

If any reasonable doubt exists as to what might or might not be the result of carrying out the literal disclosure and instructions of a prior art document, in other words if there remains a "grey area", then the case of anticipation based on such a document has to fail (T 793/93; see also T 464/94 and T 95/07).

In T 2010/08, the board pointed out that the requirement to prove prior use beyond reasonable doubt could not be circumvented by overstretching the principle of ex officio investigation and so shifting the burden of proof from the opponent to the opposition division or the board of appeal. (On the opponent's burden of proof in a case in which, by contrast, the balance of probabilities was applied as regards a prior use, see point 19 of T 72/16.)

The board in T 703/12 stated that all the evidence in support of the alleged public prior use (of a water filter jug, presented at the Ambiente trade fair in Frankfurt) lay within the power and knowledge of the appellant (opponent). The respondent (patent proprietor) disputed that the "what" was disclosed and that the "circumstances" of the prior use were proven beyond any reasonable doubt. The board was not convinced that either what was disclosed or the circumstances of the alleged disclosure had been proven to the required degree of certainty, namely beyond any reasonable doubt.

In T 483/17, since the sale and delivery of five roller bearings from the appellant (opponent) to a third party was completely outside the sphere of the respondent (patent proprietor), proof had to be provided "up to the hilt". Determining that the prior use had occurred thus required that the facts giving rise to the prior use be established without any gaps (see T 472/92, OJ 1998, 161, point 3.1 of the Reasons). However, this did not mean that the opponent had to provide each and every theoretically possible piece of evidence. Instead, it was sufficient that the evidence put forward convinced the board. On the other hand, a prior use was not considered to have been sufficiently proven if the proprietor had successfully pointed out any inconsistencies or drawn attention to any gaps in the opponent's chain of proof (see T 472/92). In the case in hand, the board considered it established that the alleged prior use had taken place, finding that neither doubts about the prior use expressed by the opposition division nor the arguments provided by the respondent (patent proprietor) pointed to any gap in the opponent's chain of proof.

T 274/12 dealt with an alleged prior use (talks between firms), all the evidence being in the hands of the opponent. In this case the board had to also decide whether there was an implicit obligation to maintain secrecy.

In T 202/13 several public prior disclosures were alleged by the respondents (opponents). The board agreed with the appellant that the standard "up to the hilt", or "beyond reasonable doubt", was appropriate in the present case. One of the joint respondents 2 was the successor of the company directly involved in the alleged public prior disclosure. Respondent 2, as successor, had full knowledge of the actions alleged to constitute the public prior disclosure and full access to the sources of evidence.

In T 1469/08 the appellant (opponent) alleged a public prior use in the form of the sale of composite "PARP PU" prostheses before the patent's priority date. Although the public