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D E C I S I O N
of 16 February 2005

Case Number: T 0197/02 - 3.3.04

Application Number: 94108611.8

Publication Number: 0644202

IPC: C07K 14/18

Language of the proceedings: EN

Title of invention:

Synthetic antigens for the detection of antibodies to hepatitis C virus

Patentee:

INNOGENETICS N.V.

Opponent:

Chiron Corporation

Headword:

HCV antigen II/INNOGENETICS

Relevant legal provisions:

EPC Art. 123, 56

EPC R. 88

Keyword:

"Main Request - inventive step (no)"

"Auxiliary Request - added subject-matter (yes)"

Decisions cited:

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Catchword:

-



Case Number: T 0197/02 - 3.3.04

D E C I S I O N
of the Technical Board of Appeal 3.3.04
of 16 February 2005

Appellant I: INNOGENETICS N.V.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
25 February 2002 concerning maintenance of
European patent No. 0644202 in amended form.

Composition of the Board:

Chair: U. M. Kinkeldey
Members: G. L. Alt
S. C. Perryman

Summary of Facts and Submissions

- I. Appeals by the patent proprietor (appellant I) and the opponent (appellant II) were filed against the decision of the Opposition Division to maintain European patent No. 0 644 202 in amended form on the basis of Auxiliary Request II. The Main Request (corresponding to the claims as granted) was found by the Opposition Division not to comply with the requirements of Article 56 EPC, the amendments made in Auxiliary Request I were considered as not suited to overcome the objections which had caused the Main Request to be refused, and so Auxiliary Request I was not allowed into the proceedings pursuant to Rule 57a EPC.
- II. Appellant I filed two notices of appeal, one on 15 June 2001 before the issuance of the written decision of the opposition division and one on 17 April 2002. Appeal fees were paid on the same days.
- III. In a communication sent pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal, the Board *inter alia* gave its provisional view on some of the substantive issues, commented on the admissibility of the two appeals of the proprietor and granted the request of both parties that the present proceedings be consolidated with those of case No. T 748/01 involving the same parties and relating to the patent granted on the parent application to which the patent in suit was filed as a divisional application.
- IV. Oral proceedings on both appeal cases took place on 15 and 16 February 2005, attended by both parties.

V. Of the requests submitted, the following were maintained by the end of the oral proceedings, and the decision thereon was announced by the Board, all earlier requests made in writing having been withdrawn during the course of the oral proceedings:

- Main Request (submitted in writing on 14 January 2005 labelled Auxiliary Request 7; corresponding to the claims of the Auxiliary Request II maintained by the Opposition Division) in the version for all designated Contracting States except ES and GR.
- Auxiliary Request (submitted at the oral proceedings) in the version for all Designated Contracting States except ES and GR.

VI. Claim 1 of the Main Request read:

"1. A method for the *in vitro* detection of antibodies to hepatitis C virus present in a body fluid such as serum or plasma, comprising at least the steps of

(a) contacting said body fluid of a person to be diagnosed with a peptide applied on a nylon membrane selected from the following list:

(2263)

(XV) Glu-Asp-Glu-Arg-Glu-Ile-Ser-Val-Pro-Ala-Glu-Ile-Leu-Arg-Lys-Ser-Arg-Arg-Phe-Ala (SEQ ID No 16)

(2282)

(2275)

(XVI) Leu-Arg-Lys-Ser-Arg-Arg-Phe-Ala-Gln-Ala-Leu-Pro-Val-Trp-Ala-Arg-Pro-Asp-Tyr-Asn (SEQ ID NO 17)

(2294)

(2287)

(XVII) Val-Trp-Ala-Arg-Pro-Asp-Tyr-Asn-Pro-Pro-Leu-Val-Glu-Thr-Trp-Lys-Lys-Pro-Asp-Tyr (SEQ ID NO 18)

(2306)

(2299)

(XVIII) Glu-Thr-Trp-Lys-Lys-Pro-Asp-Tyr-Glu-Pro-Pro-Val-Val-His-Gly-Cys-Pro-Leu-Pro-Pro (SEQ ID NO 19)

(2318)

(b) detecting the immunological complex formed between said antibodies and the peptide(s) used."

