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**D E C I S I O N**  
of 4 May 1995

**Case Number:** T 0195/93 - 3.3.4

**Application Number:** 84110126.4

**Publication Number:** 0139994

**IPC:** A61L 2/18

**Language of the proceedings:** EN

**Title of invention:**  
Process and kit for disinfection of contact lenses

**Patentee:**  
ALLERGAN, INC.

**Opponent:**  
CIBA-GEIGY AG Patentabteilung

**Intervener:**  
OTE OPTICS B.V.

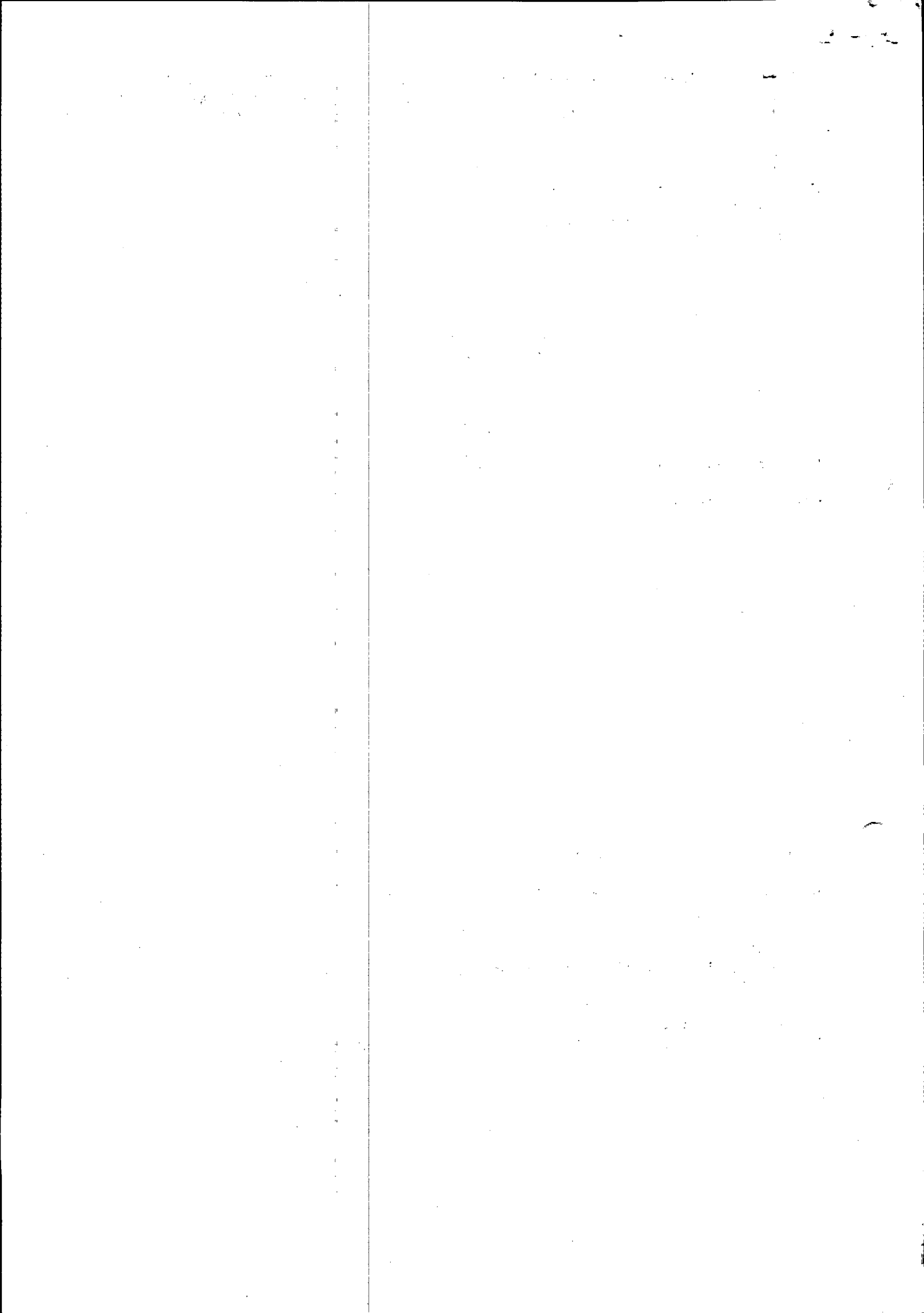
**Headword:**  
Contact lenses/ALLERGAN

**Relevant legal provisions:**  
EPC Art. 105

**Keyword:**  
"Admissibility of intervention (no) - no official court proceedings"

**Decisions cited:**  
G 0007/91, G 0008/91, G 0001/94, T 0296/93

**Catchword:**  
-





Case Number: T 0195/93 - 3.3.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.4  
of 4 May 1995

