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Aktenzeichen / Case Number / N° du recours : T 90/88 - 3.3.2

Anmeldenummer / Filing No / N° de la demande : 82 108 857.2

Veröffentlichungs-Nr. / Publication No / N° de la publication : 76 953

Bezeichnung der Erfindung: Pseudomonas compositions

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : C12N 15/00

ENTSCHEIDUNG / DECISION

vom / of / du 25 November 1988

Anmelder / Applicant / Demandeur : Microlife Genetics, Inc.

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Micro-organism/MICROLIFE

EPU / EPC / CBE Article 83, Rule 28

Schlagwort / Keyword / Mot clé : "Micro-organism - deficiency in deposit"

Leitsatz / Headnote / Sommaire

See T 39/88 (to be reported in OJ EPO).

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number : T 90/88 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 25 November 1988

Appellant : Microlife Genetics, Inc.
1817, 57th Street
Sarasota
Florida 33578 (US)

Representative : Dr. H. Kinkeldey
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Decision under appeal : Decision of Examining Division 023
of the European Patent Office
dated 15 September 1987 refusing
European patent application
No. 82 108 857.1 pursuant to
Article 97(1) EPC

Composition of the Board :

Chairman : P. Lançon
Members : E. Persson
S.G. Schödel

Summary of Facts and Submissions

- I. European patent application No. 82 108 857.2 was filed on 24 September 1982. It claimed priority from US application No. 310 090 filed on 9 October 1981. The application was directed to certain *Pseudomonas* compositions and involved the use of five strains of *Pseudomonas* bacteria, which had been deposited with the Agricultural Research Culture Collection (NRRL) in the USA on 24 September 1981. These strains were in the application identified by their deposit numbers being NRRL B-12535 - NRRL B-12539. The European application was published on 20 April 1983 and the cognate US patent (No. 4 452 894) issued on 5 June 1984, i.e. almost 14 months later.
- II. The Examining Division refused the application on the ground that it did not meet the requirements of Article 83 in conjunction with Rule 28 EPC, since there was no certainty that the above five strains had been deposited in such a way that a delivery to the public of a sample of the deposited strains, as prescribed by Rule 28(3) to (8) EPC, was possible. It was left undecided by the Examining Division whether or not the deposit in question was in conformity with the requirement of making the strains available during a sufficient period of time.
- III. In the appeal against the decision by the Examining Division, it is requested to grant a patent on the basis of Claims 1-17 presently on file.

Reasons for the Decision

1. The appeal is admissible.

2. The deposit of the five micro-organisms in question was, as appears from paragraph I above, made before the date of filing of the present European patent application. The depositary institution used in this case, NRRL, was at that point in time, and is still, recognised by the EPO for the purpose of Rule 28 EPC both in its capacity as international depositary authority under the Budapest Treaty and on the basis of a special agreement with the EPO of 29 October 1979 (see OJ EPO 1980, 4 and OJ EPO 1981, 29).

3. The problem in this case is that the deposit was originally made for the purpose of the US priority application without the deposit subsequently being converted into a deposit under Rule 28 EPC or under the Budapest Treaty before the filing of the European application, which may have created a gap in time of almost 14 months with regard to the availability of the deposited organisms to the public. As fully explained by this Board in the decision of 15 November 1988 in case T 39/88 (to be reported in OJ EPO), there may be a deficiency in complying with Rule 28 EPC when the deposit of a culture of a micro-organism, originally made under other legislation, was not converted into a deposit under Rule 28 EPC or the Budapest Treaty before the filing of a European patent application. Nevertheless, due to the lack of clarity in this respect, which was inherent in the system of deposits at that time, it has not been considered as justified to refuse, on this sole ground, a European patent application filed before the publication of the clarifying notice of the EPO dated 18 July 1986 concerning patent applications and European patents in which reference is made to micro-organisms (OJ EPO 1986, 269). This principle does, in the Board's view, fully apply also to the present case and there is for the purpose of deciding this case, therefore, no point in dealing with various submissions made by the Appellant to

the effect that the deposit ought to be considered as fully complying with all the requirements of Rule 28 EPC.

4. In the decision under appeal it was left open, whether the deposit in question fulfils the requirement of making the deposited strains available during a sufficient period of time (cf. OJ EPO 1978, 303, point 12). There were further made some remarks in paragraph 4 of the reasons for the decision (see sections 3 and 4) concerning the first portion of Claim 1 and a certain part of the description, which seem to be unclear in this context. Finally, it appears from that decision that the Examining Division has not yet completed the substantive examination of the application. The case has therefore to be remitted to the Examining Division for further prosecution.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The application is referred back to the Examining Division for further prosecution on the basis of Claims 1-17 presently on file.

The Registrar:

The Chairman:

F.Klein

P.Lançon