

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 may, for example, arise if an object is unconditionally sold to a member of the public, since the buyer thereby acquires unlimited possession of any knowledge which may be obtained from the object. Even where in such cases the specific features of the object may not be ascertained from an external examination, but only by further analysis, those features are nevertheless to be considered as having been made available to the public. This is irrespective of whether or not particular reasons can be identified for analysing the composition or internal structure of the object. These specific features only relate to the intrinsic features. Extrinsic characteristics, which are only revealed when the product is exposed to interaction with specifically chosen outside conditions, e.g. reactants or the like, in order to provide a particular effect or result or to discover potential results or