

Veröffentlichung im Amtsblatt Publication in the Official Journal Publication au Journal Officiel	<input checked="" type="checkbox"/> Ja/Yes <input type="checkbox"/> Nein/No <input type="checkbox"/> Nicht/Non
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Aktenzeichen / Case Number / N<sup>o</sup> du recours : T 106/88 - 3.3.2

Anmeldenummer / Filing No / N<sup>o</sup> de la demande : 83 110 651.3

Veröffentlichungs-Nr. / Publication No / N<sup>o</sup> de la publication : 112 459

Bezeichnung der Erfindung: Production of butanol by a continuous fermentation  
Title of invention: process  
Titre de l'invention :

Klassifikation / Classification / Classement : C12P 7/28

**ENTSCHEIDUNG / DECISION**  
vom / of / du 15 November 1988

Anmelder / Applicant / Demandeur : CPC International Inc.

Patentinhaber / Proprietor of the patent /  
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Micro-organisms/CPC

EPU / EPC / CBE Article 83, Rule 28

Schlagwort / Keyword / Mot clé : "Micro-organisms" - "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 106/88 - 3.3.2

**D E C I S I O N**  
of the Technical Board of Appeal  
of 15 November 1988

**Appellant :** CPC International Inc.  
International Plaza  
P.O. Box 8000  
Englewood Cliffs  
New Jersey 07632 (USA)

**Representative :** Dr. Franz Lederer  
Van der Werth, Lederer & Riederer  
Lucile-Grahn Strasse 22  
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**Decision under appeal :** Decision of Examining Division 023  
of the European Patent Office  
dated 22 September 1987 refusing  
European patent application  
No. 83 110 651.3 pursuant to  
Article 97(1) EPC

**Composition of the Board :**

**Chairman :** P. Lançon  
**Members :** E. Persson  
U.M. Kinkeldey

## Summary of Facts and Submissions

- I. European patent application No. 83 110 651.3, filed on 25 October 1983 and claiming priority from US application No. 442 806 filed on 18 November 1982, was refused by a decision of the Examining Division dated 22 September 1987 pursuant to Article 97(1) EPC. The reason for the refusal was that the requirements of Article 83 in conjunction with Rule 28 EPC were not met in respect of a micro-organism, referred to in Claim 9 (with a cross-reference to Claim 1), which was identified by its deposit number being ATCC 39236. It was left undecided in the decision, whether or not another micro-organism, referred to in the application (ATCC 4259), was to be considered to be available from an independent source during a sufficient period of time.
  
- II. In the appeal against this decision it is requested that a patent be granted on the basis of Claims 1-9 presently on file. There is also a further request for the deletion of lines 20-24 on page 5 of the description referring to a copending patent application (EP 83 110 649.7).

## Reasons for the Decision

1. The appeal is admissible.
  
2. The circumstances of this case are in all relevant respects identical with those of case T 39/88 which concerns a copending European patent application (EP-83 110 649.7) involving the use of the same micro-organisms as in the present case, i.e. ATCC 39236 and ATCC 4259. The underlying legal problem is, in both cases, that the deposit of ATCC 39236 was originally made (on 5 November 1982) for the

purpose of the respective national US priority application without the deposit being converted into a deposit under Rule 28 EPC or under the Budapest Treaty before the filing of the respective European patent application, which created a certain gap in time with regard to the availability of the deposited organism to the public (in this case of almost 11 months). As fully explained in the above decision this day in case T 39/88 (to be reported in the 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 that respect which was inherent in the system of deposits at that time, it is not 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). The Board does not see any reason for treating the present case differently from case T 39/88. Thus, also this case must be referred back to the Examining Division for further prosecution, including examination of the above request for a deletion of a certain part of the description.

#### 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 1-9 presently on file.

The Registrar:

The Chairman:

F.Klein

P.Lançon