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**Datasheet for the decision
of 14 April 2011**

Case Number: T 1610/07 - 3.3.04

Application Number: 96200677.1

Publication Number: 0732340

IPC: C07K 14/18

Language of the proceedings: EN

Title of invention:

Expression of porcine reproductive respiratory syndrome virus polypeptides in the same cell

Patentee:

Intervet International BV

Opponent:

Wyeth

Headword:

Porcine reproductive respiratory syndrome virus/INTERVET

Relevant legal provisions:

EPC Art. 101(3)(b), 111(1)

Keyword:

"Revocation of the patent upon proprietor's request"

Decisions cited:

T 0820/94, T 0348/00, T 0535/00, T 0904/05

Catchword:

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Case Number: T 1610/07 - 3.3.04

D E C I S I O N
of the Technical Board of Appeal 3.3.04
of 14 April 2011

Appellant: Wyeth
Five Giralda Farms
Madison, New Jersey 07940-0874 (US)

Representative: Von Menges, Albrecht
Uexkuell & Stolberg
Beselerstrasse 4
D-22607 Hamburg

Respondent: Intervet International BV
Wim de Körverstraat 35
NL-5831 AN Boxmeer (NL)

Representative: Keus, Jacobus Albertus Ronald
Intervet International B.V.
Patent Department
P.O. Box 31
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
10 May 2007 concerning maintenance of European
patent No. 0 732 340 in amended form.

Composition of the Board:

Chairman: C. Rennie-Smith
Members: G. Alt
B. Claes

Summary of Facts and Submissions

- I. This is an appeal is by the opponent (hereinafter "appellant") against the decision of the opposition division expressing its intention to maintain the European patent No. 732340 in amended form.
- II. In the statement setting out the grounds of appeal the appellant requested that the decision of the opposition division be set aside, that the patent be revoked and that oral proceedings be held in the case that the board could not comply with the previous request in the written proceedings.
- III. In a letter dated 2 March 2011 the respondent stated:
- "The above-mentioned European patent is herewith withdrawn."
- IV. In reply the board sent a communication observing inter alia the following:
- "3. In the letter dated 2 March 2011 the respondent states that "[t]he above mentioned European patent is herewith withdrawn".
4. Currently, the board interprets this statement as meaning either that the respondent does no longer approve the text in which the patent was granted. According to established case law and under the present procedural circumstances this would have the consequence that the board would revoke the patent without substantive examination as to patentability

(see Case Law of the Boards of Appeal of the EPO, 6th edition 2010, VII. C.6.1.2, second paragraph).

5. Or, the respondent's statement could be interpreted as a request that the decision of the opposition division be set aside and that the patent be revoked. Also this procedural situation - identical requests of both parties to the proceedings - would have the consequence that the board would revoke the patent without substantive examination(see Case Law of the Boards of Appeal of the EPO, 6th edition 2010, VII. C.6.1.2, third paragraph)."

V. In a further letter dated 24 March 2011 the respondent commented on the board's communication as follows:

"1) The Patentee informs the Board that the Patentee still agrees with the text in which the Patent was granted.

2) However, the Patentee is no longer interested in the maintenance of the Patent. The Patentee will therefore refrain from taking further actions to maintain the patent."

VI. The respondent has not requested oral proceedings.

Reasons for the decision

1. The respondent, i.e. the patent proprietor declared that it withdraws the patent at issue. In other words, it appears to request the withdrawal of the patent.

- However, "withdrawal" of a patent on request of (or even by) the patent proprietor is not as such foreseen in the procedure according to the EPC.
2. The boards have followed two different ways of dealing with requests by patent proprietors for withdrawal of their patent (see section IV above). Either such a request is interpreted as expressing disagreement with the text of the patent (see for example decisions cited in the Case Law of the Boards of Appeal of the EPO, 6th edition 2010, VII. C.6.1.2, second paragraph and also decisions T 904/05 of 26 September 2006, T 535/00 of 2 February 2001; T 348/00 of 19 December 2000). Or such a request is interpreted as the patent proprietor's agreement with the opponent's request for revocation of the patent (see for example decisions cited in the Case Law of the Boards of Appeal of the EPO, 6th edition 2010, VII. C.6.1.2, fourth paragraph and also T 820/94 of 29 November 1996, point 6 of the Reasons).
 3. The respondent explains in its letter of 24 March 2011 that it agrees with the text in which the patent was granted, but that it is no longer interested in the maintenance of the patent and therefore will refrain from taking further actions to maintain the patent (see section V above).
 4. Given that these statements are in reaction to the board's communication, the board interprets the respondent's request for withdrawal of the patent therefore as a request for revocation of the patent in accordance with point 5 of the board's communication (see section IV above).

5. Hence, both the appellant and the respondent request that the decision of the opposition division be set aside and that the patent be revoked.
6. The parties' requests are granted.
7. According to the case law (see for example decisions cited in the Case Law of the Boards of Appeal of the EPO, 6th edition 2010, VII. C.6.1.2, third paragraph) the present decision can be given without substantive examination as to patentability and thus also without detailed reasons.
8. Moreover, the board could take the decision in the written proceedings since it follows the appellant's main request and the respondent has made no request for oral proceedings.

Order

For these reasons it is decided that:

1. The decision of the opposition division is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

P. Cremona

C. Rennie-Smith