

- j) Adverse effect of a reversal of the burden of proof cited in support of a request for review

In R.21/10 the Enlarged Board ruled that a board's alleged reversal of the burden of proof is not a ground for review, these being exhaustively listed in Art.112a(2)(a) to (e) and R.104 and 105 EPC. It found that, in any event, the technical board concerned – far from reversing the burden of proof – had merely applied the rule that each party bears the burden of proving the facts it asserts.

5.2.3 Cases in which the burden of proof was not reversed

In T.954/93 the appellant (opponent) had put forward objections to the patent on the basis of lack of novelty, which would have had to be demonstrated by means of experiments. It had not, however, carried out any tests on the ground that they would have been very expensive. The board considered the allegation unproven and refused to reverse the burden of proof. The fact that experiments would have been very expensive did not shift the burden of proof onto the patent proprietor.

In T.453/04 the opposition had been rejected, i.e. the grounds alleged pursuant to Art.100 EPC had been found not to be substantiated. The board referred to the previous case law in T.667/94 according to which, in such cases, the burden of showing that the decision of the opposition division was incorrect remained with the appellant (opponent). The burden is not automatically shifted to the proprietor to show on appeal that the reasons for maintaining the patent were justified was not automatically shifted to the proprietor.

According to T.499/00, the burden of proof could not be reversed to rest with the patentee in cases where – as opposed to the situation in T.585/92 – the patent had been revoked by the opposition division not on the strength of a real failure to disclose the information needed to reproduce the claimed subject-matter, but for reasons that the board elsewhere deemed erroneous.

T.55/18 is an example of a decision in which the parties were in dispute over whether the burden of proof had been shifted. The opposition division had placed the burden of proof on the patent proprietor but failed to explain in the reasons for its decision, which it had based on that allocation of the burden of proof, why it had not followed the applicable principles established in the established case law. Its decision was incorrect for that reason alone. Furthermore, the board was of the opinion that the objection raised by the respondent (opponent) had not been substantiated by verifiable facts, meaning that the respondent had failed to discharge its burden of proof. The fact that the appellant (patent proprietor) had filed two pixelated and fuzzy photos during the oral proceedings before the opposition division could not in itself relieve the respondent (opponent) of its burden of proof. There had thus been no shift of the burden of proof in T.55/18.