**Appellant:**  
(Opponent 02)

CIBA-GEIGY AG  
Patentabteilung  
Postfach  
CH-4002 Basel (CH)

**Representative:**

-

**Intervener:**

OTE OPTICS B.V.  
Stadrijk 209  
NL-5403 NK Uden (NL)

**Representative:**

Van Kan, Johan Joseph Hubert, Ir.  
Algemeen Octrooibureau  
P.O. Box 645  
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**Respondent:**  
(Proprietor of the patent)

ALLERGAN, INC.  
2525 Dupont Drive  
P.O. Box 19534  
Irvine, California 92713-9534 (US)

**Representative:**

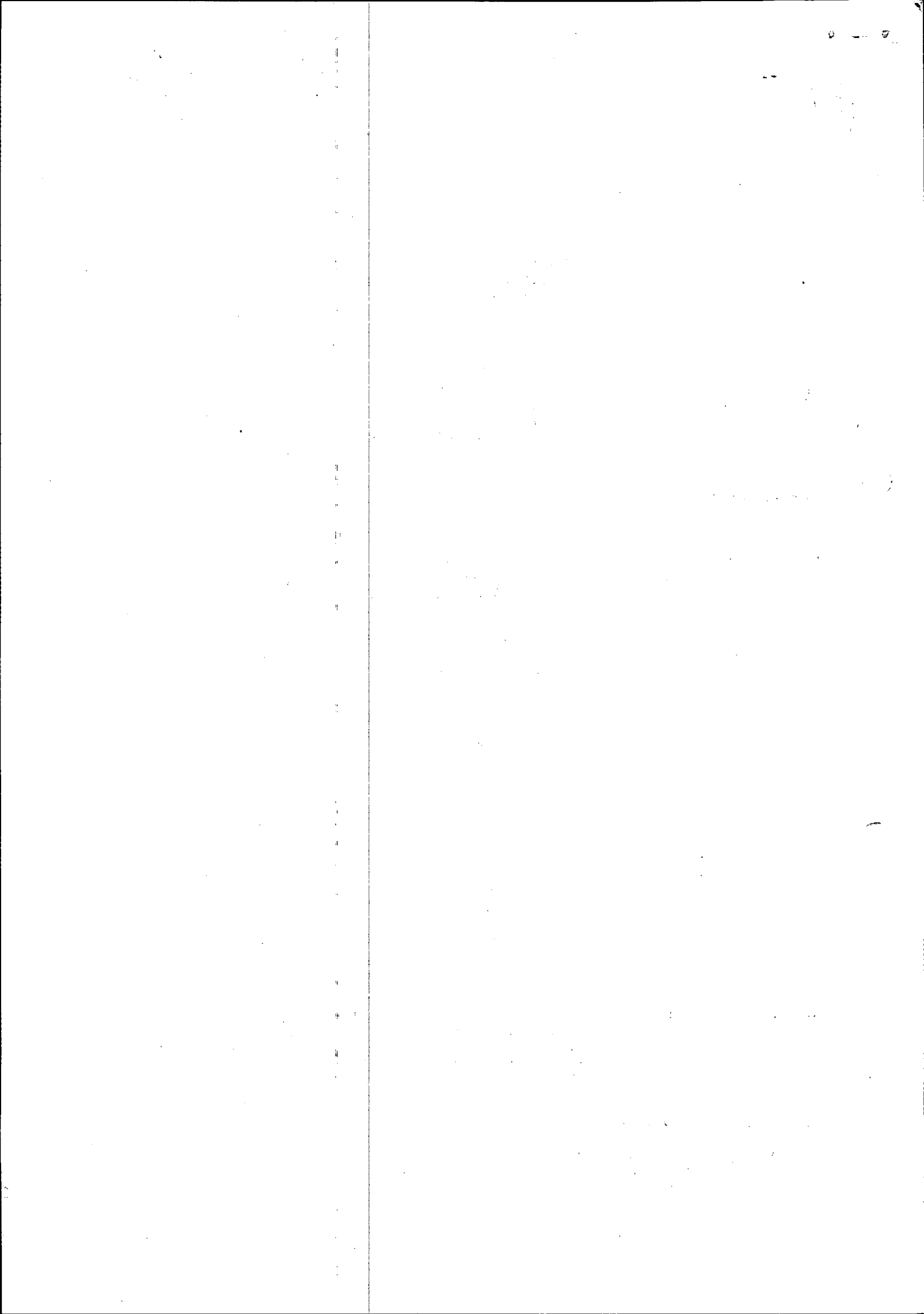
Brauns, Hans-Adolf, Dr. rer. nat.  
Hoffmann, Eitle & Partner  
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D-81904 München (DE)

