

See chapter I.C. "Novelty".

b) Inventive step

In T 547/88 inventive step was contested. Although the board had asked the parties to issue a joint protocol stating what **tests** had to be done and under what conditions, each party had in fact conducted its own experiments and obtained contradictory results. It was therefore not possible for the board, on the basis of these tests, to conclude definitively that no inventive step was involved. The board held that in such a case the patent proprietor should be given the **benefit of the doubt** with regard to the relevance of the claimed features to the problem to be solved. Moreover, since the prior art did not suggest the subject-matter of the contested claims, that subject-matter implied an inventive step. The patent was therefore maintained.

The burden of proving that the claimed method leads to the **advantageous effects** mentioned in the patent in suit rests with the patentee. In the absence of any corroborating evidence that these advantageous effects were obtained, the alleged effects are not to be taken into account when assessing inventive step (cf. T 97/00; see also T 1409/04).

In T 862/11 the appellant (opponent) failed to submit comparative tests in support of its own assertion that an improvement was implausible owing to the lack of any evidence. In the absence of such tests, however, it failed to convince the board, which therefore regarded the problem as solved, and saw no need to reformulate it (see also in this chapter III.G.4.2.2 "Test and experimental evidence").

The problem stated in a granted patent is deemed to have been plausibly solved by the claimed invention when there are no grounds to suspect otherwise. According to the established case law of the boards of appeal, in opposition (or any subsequent appeal) proceedings it is insufficient for the opponent to attack a granted patent with an unsubstantiated assertion. The opponent bears the burden of proving its assertion or must at least furnish evidence liable to raise doubts that the problem has indeed been solved (T 534/13, citing T 1797/09, point 2.7 of the Reasons).

In T 2320/16, the opponent (appellant) alleged, with reference to T 415/11, that the burden of proof in relation to the problem-solution approach lay with the respondent (patent proprietor). The board disagreed, holding that it was insufficient in opposition proceedings for the opponent to challenge a granted patent with an assertion which had not been substantiated. The appellant (opponent) had not submitted any evidence which cast doubt on the claimed effects.

In T 1177/17, the question arose as to whether 2-FL could, by itself, provide the claimed indirect antiviral effects by means of NK cell stimulation, as alleged by the respondent (patentee). In the board's view, it could not. There was no evidence on file to show this, the respondent not having substantiated its submissions with any evidence other than the data reported in example 1 of the patent – a study in mice vaccinated with Influvac. On the contrary, it had argued that it was down to the appellants (opponents) to demonstrate that 2-FL did not provide the claimed antiviral effects by means of NK cell stimulation.