Claim 1 of the Auxiliary Request read:

"1. A peptide composition characterized in that it contains the following mixture of peptides:

F. VIII (SEQ ID NO 9), IX (SEQ ID NO 10), XI (SEQ ID NO 12), XIII (SEQ ID NO 14), and XIX (SEQ ID NO 15)."

Both requests contained further claims.

VII. The following documents are mentioned in this decision:

D2: EP-A-0 388 232

Comparative tests filed with the submissions dated 6 July 1998 ("Annex A") and 7 October 1999 (both during opposition proceedings).

Result Tables 1 to 3 filed on 13 December 2000 summarizing the results of "Annex A"

VIII. Appellant I's arguments in writing and during oral proceedings, insofar as they are relevant to the present decision, may be summarized as follows:

Main Request

- Document D2 should be treated as the closest prior art because it related to HCV polypeptides and suggested their use in diagnostic assays.
- The comparative experiments filed during examination and opposition proceedings showed that the peptides had unexpectedly good immunogenic properties.
- The appellant II's criticism on the reliability of these data was not justified.
- Document D2 disclosed on page 32 a table with 17 clones encoding HCV polypeptide which were said in document D2 to have "proven reactivity with sera from NANBH patients". However, one of these, namely clone 33c, covered a region in which it was impossible to find diagnostically significant peptides and this indicated that the information on the antigenicity of the peptides in document D2 could not be relied on to achieve success.

- A skilled person would not necessarily have focussed on clones 8f or 33f encompassing sequences of the claimed peptides, but could have chosen any of the other 15 from the table.

- Whereas document D2 disclosed on pages 15 and 16 a list of fragments of the clones of the table on page 32, due to the absence of immunological reactivity data a person skilled in the art would not have considered the list as having any technical value, and therefore would not have investigated the fragments suggested.

- Even if the skilled person had concentrated on these clones, fragmented them and carried out an antigenicity screening, this would not give any definitive result. Only a real diagnostic test could elucidate the immunogenic properties of the peptides and there still remained the possibility that diagnostically useful peptides might not be found at all. Therefore, the skilled person would have had no reasonable expectation that any of the shorter peptides would be diagnostically useful.

- The "long" peptides of the table on page 32 are said in document D2 to have "proven reactivity with sera from NANBH patients". Therefore, a person skilled in the art would have been tempted to use those in diagnostic assays, but not any others.

- D2 generally referred to solid supports without specifically hinting at nylon membranes or the influence of the support on the antigenic reactivity of the peptides.
- Comparative data demonstrated that the four claimed peptides scored better on the nylon support when compared to an ELISA setting. Thus, it was the combination that gave rise to an unexpected effect.

Auxiliary Request

- The error and its correction was obvious. There is a certain order in the numbering of the SEQ IDs and therefore it was clear that it was the peptide and not the SEQ ID number which was incorrect. Moreover, if necessary, in case of a divisional application, one should be allowed to go back to the parent application as a basis for correcting obvious errors.

IX. Appellant II's arguments in writing and during oral proceedings, insofar as they are relevant to the present decision, may be summarized as follows:

Main Request

- Document D2 was the closest prior art document.
- The comparative experiments of appellant I aimed at demonstrating an unexpected effect of the claimed peptides could not be taken into account

because the tests were not reliable for several reasons.

- The problem to be solved could thus only be formulated as the provision of further HCV-epitope-containing peptides.
- In order to solve this problem a person skilled in the art would start with the "long" HCV clones from the table on page 32 of document D2 and prepare a series of shorter peptides which he would screen for their antigenic reactivity as taught on pages 14 and 15 of document D2.
- By doing a systematic routine check for such shorter peptides taught on pages 14 and 15 of document D2, the skilled person would inevitably arrive at the subject-matter of claim 1.
- Nylon is one of several obvious support materials for peptides and document D2 expressly mentioned on page 21 that for the purpose of diagnostic assays peptides may be bound to solid supports.

Auxiliary Request

While the error was obvious, the way it needed to be corrected, was not. Moreover, it was not permitted in case of divisional applications to go back to the parent application as a basis for the correction.

X. *Requests*

Appellant I (patentee) requested as a main request that the appeal of the opponent be dismissed or as auxiliary request that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 13 of the auxiliary request filed at oral proceedings on 16 February 2005 subject to a correction of claim 1 of this request and the corresponding passage of the description to refer to "XIV (SEQ ID NO 15)" instead of "XIX (SEQ ID NO 15)" under Rule 88 EPC.

