

opponent 1 in proving its case of prior use (witness employed by Company E). It therefore asked the board to apply a different standard of proof from the one applied by the opposition division (namely "beyond reasonable doubt" instead of the "balance of probabilities"). The board was unconvinced and found that whenever an opponent wished to prove a prior use and the evidence of this was in the possession of a third party, a certain level of co-operation with that third party was normally required. The appellant-proprietor's second line of argument (company E and opponent 1 were jointly infringing the patent at issue) was an incomplete set of infringement allegations and supporting evidence from which no conclusions could be drawn. The board held that the appellant-proprietor had not substantiated its case for the board to treat company E as being in any different position from that found by the opposition division, namely that of an independent supplier outside the sphere of opponent 1.

b) Evidence within the sphere of the opponent: beyond any reasonable doubt

By contrast, in cases where all **evidence** in support of an alleged public prior use lies **within the power and knowledge of the opponent**, while the patentee has barely any or no access to it at all, it is incumbent upon the opponent to prove the alleged prior use **up to the hilt** (T 472/92, OJ 1998, 161; cf. T 782/92 referring to proof "beyond any reasonable doubt"). The boards decided that the evidence lied within the **sphere of the opponent**: T 2451/13 and T 703/12 (prior use originating from a subsidiary of the opponent); T 202/13 (the opponent was the successor of the company directly involved in the alleged public prior disclosure); T 2338/13 (opponent bore consequences of lack of information on relationship between him, the witness whose testimony he was relying on and the person who had contacted the witness); T 703/12 (product presented at the Ambiente trade fair in Frankfurt); T 274/12 (subsidiary – talks between firms); T 544/14 (subsidiary); T 1262/15 (subsidiary of the opponent); T 1469/08 (evidence presented involved opponent's company's sale); T 441/04 (witness testimony measured according to the high standard of proof beyond reasonable doubt); T 1682/09 ((the opponent's) packing system delivered to and mounted at a client's premises); T 1914/08, T 738/04, T 1776/14 (the two parties did not have equal access to evidence); T 2659/17 (since the alleged prior use took the form of sales of machines by the opponent, the patent proprietor's request to hear the author of a contested declaration as a witness should not have been refused).

Decision T 918/11 (point 3.3 of the Reasons) summarised the case law on standards of proof and the conclusion drawn in T 750/94 (OJ 1998, 32), with the board also emphasising the need to take into consideration that the application of the strict standard of proof referred to in the impugned decision was not justified in view of the fact that the actual production and the selling of the containers was clearly outside the sphere of the opponent. The board was also of the opinion that the application of the standard of proof "beyond reasonable doubt" did not justify disregarding the witness testimony (regarding facts which had occurred a long time ago). T 2451/13 summarised the principles governing the standard of proof in case of public prior use and specified the meaning of the standard of "up to the hilt" (see Catchword) used in T 472/92, which is to prove beyond reasonable doubt. All the evidence about the publication date of a brochure was essentially in the hands of the opponent (brochure originated from a subsidiary of the opponent, on this latter point see also T 738/04).