**Decision under appeal:**

Interlocutory decision of the Opposition Division  
of the European Patent Office dated 30 December  
1992 concerning maintenance of European patent  
No. 0139994 in amended form.

**Composition of the Board:**

**Chairman:** U. M. Kinkeldey  
**Members:** L. Galligani  
C. Holtz



### Summary of Facts and Submissions

- I. The Appellant (Opponent 02), who was the single party appealing a decision of the Opposition Division dated 30 December 1992 whereby the Respondents' patent number 0 139 994 was maintained in amended form, withdrew the appeal with telefax dated 25 April 1995.
  
- II. On 13 July 1993, i.e. after dispatch of the appealed decision, but during pending appeal proceedings, the intended Interveners filed a notice of intervention under Article 105 EPC and paid the opposition fee. This notice was based on the sole fact that they had been sent a legal warning letter from the Respondents wherein they were requested to stop production and sale of a product which was within the scope of the patent in suit.
  
- III. On 12 August 1993, the Board of Appeal issued a communication pursuant to Article 110(2) EPC expressing the provisional view that the intervention was not admissible, unless the Interveners could show proof, in accordance with Article 105(1) EPC, second sentence, that they had instituted proceedings for a court ruling that they were not infringing the patent.
  
- IV. In response to this communication, the Interveners maintained their opinion that the warning letter had instituted such proceedings since under Dutch law damages had to be paid from 30 days on receipt of such a letter.
  
- V. In a further communication pursuant to Article 110(2) EPC, the Board indicated that Article 105 EPC presupposed official **court proceedings** and that according to Dutch law damages could not be awarded until it had been established that the Respondents had

won the case, which required that at some stage a court action had been instituted. This particular feature in the Dutch law seemed to be fully in line with national laws of other member States of the EPO. As in the present case neither infringement nor non-infringement proceedings had been instituted, the Board considered the notice of intervention to be inadmissible. In response to this communication, Opponent 02 and the Respondents both agreed with the Board's opinion, whereas the Interveners defended the position that infringement proceedings had been instituted already by sending of the quoted warning letter.

#### **Reasons for the Decision**

1. Normally, where the sole Appellant withdraws its appeal, the case would be immediately terminated (cf. decisions G 7/91, OJ EPO 1993, 356, and G 8/91, OJ EPO 1993, 346).
2. However, in the present case there is a request to have an intervention considered. According to Article 105 EPC, if this intervention is admitted, the Interveners shall be treated as Opponents.

The Enlarged Board of Appeal in decision G 1/94 (OJ EPO 1994, 787) stated that an intervention of an assumed infringer under Article 105 EPC is admissible during pending appeal proceedings and may be based on any ground for opposition under Article 100 EPC, including grounds which were not invoked by the original Appellant(s) (see point 13 of the Reasons). The latter statement indicates that the position of Interveners is independent of that of the other Appellant(s). In fact, unless the intervention must be considered in spite of a withdrawal of the appeal by the co-opponent, it would not make sense to admit new grounds for the

intervention. Accordingly, in the present case, the fact that the original Appellant withdrew its appeal after the intervention was filed cannot immediately lead to a termination of the proceedings. The Board must therefore consider the admissibility of the intervention.

3. As the Board indicated in two communications (see Sections IV and V, above), an official court action before a proper court of law is required under Article 105 EPC because it establishes the necessary indisputable starting date for the time period for intervention (cf. decision T 296/93 of 28 July 1994, to be published in the OJ EPO).
4. Since the Interveners have not shown that either infringement or non-infringement court proceedings were instituted before a national court of law, the intervention is inadmissible and the appeal proceedings are terminated.

**Order**

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

The intervention is rejected as inadmissible.

The Registrar:

The Chairwoman:

L. McGarry

U. Kinkeldey