Appellant II (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

Admissibility of appeal (Article 108 EPC)

1. The proprietor filed a Notice of Appeal and paid the appeal fee already on 15 June 2001, before the issuance of the written reasoned decision of 25 February 2002 of the Opposition Division, confirming its decision which had been announced at the oral proceedings on 15 February 2001. The Board interprets the requirement of Article 108 EPC that the notice of appeal must be filed (and the appeal fee paid) within two months after the date of notification of the decision under appeal as merely setting the latest date for performing these acts. On this view the notice of appeal can be filed at any time earlier provided the requirement of Rule 64(b)

EPC is met that the Notice of Appeal contains a statement identifying the decision which is impugned and the extent to which amendment or cancellation of the decision is requested. This is the case for the patentee's Notice of Appeal of 15 June 2001. Accordingly, appellant I had filed an admissible appeal already on 15 June 2001.

2. The Board takes the view that one and the same party can only file a single effective appeal, and needs only to pay one appeal fee. Accordingly, the Notice of Appeal filed on 17 April 2002 was superfluous, and any further appeal fees paid by appellant I are to be reimbursed.

Main Request

3. Since no other objections were raised with regard to this request, inventive step is the only issue to be decided.

Background information

4. NANBH is the abbreviation for non-A, non-B hepatitis, a disease distinguishable from other forms of viral-associated liver diseases including that caused by, for example, hepatitis A virus, hepatitis B virus and delta hepatitis virus as well as the hepatitis induced by cytomegalovirus or Epstein-Barr virus. NANBH is, for example, caused by infection with hepatitis C virus (HCV, formerly called NANBV).

Closest prior art

5. The parties have both submitted that document D2 relating to NANBV diagnostics and vaccines is the closest prior art document, and the Board agrees.

6. Figure 17 of document D2 shows the sense strand of the HCV cDNA sequence compiled by the authors of document D2, and numbers the nucleic acids rather than the amino acids, though the latter are also identified in the Figure. The sequences XV (amino acids 2263-2282), XVI (amino acids 2275-2294), XVII (amino acids 2287-2306), and XVIII (amino acids 2299-2318), mentioned in claim 1 of the patent in suit, correspond exactly to the correspondingly numbered amino acids shown in Figure 17-8 of document D2, as can be seen by comparing amino acids corresponding to nucleic acid numbers 6787-6846 (= sequence XV), 6823-6882 (= sequence XVI), 6859-6918 (= sequence XVII), 6895-6954 (= sequence XVIII).

7. Document D2 further discloses on page 32 a table with 17 clones encoding HCV polypeptides, and gives information on the DNA sequence of these clones and the polypeptides thereby encoded. All clones of the table are said to have "proven reactivity with sera from NANB patients". In order to be able to arrive at that result, the clones must have been applied in a method for the in vitro detection of antibodies to HCV. In this respect it is stated on page 21, lines 9 to 13 under the heading "Immunoassay and Diagnostic Kits" that "...polypeptides which react immunologically with serum containing HCV antibodies [...] those derived from or encoded within the isolated clones described in the Examples [...] are useful in immunoassays to detect

presence of HCV antibodies [...] in biological samples." Amongst the 17 clones of the table are clones 8f and 33f encoding, respectively, amino acids 2200 to 3325 and 2287 to 2385 derived from the NS5 region of the HCV genome, assumed, at that time, to encode the HCV polymerase (table on page 34 of document D2).

8. Appellant I's argument that the teaching in document D2 on the immunogenicity of clones of the table on page 32 cannot be relied on because one of them, namely clone 33c, which is one indicated as particularly immunogenic on page 31, covered a region in which it was impossible to find diagnostically significant short peptides, is not relevant to the assessment of inventive step starting from document D2 because, even if this were true in respect of clone 33c, there is no evidence, certainly none on file, that this was information available to the skilled person before the filing date of the patent in suit. Such an unknown result thus could not have influenced the skilled person's initial attitude vis-à-vis document D2.

