

prior use stemmed from the opponent itself, it had provided only **sales records** to substantiate the prostheses' availability. In such circumstances, there were **serious doubts** that documents actually existed establishing the prostheses' availability to the public before the priority date. See also T.71/09, setting out the case law and citing T.750/94 and T.97/94. The respondent (opponent) alleged public prior use prejudicial to the novelty and inventive step of the subject-matter claimed. Here too, the prior use was its own: the evidence presented involved its company's sale of a certain product. The board held that the evidence submitted failed to establish the product's composition beyond any reasonable doubt.

In T.1776/14 the opponent stated that disclosure had been in its interest and implied that it was very likely the prior use had been public; in view of the circumstances, however, the board rejected its position and concluded that the balance of probabilities was not applicable because the two parties had not had equal access to the evidence.

In T.624/14, the analysis of the specific prior-use products, on which the determination of the content (internal structure) and hence the line of argument put forward by the appellant (opponent) relied entirely, had been performed by an employee of the appellant, and thus lay solely in the appellant's sphere. During the opposition proceedings, the respondent had voiced doubts about the credibility of the appellant's measurements and asked to be provided with the specific prior-use products used for the measurements in order to perform its own analysis. The opposition division had voiced similar doubts, stating that a simple visual inspection (e.g. during oral proceedings) would not suffice to determine the internal structure. It had then been up to the appellant to dispel these doubts by providing the samples. As the appellant had not provided these samples, there remained reasonable doubt as to the correctness and content of the analysis performed by its employee. The alleged prior use had thus not been proven beyond any reasonable doubt.

#### c) Miscellaneous – evaluation in the case law

In T.674/91 the board stated that all the assertions (affidavits or declarations) made by different witnesses of the alleged prior use and which were in agreement with one another already provided **sufficient evidence** of the commercial nature of the tests mentioned. An obligation of confidentiality could not have existed, since the access to the new tool was not restricted to a particular group of persons. The board concluded that the prior use was prior art within the meaning of Art. 54(2) EPC 1973.

The board in T.1682/09 held that evidence from an independent source corroborating an alleged prior use would have constituted strong evidence in support of the allegation, but the mere absence of such independent evidence was not a sufficient reason to dismiss it.

In T.1452/16 the alleged prior use concerned a product which was commercially available as agreed by all parties. It was thus possible for the patent proprietor to simply obtain samples and test them. Even if the present case did fall into the category of "balance of probabilities", the board did not merely form its opinion on the basis of whether the alleged facts were just slightly more likely to have occurred than not, but on the basis of whether it was convinced that they had occurred.