

discretion in respect of the admissibility of the patentee's late-filed request but arbitrarily decided not to allow the request. This arbitrary decision deprived the patent proprietor of a proper opportunity to comment on the admissibility of its further request and to reply to the objections of the opposing party.

In T 1014/10 the appellant (patent proprietor) argued that during the opposition proceedings it had been given no opportunity to study the opponent's submissions because they were delivered to its office only on the day of the oral proceedings. The board observed that it was the duty of the parties – and of the board – to check the content of the electronic file in order to make sure that no submission had been added in the days before the oral proceedings. Moreover, the proprietor could have requested an interruption of the oral proceedings to study the submissions, or even asked the opposition division not to admit them into the proceedings. As shown by the minutes, the proprietor did not make use of these procedural options. Under these circumstances, the late-filed submissions, which furthermore did not contain any new facts, were to be put on the same footing as new arguments which might have been put forward and discussed anyway during the oral proceedings. The board did not see any violation of Art. 113 EPC.

2.6.3 Introduction of a new ground of opposition by the opposition division

In T 515/05 the appellant had based its opposition only on the grounds of Art. 100(a) EPC. In the summons to the oral proceedings the opposition division itself introduced a further ground for opposition under Art. 100(b) EPC. At the beginning of the oral proceedings the chairman of the opposition division stated that no discussion of the ground of opposition under Art. 100(b) EPC would take place because it had not been sufficiently substantiated by the opponent. Denying the appellant the opportunity to comment on this ground, albeit introduced by the opposition division itself, was considered a substantial procedural violation. The fact that the appellant did not file written arguments in response to the summons to attend the oral proceedings did not deprive it of its right to be heard. The appellant was entitled to expect that it would still have an opportunity to comment on this new ground during the oral proceedings.

2.6.4 Hearing witnesses

In T 142/97 the board held that the opposition division had violated the opponent's right to be heard under Art. 113(1) EPC by not hearing the witness offered in connection with a prior use that had been adequately substantiated in the notice of opposition. See also T 959/00 in which the board held that the opposition division's failure to hear the witness, and the absence in the decision under appeal of any reference to a reason why it had not been necessary to hear the witness, amounted to a fundamental procedural violation of the right to be heard.

In T 269/00 the board held that the case before it differed from T 142/97 because the ground of prior use was not adequately substantiated during the opposition period, but completed piecemeal during the opposition proceedings. The board concluded that not hearing the witness did not amount to a substantial procedural violation.