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Datasheet for the decision of 2 July 2026

Case Number: T 0614/24 - 3.3.08

Application Number: 13791247.3

Publication Number: 2850175

IPC: C12M3/02, C12M3/06

Language of the proceedings: EN

Title of invention:
Improved methods of cell culture for adoptive cell therapy

Patent Proprietor:
Wilson Wolf Manufacturing Corporation

Opponent:
GRUND IPG Patentanwälte und Solicitor PartG mbB

Headword:
Cell culture/WILSON WOLF

Relevant legal provisions:
EPC Art. 123(3)

Keyword:
Amendments - broadening of claim (yes)

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It can be changed at any time and without notic

Decisions cited:
T 0307/05

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Case Number: T 0614/24 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 2 July 2026

Appellant: (Opponent)	GRUND IPG Patentanwälte und Solicitor PartG mbB Steinsdorfstrasse 2 80538 München (DE)
Representative:	Grund, Martin Grund Intellectual Property Group Patentanwälte und Solicitor PartG mbB Steinsdorfstraße 2 80538 München (DE)
Respondent: (Patent Proprietor)	Wilson Wolf Manufacturing Corporation 33-5th Avenue NW Suite 700 New Brighton, MN 55112 (US)
Representative:	Barker Brettell LLP 100 Hagley Road Edgbaston Birmingham B16 8QQ (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted/ electronically transmitted on 4 March 2024 concerning maintenance of the European Patent No. 2850175 in amended form**

Composition of the Board:

Chairwoman	T. Sommerfeld
Members:	A. Schmitt
	D. Rogers

Summary of Facts and Submissions

I. The opponent's (appellant's) appeal is against the opposition division's interlocutory decision concerning the maintenance of European patent No. 2 850 175 (the patent) in amended form based on auxiliary request 6 filed during the opposition proceedings.

II. The patent, entitled "*Improved methods of cell culture for adoptive cell therapy*", was granted on the basis of European patent application No. 13 791 247.3, which had been filed as an international application published as WO 2013/173835 (the application).

III. The opposition proceedings were based on the grounds for opposition under Article 100(a) EPC in relation to novelty (Article 54 EPC) and inventive step (Article 56 EPC), as well as those under Article 100(b) and (c) EPC.

IV. In the statement of grounds of appeal, the appellant challenged the opposition division's decision with respect to, *inter alia*, extension of scope (Article 123(3) EPC).

V. With the reply to the appeal, the patent proprietor (respondent) filed a set of claims of a main request identical to the set of claims of auxiliary request 6 considered by the opposition division and sets of claims of auxiliary requests 1 to 7.

Claim 1 of the main request reads as follows:

"1. A cell culture and cell recovery device for static cell culture comprising:

a cell culture compartment bounded by a growth surface and an opposing upper confine, said growth surface comprised of liquid impermeable gas permeable material, the bottom surface of said gas permeable material in contact with a growth surface support that holds the gas permeable material in a horizontal position during culture and allows ambient gas to contact the underside of the gas permeable material without being forced into contact,
a medium removal opening 1008 of medium removal conduit 1010 which resides near growth surface 1006; a cell removal conduit that is in contact with the growth surface including a cell removal opening that is located along the lower edge of the device and that acts to drain media and cells from low point in the device when the device is oriented in a cell recovery position in which the growth surface is not horizontal, and when the device is oriented in the static culture position the growth surface is in a horizontal position, the distance from said growth surface to said medium removal opening is at least 0.2cm and less than half the distance from said growth surface to said upper confine."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the growth surface is comprised of liquid impermeable gas permeable "non-porous" material.

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that it is directed to a "static cell culture and cell recovery device comprising" the recited features.

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 in that the ambient gas is allowed

to contact the underside of the gas permeable material without being forced into contact "by pumps or other mechanisms to force gas to or from the growth surface".

The sets of claims of auxiliary requests 4 to 7 are identical to the sets of claims of the main request and auxiliary requests 1 to 3, respectively, except for the deletion of claim 2 in each of auxiliary requests 4 to 7.

VI. The board summoned the parties to oral proceedings in accordance with their requests and, in a communication under Article 15(1) RPBA, expressed its preliminary opinion on some matters of the appeal.

VII. The arguments of the parties relevant to the board's decision are referred to, where appropriate, in the Reasons for the Decision.

VIII. The parties' requests relevant for the decision were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed, i.e. that the patent be maintained in amended form based on auxiliary request 6 considered by the opposition division (main request) or, in the alternative, that the patent be maintained in amended form on the basis of the set of claims of one of auxiliary requests 1 to 7, all submitted with the reply to the appeal.

Reasons for the Decision

Main request
Extension of scope of protection (Article 123(3) EPC)

1. Under Article 123(3) EPC, a European patent may not be amended in such a way as to extend the protection it confers.

2. To assess whether claim 1 of the main request complies with this requirement it is necessary to compare it to claim 1 of the patent as granted.

3. Claim 1 of the patent as granted comprised the feature "*when the device is oriented in the static culture position the growth surface is in a horizontal position, the distance from said growth surface to said cell removal opening is less than half the distance from said growth surface to said upper confine*".

4. This feature is amended in claim 1 of the main request to read "*when the device is oriented in the static culture position the growth surface is in a horizontal position, the distance from said growth surface to said medium removal opening is at least 0.2cm and less than half the distance from said growth surface to said upper confine*".

