

4.3.4 Public availability of prior art documents

a) Commercial brochures

With regard to the public availability of commercial brochures, some boards adopt the less strict standard of the "balance of probabilities" (see e.g. T. 743/89 (brochure produced by the patentee) and T. 804/05 (prospectus issued by a third party)). Concerning a commercial brochure (prospectus) of a product produced by the opponent, in T. 1748/10 the board considered it more appropriate to assess public availability on "the balance of probabilities" citing T. 743/89 and T. 1140/09 and not the standard "up to the hilt" as alleged by the patentee, in view of the fact that the brochure originated from the opponent. In the board's view, although D1 originated from the opponent, it was distributed to the public. Therefore both parties were able to access and adduce evidence relating to the availability of document D1. The board in T. 1140/09 considered the "balance of probabilities" to be the proper standard of proof to be applied for the question of the public availability of document E3, a brochure that had been distributed by the appellant (opponent) to visitors at CeBIT and had therefore been made available to the public before the priority date. In the particular case, **however**, the evidence presented by the appellant was such that it also met the stricter standard of proof as proposed by the respondent. Given the importance of large industrial fairs such as CeBIT for doing business and the strong interest of the appellant in making its brochure as widely available as possible, the board found that the public availability of document E3 was proven beyond reasonable doubt.

In T. 184/11 the board first had to decide whether the document was an advertising brochure or a product data sheet. It contained no detailed technical data, merely general technical information. After a detailed review of the case law on standards of proof and the public availability of advertising brochures, the board decided that nothing in the reasons given for the contested decision indicated that the opposition division, in assessing probability, had not critically and precisely evaluated the evidence before it.

In T. 146/13 the proprietor maintained that it had not been proven beyond any doubt that an advertising brochure had been distributed before the patent's priority date. The board, citing settled case law on commercial brochures as prior art and in particular T. 743/89 and T. 804/05, held that enough time (two years) had elapsed between printing and the priority date to conclude that the brochure really had been made available to the public. Adding that in practice the whole point of printing advertising brochures was to attract the attention of potential clients, it therefore decided that the brochure was prior art within the meaning of Art. 54(2) EPC. Compare with T. 738/04, point 4.1.1 of the Reasons.

In T. 743/89 it had been proved that a **leaflet** disclosing the invention had been printed seven months before the priority date, but it was uncertain when the leaflet had been distributed. Based on the balance of probabilities, the board concluded that the leaflet was available to the public before the priority date of the patent in suit and was, consequently, comprised in the state of the art. Although the date of distribution could no longer, i.e. 10 years on, be ascertained, it could reasonably be assumed that it had taken place within less than 7 months and had thus been completed well before the priority date of the patent in suit. The opposite assumption that the brochure had been kept confidential was not very