

would be able to corroborate the opponent's allegations. Pre-empting the evidence's evaluation in this manner had been unjustified. See also T.2238/15.

Similarly, in T.906/98 the board found that the opposition division had applied the wrong criteria when exercising its discretion (not to order the hearing of witnesses on a prior use) by speculating instead of investigating before refusing to take the evidence on offer, which related to the aspect of the prior use in dispute, namely what had been used and so made available to the public.

In T.314/18 (alleged public prior use – several sales) a witness had been offered but not heard. Contrary to the view of the opposition division, the appellant (opponent) had offered the witness solely to corroborate the facts already submitted in support of the alleged prior use. No provision of the EPC required an alleged prior use to be conclusively proven within the opposition period. In referring to the EPO Guidelines and arguing that the lack of adequate substantiation of the prior use in the notice of opposition could not be overcome by hearing the witness, the opposition division had mixed up the submission of facts and the proof required to establish them. By refusing to hear the proposed witness, the opposition division had in fact proceeded to assess evidence that had not yet been established, although it had appeared to be prima facie relevant for the decision to be taken. This was procedurally incorrect and the opposition division had thus infringed the appellant's right to be heard under Art. 117(1) and 113(1) EPC.

According to the case law of the boards of appeal and as mentioned in decision T.142/97, a deciding body must ascertain the relevance of evidence submitted to it before deciding to admit or reject it. When relevant features of the prior art trailers as asserted by the opponents were questionable and remained contested, a request by the opponents **for the evidence to be secured**, e.g. by hearing witnesses proposed by the opponents or by inspection of the trailer in accordance with Art. 117(1)(f) EPC, could not be rejected without justification. In case T.1647/15 the opposition division had rejected the evidence on the basis of mere suppositions, making no real attempt to definitely assess it or its relevance. This refusal to consider evidence filed **in due time** infringed a party's fundamental rights to a free choice of evidence and to be heard (Art. 117(1) and 113(1) EPC).

In T.267/06 the witness hearing offered as further evidence should not have been disregarded for the purposes of assessing the claimed public prior use as per D12 (drawing without a date). This amounted to a fundamental procedural violation (Art. 113(1) EPC). This decision was cited in T.1231/11, but the board there held that the two cases differed. See also T.660/16.

3.3.5 Witnesses at oral proceedings despite not confirming attendance in advance

In T.2003/08 of 31 October 2012 witnesses were summoned in accordance with R. 118 EPC and they were invited to confirm their attendance. Neither witness replied at all. But both witnesses were present. The appellant (patentee) requested the board to refrain from hearing them. The failure to react to the invitation in the summonses did not have any influence on the board's view that the witness evidence was necessary.