

objection. Furthermore, the affidavit of the petitioner's representative submitted with the petition did not assist the petitioner on this crucial point.

4.2.3 Test and experimental evidence

a) Test methodology and probative value

In T.702/99 the board made extensive remarks with regard to the probative value of test evidence. It noted that it was essential that **comparative tests** conducted by a number of persons as evidence for or against qualities such as an improved "feel" of a product (e.g. cosmetics) be made under conditions of maximum objectivity on the part of those conducting the tests. Parties to proceedings should adopt the same standards in the preparation of such test evidence as they should in the preparation of experimental evidence. While the use of independent persons would naturally tend to carry more weight, the use of employees might not be objectionable per se as long as the test conditions were designed to ensure that the employees were not biased by prior knowledge of either the tested products or of their employer's expectation of the test result. The presentation of test evidence also had to be accurate, but the format of the presentation was of secondary importance; a carefully prepared report and/or table might convey as much information as a large number of statements from the testers.

In T.275/11 (bleaching/highlighting composition for hair) in order to demonstrate that the problem was successfully solved, the appellant (patentee) referred to two comparative examples. The board cited T.702/99 and recalled that it was desirable to show that the tests had been **carried out under "blind" conditions** to avoid any suspicion of bias. The board found that there was no indication of the conditions under which these tests had been conducted. Therefore, any effects referred to by the appellant had to be disregarded.

In T.103/15, on the matter of test reports ("*rapports d'essai*") filed by the opponent (appellant), the board, with reference to T.702/99, stated that, with respect to the probative value of test evidence, it was important not only to indicate the conditions under which those tests had been conducted, but also to specify the names of the testers and their employers so that the relationship between the testers and the party could be established if necessary. This also applied in cases where the opponent was acting as a **straw man** on behalf of a company, because then the relationship between that company and the testers could be a factor in deciding on the probative value of the test evidence filed by the straw man. A neutral institute could have been assigned to perform the tests. The appellant had been given the **opportunity to provide the relevant information** about the authorship of the test report D9 during the oral proceedings, but had **refused** to do so (see minutes). Lastly, the reasons for not considering document D9 during the first-instance opposition proceedings still applied at the appeal stage. In view of the test report's limited probative value, the board did not take it into account when reviewing the opposition division's decision.

In T.301/94, on the issue of novelty, the board stated that analyses produced by the opponent (Saint-Gobain Emballage) showed that the results obtained by two laboratories (the laboratories of the Institut National du Verre in Belgium and of Saint-Gobain