition 2022, sections III.B.3 and IV.D.2).
4. Since the board has no reason to deviate from this case law, the patent must be revoked.

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:



N. Michaleczek

B. Müller

Decision electronically authenticated