

plausible since it was in the patentee's own interest to ensure wide-spread distribution of the brochure in order to inform as many potential customers as possible of this latest development in a highly competitive field. Hence, the onus of proof was incumbent on the patentee who incidentally, being the originator of the pamphlet, should be in the possession of the necessary information.

In T 2451/13 the board applied the standard "up to the hilt" as meaning beyond reasonable doubt concerning the publication date of a brochure (brochure originated from a subsidiary of the opponent – all evidence essentially in the hands of the opponent). See also T 1262/15 (instruction manual).

The board in T 1710/12 agreed that the rigorous standard of "up to the hilt" is typically applied in cases where a prior use is involved. However, in the case before it, catalogue E1 had **not** been **provided in support of an alleged prior use**, but as written evidence on its own. The board thus deemed it appropriate to judge the public availability of E1 using the "balance of probabilities" approach. Document E1 (catalogue published by a company not being a party) was considered prior art under Art. 54(2) EPC.

#### b) Convincing the board and discussion on the standard of proof

Even though different concepts as to the standard of proof have developed in the case law of the boards, they all have in common that a judgement is to be made on the basis of the application of the principle of free evaluation of evidence. In the case of published documents, the standard of proof for public availability is usually the less strict one of the "balance of probabilities" (T 1140/09, point 3.2 of the Reasons). But even though the present case (date of availability in a public library of journal supplement disclosing meeting abstracts for a future conference) fell under the "balance of probabilities" standard for burden of proof, the board did not form its opinion solely on the basis of whether the alleged facts were just slightly more likely to have occurred than not, but on the basis of whether it was convinced that they had indeed occurred (T 1050/12).

The board in T 1107/12 found there was no indication that the opposition division had applied the wrong standard of proof, even if it had not explicitly discussed whether the strict standard of "beyond reasonable doubt" or the usual "balance of probabilities" standard should be applied. The case law requiring absolute certainty or proof beyond all reasonable doubt, which the respondent had cited in support of its position, was concerned with alleged public prior use (see T 441/04, T 472/92 and T 2451/13) and had applied that standard because, in such cases, the supporting evidence was almost always in the opponent's possession. The case in hand, however, turned on whether a document originating from one of the opponents had been publicly available on a particular date. Its availability was supported by witness testimony, the probative value of which was to be evaluated freely. Ultimately, there was no need to decide whether the stricter standard of proof had to be applied in such circumstances too, since, in view of the evaluation of the evidence by the department of first instance, the board didn't have to re-evaluate the evidence in its place. See also T 2466/13 below, in which it was likewise found that there was no need to decide on the applicable standard of proof. In the same vein, see T 768/20 and T 660/16 citing in particular to T 545/08 (points 8 and 11 of the Reasons).