5. Thus, as the expression "cell removal opening" has been replaced by "medium removal opening" in this feature, claim 1 of the main request no longer has the requirement present in claim 1 of the patent as granted that the distance from said growth surface to said cell removal opening is less than half the distance from said growth surface to said upper confine. In view of this, the scope of protection of claim 1 of the main

request is extended compared to that of claim 1 of the patent as granted. This will, however, not be the case if the limitation that the distance from said growth surface to the cell removal opening is less than half the distance from said growth surface to said upper confine is inherently present in the cell culture device as defined in claim 1 of the main request.

2. The respondent asserted that this limitation was inherent as the claim defined that the cell removal opening was "*located along the lower edge of the device*" and acted "*to drain media and cells from low point in the device*". In view of these features in combination with the fact that the cell removal conduit was defined as being "*in contact with the growth surface*", the only possible position for the lower edge of the device and hence the cell removal opening was at the growth surface as exemplified in Figure 22 of the patent.

3. The board does not agree because the claim does not define the "lower edge" in relation to any other part of the device. It defines a growth surface and an opposing "upper" confine of the cell culture compartment, but there is no relation between this upper confine and the "lower edge" or the "low point" of the device to which the claim later refers. In fact, the claim defines the lower edge and low point of the device only under the condition "*when the device is oriented in a cell recovery position in which the growth surface is not horizontal*" and therefore defines them only in relation to a tilted device in which the growth surface is not horizontal.

4. It is therefore not clear from the wording of the claim which part of the device should be the "lower edge" in

relation to the growth surface or the upper confine. The appellant is therefore right in that the lower edge and the low point as defined in the claim can also be located at the upper confine if the device is tilted accordingly.

5. It follows from this that the embodiments proposed by the appellant in section 6.10 of the statement of grounds of appeal, in which the cell removal opening is located more than half way of the distance from the growth surface to the upper confine or is located at the upper confine in a cell removal conduit extending from the growth surface towards the upper confine, are within the ambit of claim 1 of the main request. However, these embodiments were not encompassed by claim 1 of the patent as granted since it required that the distance from the growth surface to the cell removal opening was less than half the distance from said growth surface to said upper confine.

6. The respondent asserted that the embodiments suggested by the appellant in section 6.10 of the statement of grounds of appeal did not make any technical sense. Since the cell removal conduit was defined as being in contact with the growth surface, the proposed embodiments created a redundant space in the conduit in which cells were lost when attempting to withdraw them with the conduit. These embodiments hence would result in substantial cell loss, contrary to the requirement expressed in the sentence bridging pages 57 and 58 of the application that few or no cells should be lost. Hence, having the cell removal opening in the middle of the conduit or at the upper confine while having the cell removal conduit in contact with the growth surface did not allow a functional cell removal. The skilled

person would never have contemplated and implemented such nonsensical embodiments.

7. However, as pointed out by the appellant, the claim does not require that the cell removal conduit extends from the upper confine towards the growth surface. The claim only requires that it is "*in contact with the growth surface*". The cell removal conduit may therefore likewise extend through the growth surface towards the upper confine.

8. Moreover, the patent specifically contemplates embodiments in which the cell removal opening is not at a "lower edge" of the device as exemplified in Figure 22, i.e. at an edge formed by the growth surface and a side wall. This is evident from paragraph [0120] of the patent, which teaches that "*the cell removal opening of the cell removal conduit need not be located along the lower edge of the device* [as described in Figure 22, see paragraph [0119]]. *Once the step of mixing the cells in the cell recovery medium is* complete, *the cell recovery medium can be removed from any location in the device by simply rotating the device until the cell recovery medium is located at the cell removal opening, and then withdrawing the cell recovery medium by way of the cell removal conduit. Skilled artisans should recognize that the conduits need not be as shown* [in Figure 22]*, but can be any configuration*".

9. In view of this teaching and the fact that the "lower edge" is only defined in the claim in a relative manner, the embodiments proposed by the appellant in section 6.10 of the statement of grounds of appeal are neither excluded by the claim nor are they claim interpretations that do not make any technical sense.

They may not be the optimal configurations of the claimed cell culture and cell recovery device in terms of cell removal; however the claim does not require that all or a certain percentage of the cells could be recovered.

10. It is established case law that the requirements of Article 123(2) and (3) EPC are assessed according to the standard of "beyond reasonable doubt" (e.g. T 307/05, Reasons 3.3.1). This means that if there are doubts that the scope of extension is extended in an amended claim compared to the claims as granted, the requirements of Article 123(3) EPC are not met.

11. In the case at hand, the above considerations demonstrate that embodiments which are not technically nonsensical and in which the distance from the growth surface to the cell removal opening is not less than half the distance from said growth surface to said upper confine fall under the scope of claim 1 of the main request. Hence the scope of protection of claim 1 of the main request is broader than that of claim 1 of the patent as granted.

12. Claim 1 of the main request does not meet the requirements of Article 123(3) EPC.

Auxiliary requests 1 to 7

13. The considerations set out above under Article 123(3) EPC for claim 1 of the main request apply, *mutatis mutandis*, to claim 1 of each of auxiliary requests 1 to 7. No arguments to the contrary were submitted by the respondent.

14. Claim 1 of each auxiliary requests 1 to 7 do not meet the requirements of Article 123(3) EPC for the same reasons as claim 1 of the main request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairwoman:

C. Rodríguez Rodríguez T. Sommerfeld

Decision electronically authenticated