9. Document D2 discloses on pages 15 and 16 a list of peptides being fragments of the polypeptides encoded by the clones of the table on page 32. Whether this part of the disclosure was a technical teaching that the listed fragments contained epitopes, or whether it was there merely to illustrate the way in which a polypeptide can be divided into fragments for an antigenicity screening assay, or whether it was of no technical value at all was in dispute between the parties. The Board considers it impossible to say that it has no technical value, but will treat these passages as merely illustrating how clones such as

those given in the table on page 32 could be divided into fragments for further screening.

10. The Board thus considers that when looking for further HCV peptides for use in HCV diagnostics the skilled person looking at document D2 would start from the clones disclosed in the table on page 32.

11. In the course of the appeal proceedings appellant I referred to comparative tests submitted during opposition proceedings in order to demonstrate unexpected properties of the claimed peptides. The reactivity of the peptides of claim 1 with sera of HCV-infected patients was compared to the reactivity with the same sera of peptides from the list on page 15 of document D2, but not to the reactivity with the peptides of the table on page 32. For the Board to be able to recognize an improvement in relation to reactivity of the claimed peptides with sera of patients compared to what is described for peptides disclosed in document D2, the comparison should be with those peptides which are described in document D2 as being reactive with sera of patients. Document D2 only described that the peptides of the table on page 32 had reactivity with sera of patients, but not that all the peptides of the list on page 15 had such reactivity. The tests carried out by appellant I not having been made by way of comparison to the peptides of the table on page 32 stated to have reactivity, they cannot be taken as establishing any improvement of the claimed peptides over the prior art. This conclusion renders a further discussion on the reliability of appellant I's comparative data unnecessary.

12. Hence, the problem to be solved in view of the closest prior art can only be regarded as the provision of a further method for the in vitro detection of antibodies to HCV present in a body fluid.
13. The patent in suit discloses reactivity of the four peptides bound to a nylon membrane with sera from HCV infected patients (pages 10 to 12). Thus, the problem underlying the patent in suit has been solved by the subject matter of claim 1.
14. The question to be answered for the evaluation of inventive step is what would a skilled person derive from the prior art in an obvious way as a solution to the above formulated problem, and would the solution(s) so derived fall under claim 1, thus depriving claim 1 of inventive step.
15. Claim 1 is directed to a detection method encompassing the use of peptides bound to a nylon membrane. Hence, since there are two features potentially contributing to inventive step - the peptides or the membrane, the question arises as to whether or not the provision of each of them individually or of both in combination was obvious.

The peptides

16. The positions of peptide sequences recited in claim 1 (see point 6 above) correspond to the positions of these peptide sequences in Figure 17 of document D2. The sequences exactly match the sequence disclosed in Figure 17 at these positions.

17. Each of the four peptides recited in claim 1 consists of 20 amino acid residues. However, in the patent in suit no technical significance is attached to this length feature, nor was it argued before the Board that any technical significance attaches to this feature.
18. In the context of the preparation of antigenic polypeptides it is suggested in document D2 on page 14 that "in addition to full-length viral proteins, polypeptides comprising truncated HCV amino acid sequences encoding at least one viral epitope are useful as immunological reagents. For example, polypeptides comprising such truncated sequences can be used as reagents in an immunoassay". Furthermore, it is stated on page 15 that the size of these truncated HCV sequences is "at least about 10, 12 or 15 amino acids up to a maximum of about 20 or 25 amino acids". Thus, document D2 contains a clear pointer to using immunogenic peptides shorter than those explicitly disclosed in the table on page 32 of document D2 in immunoassays.
19. Moreover, document D2 discloses on page 15 a method by which further, epitope-containing peptides, namely those truncated with respect to the "long" sequence clones of the table on page 32 can be identified:
- "Truncated HCV amino acid sequences comprising epitopes can be identified in a number of ways. For example, the entire viral protein sequence can be screened by preparing a series of short peptides that together span the entire protein sequence. An example of antigenic screening of the regions of the HCV polyprotein is shown infra. In addition, by starting with, for example

100mer polypeptides, it would be routine to test each polypeptide for the presence of epitope(s) showing a desired reactivity, and then testing progressively smaller and overlapping fragments from an identified 100mer to map the epitope of interest. Screening such peptides in an immunoassay is within the skill of the art".

20. It is uncontested by the parties that such a method could be carried out at the time of the filing of the patent in suit in a routine manner.

