

c) Archives and internet publications

In T 151/99 the board regarded it as **highly plausible** in the light of the available evidence that a **master's thesis** had become available to at least one member of the public. If the reference was in a document published before the priority date of the patent in suit then it could be assumed that the thesis had also been made available to the public before the said date (decision analysed more recently in T 538/09, which concerns a master's thesis of the first examiner as prior art; also citing T 1134/06 and T 750/94 in that an important criterion in evaluating evidence is the reliability of the source: fulfilled for University of Utah). The strict standard of proof (beyond reasonable doubt) laid down as the rule for internet publications in T 1134/06 no longer applies since T 286/10 and T 2227/11, both found the balance of probabilities to be the usually applicable standard.

In T 2165/18 the opposition division had found there was a lack of novelty over the undated user manual E1, which had been published online (www.janserwis.pl). The board observed that dates obtained from reputable and trusted editors or archives, which included www.archive.org in particular, were accepted by the boards as reliable. Janserwis, however, was not a known reputable editor or archive, so the board considered the probative value of a witness statement made by two of its company members to be insufficient. The opponent had also invoked the prior use of the mass-market software product the user manual was for, but this was unsuccessful as it did not answer the crucial question what version of the manual had been supplied then. Finding that a witness's testimony alone was not enough to fill in the gaps in the evidence as to when user manual E1 had been published and which software version it had accompanied, the board held that its date of public availability had not been established.

In T 1469/10 the board held that the publication dates indicated on the documents published by the ETSI 3GPP organisation, which was regarded as a reputable standardisation body having clear and reliable rules for their publications, were of a high probative value and thus might serve as prima facie evidence that a document was published on the date indicated, and regarded the documents at issue thus as representing the state of the art under Art. 54(2) EPC.

As a matter of principle, if an adverse decision of an organ of the EPO is to rely on a certain fact that fact should be proven beyond any reasonable doubt. In T 826/03, the board applied this principle when attempting to establish the publication date of a Canadian patent application, and whether it was prior art. It found that in view of the contradictory evidence on file and in the absence of any further clarifying information from the Canadian Intellectual Property Office, it was virtually impossible for the board to establish with certainty that the public had access to the application according to document D3 before the priority date claimed by the application in suit. It therefore considered document D3 as not belonging to the prior art within the meaning of Art. 54(2) EPC.

4.3.5 Claiming a valid priority

In T 1056/01 the board pointed out that because of the crucial effect a valid priority date had on patentability, the date of filing of the application whose priority was claimed had to