

# EPO: Non-proven facts introduced ex officio

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**Jakob Pade Frederiksen** February 26, 2021



**Jakob Pade Frederiksen of Inspicos P/S explains the findings of a recent decision by the EPO Board of Appeal, which permits the introduction of new facts and evidence in proceedings**

In a recent decision of January 25 2021, T 1370/15, one of the EPO's Technical Boards of Appeal relied on common general knowledge introduced by the Board *ex officio*, for which there was no documentary evidence on file. According to the decision, an EPO Board of Appeal is allowed to

introduce new common general knowledge without evidence of such knowledge that prejudices the maintenance of the patent, to the extent that the board is knowledgeable in the respective technical field from the experience of its members working on cases in this field.

In the case concerned, the patentee had brought an appeal against a first-instance decision in *inter partes* opposition proceedings revoking the patent concerned. The assessment of non-obviousness on appeal was carried out on the basis that a particular prior art document identified as “the closest prior art” failed to disclose certain features of a user interface (UI) of a broadcast processing apparatus, such as a digital TV.

The Board of Appeal held that these features contributed to increasing user convenience in selecting criteria for searching channels, and that the skilled person seeking to solve that problem would have provided an adequate UI on the basis of their knowledge of grid or drop-down menus as a matter of obviousness. The knowledge of the members of the Board of Appeal to the effect that grid or drop-down menus formed part of the skilled person’s knowledge was not proven by documentary evidence. Yet, the Board relied on such knowledge in holding the claimed subject-matter as non-inventive.

The Board of Appeal referred in its decision to a prior decision, T 1090/12 of 2017, in which another one of the EPO’s Boards of Appeal, in the context of *ex partes* proceedings, had laid down that there is no general obligation on a board to provide documentary evidence for the existence of a piece of common general knowledge. In line with that decision, the Board held in T 1370/15 that a board is not excluded outright from introducing new facts and evidence in *inter partes* proceedings.

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