21. Given that document D2 teaches in the context of preparation of truncated HCV amino acid sequences as immunological reagents (last paragraph of page 14) that "it is usually desirable to select HCV sequences of at least about 10, 12 or 15 amino acids, up to a maximum of about 20 to 25 amino acids" (first paragraph on page 15), and that furthermore, document D2 teaches on page 11 that an epitope consists of at "least 5 such amino acids, and more usually, consists of at least 8-10 such amino acids.", it is the Board's view that someone wishing to solve the problem as stated in point 12 above, would systematically investigate what sequence fragments of lengths between 10 and 25 amino acid residues over the length of the sequence given in Figure 17 of document D2 were reactive with patient sera. This, by mere routine work, would identify all amino acid fragments which were so reactive, including all sequences of length 20 amino acids which were so reactive, and thus also sequences (XV), (XVI), (XVII) and (XVIII) of claim 1.

22. Systematically applying the method to identify all possible truncated sequences of lengths between 10 and 25 would involve a lot of work, but is of a routine nature. Where the problem to be solved is to find alternatives, it must however be assumed that all routine work to find alternatives already hinted at in the prior art will be carried out.

23. Since the method disclosed in document D2 involves the preparation of a panel of peptides as well as the testing of their antigenicity, the immediate result of it is knowledge about the immunogenicity of each of the prepared peptides. Hence, the appellant's argument that immunogenicity of a given peptide cannot be reliably predicted thus lowering expectation of success of the skilled person when applying the method, does not apply.

24. Therefore, given that the clones containing longer sequences were reactive, the skilled person would be confident that the method disclosed in document D2 would achieve success.

25. Thus, the Board concludes that a skilled person facing the problem of providing a further detection method for HCV antibodies derives peptides (XV), (XVI), (XVII) and (XVIII) as a solution to this problem in an obvious manner by applying the teaching of document D2. Therefore, an inventive step cannot be acknowledged on the basis of this feature.

Nylon as a support material

26. At the priority date of the patent in suit, solid supports including nylon membranes, amongst other materials, were conventionally used in immunoassays. This is consistent with the disclosure of the patent in suit mentioning nylon as one of several possible solid supports on page 7: "In addition the peptides may be modified for binding to surfaces or solid phases, such as, for example, microtiter plates, nylon membranes, glass or plastic beads, and chromatographic supports such as cellulose, silica or agarose."

Document D2 at page 21, line 23 mentions that a solid support may be used for the immunoassay, and this suggestion renders obvious the use of any then conventional solid support unless the use of a particular conventional support in combination with some other feature required by claim 1 were shown to be unexpectedly beneficial.

The combination of the specific peptides of claim 1 with the nylon membrane

27. Appellant I argued that the invention lay in the selection of the four claimed peptides because they were especially sensitive in their reaction with sera of HCV infected patients when bound to a nylon membrane.

28. Nylon membrane assays encompassing at least one of the four peptides recited in claim 1 are referred to in the patent in Examples II.A and II.E, but are not said to be preferred to the ELISA assays of Examples II.B, II.C, II.D and II.E. Consequently, the conclusion that the

nylon membrane format has any special characteristics in combination with the four peptides (XV), (XVI), (XVII) and (XVIII) cannot be drawn from the patent in suit.

29. Nor are the further experiments filed during opposition proceedings (Annex A) suitable to support an unexpected combinative effect.

In the experiments the reactivity of 10 clones derived from the region spanned by clones 8f and 33f with 20 sera of HCV-infected patients is assayed in an ELISA test format and in a so-called LIA format, i.e. with the peptides bound to a nylon membrane. The tests were originally carried out with the intention to demonstrate superiority of peptides XV, XVI, XVII, XVIII and XIX of the patent in suit compared to prior art peptides and not to demonstrate an effect of the assay format.

30. However, leaving aside this fact and considering the results under the latter aspect (Result Table 2 summarizes results of the ELISA assay and Result Table 3 that of the LIA assay) reveals that of the four peptides recited in claim 1 (NS5-25, NS5-27, NS5-29 and NS5-31 corresponding to peptides XV, XVI, XVII and XVIII of claim 1), on the most favourable estimation of the results, peptide NS5-31 scores positive with 15 out of 20 sera in the ELISA assay and with 14 of the same 20 sera in the LIA assay and peptide NS5-29 reacts positively with 9 out of 20 sera in the ELISA and 10 out of 20 sera in the LIA assay. For the other two peptides the relation is 5 versus 14 positive and 4 versus 16 positive scores. Consequently, at least for

peptide NS5-31 it cannot be said that the result justifies appellant I's allegation of the selection of the four peptides of claim 1 due to their higher sensitivity in the LIA assay.

