

6.1 Types of non-written disclosure, in particular use, and instances of prior art made available in any other way

Rule 33.1(b),
Rule 64.2

Making available to the public may occur by means of an oral disclosure, use, exhibition or other non-written means. Use may be constituted by producing, offering, marketing or otherwise exploiting a product, or by offering or marketing a process or its application or by applying the process. Marketing may be effected, for example, by sale or exchange.

Prior art may also be made available to the public in other ways, as for example by demonstrating an object or process in specialist training courses or on television.

Availability to the public in any other way also includes all possibilities which technological progress may subsequently offer of making available the aspect of the prior art concerned.

It should be borne in mind that for the purposes of the international search and the international preliminary examination a non-written disclosure is to be considered part of the prior art for the purposes of Art. 33(2) and (3) only if its content is confirmed by a written disclosure that was made available to the public earlier than the relevant date as defined by Rule 64.1(b).

6.2 Matters to be determined as regards use

Rule 33.1(b),
Rule 64.2

When the ISA or the IPEA has gained knowledge of an object or process that has been used in such a way that it is comprised in the prior art (e.g. by a third party, see GL/PCT-EPO E-II, ISPE Guidelines 16.57 and PCT/AI section 801), the following details have to be determined:

- (i) whether there is a written disclosure that was made available to the public earlier than the relevant date as defined by Rule 64.1(b) which confirms the use of the object or the process;
- (ii) the date on which an alleged use occurred, i.e. whether there was any instance of use before the relevant date (prior use);
- (iii) what has been used, in order to determine the degree of similarity between the object used and the subject-matter of the application; and
- (iv) all the circumstances relating to the use, in order to determine whether and to what extent it was made available to the public, as for example the place of use and the form of use. These factors are important in that, for example, the details of a demonstration of a manufacturing process in a factory or of the delivery and sale of a product may well provide information as regards the possibility of the subject-matter having become available to the public.

6.2.1 General principles

Subject-matter should be regarded as made available to the public by use or in any other way if, at the relevant date, it was possible for members of the public to gain knowledge of the subject-matter and there was no bar of confidentiality restricting the use or dissemination of such knowledge. This