31. Thus, the Board concludes that since each of the individual features is derivable by the skilled person in an obvious manner from the teaching of document D2 alone or in combination with common general knowledge, respectively, and moreover since there is no evidence for the presence of an unexpected effect of the claimed subject-matter as a whole, claim 1 does not fulfil the requirements of Article 56 EPC.

Auxiliary Request

32. Claim 1 of the Auxiliary Request filed labelled Auxiliary Request 8 read: "A peptide composition characterized in that it contains the following mixture of peptides: F. VIII (SEQ ID NO 9), IX (SEQ ID NO 10), XI (SEQ ID NO 12), XIII (SEQ ID NO 14), and XIX (**SEQ ID NO 15**)."

33. Appellant I requested correction under Rule 88 EPC of this request to read: "1. A peptide composition characterized in that it contains the following mixture of peptides:

F. VIII (SEQ ID NO 9), IX (SEQ ID NO 10), XI (SEQ ID NO 12), XIII (SEQ ID NO 14), and **XIV** (SEQ ID NO 15)."
(emphasis added)

This amended request constitutes the auxiliary request under consideration.

34. The first question to be decided is whether the requested correction is allowable under Rule 88 EPC.
35. According to Rule 88 EPC "... mistakes in any document filed with the European Patent Office may be corrected on request. However, if the request for such correction concerns a description, claims or drawings the correction must be obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction". This means that it must both be obvious that there is an error, and it must be immediately unambiguously clear what the correct version should be, if the European Patent Office is to exercise its discretion under Rule 88 EPC to allow the requested correction.
36. In the text of the divisional application as initially filed, on page 6, peptide XIV is identified as SEQ ID NO 15, and on page 7, peptide XIX is identified as SEQ ID NO 20. However, on page 8 and claim 5 of the text of the divisional application as initially filed in the definition of mixture F peptide XIX is associated with SEQ ID NO 15 as in Claim 1 of the Auxiliary Request set out in point 32 above. This is also true of the divisional application as published (see respectively pages 5, 6, and 7 and claim 5 on page 40).
37. Appellant I's argument that a reader would have recognized that there is a certain order in the numbering does not convince the Board, because in the allegedly incorrect form, too an order is recognizable since all numbers are in ascending order.

38. The Board agrees that a skilled reader would see that some error has likely occurred, but from the text of the divisional application as filed the reader would not know what the correct version was, as the reader could not be certain whether the mistake was in the peptide number stated, with the intended correct version referring to peptide XIX (SEQ ID NO 20), in the SEQ ID NO, with the intended correct version referring to peptide XIV (SEQ ID NO 15), in the accidental omission of some text, with the intended correct version referring to peptide XIV (SEQ ID NO 15) and peptide XIX (SEQ ID NO 20), or there being yet another intended correct version.
39. Accordingly the requirement of Rule 88 EPC that for a requested correction of the description and claims to be considered it must be immediately evident that nothing else would have been intended than what is offered as a correction, is not met, and the request for an amendment must be refused.
40. It is true, as argued by Appellant I, that the definition of mixture F on page 9 of the parent application as originally filed related to peptides VIII, IX, XI, XIII and XIV. Originally there were no SEQ ID NOs and the error was introduced subsequently. This does not however assist appellant I because the requirement of Rule 88 EPC that the correction be immediately apparent must be met on the basis of the text of the divisional application as filed itself, as a correction which can only be established by careful research and comparison with the text of the original parent application, or other documents, cannot meet the "immediately evident" criterion of Rule 88 EPC.

41. As the Board does not allow the correction sought under Rule 88 EPC, claim 1 as requested has no basis in the divisional application as originally filed contrary to Article 123(2) EPC, and the request is not allowed into the appeal proceedings for further consideration.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. Any appeal fee(s) paid by the patentee in the appeal beyond the first such fee are to be refunded.

Registrar:

Chair:

P. Cremona

U. M. Kinkeldey