

Internet Publications – EP & UK Practice

1. In February 2008 we published an article entitled [“The internet as a source of prior art: the EPO’s view”](#), which reported on EPO Decision T1134/06. As was there explained, the Decision made it clear that publications that are made solely on the Internet (or at least where “hard” versions cannot be found), must satisfy the same criteria as oral disclosures and instances of prior use, that is, that information must be available that answers *when* the disclosure was made, *what* was disclosed, and *under what circumstances* was the disclosure made. Furthermore, the evidence must reach the higher standard of “beyond reasonable doubt”, rather than the more usual “on the balance of probabilities”.

2. More particularly, the Decision dealt with the fairly common scenario where a webpage or document is found on the internet, but where the page or document has no clear date indicating when it was uploaded to the internet. As was described in our previous article, there is a resource called “The Internet Archive” (or “The Wayback Machine”) that trawls through the internet and stores past “images” of websites, which can be retrieved using the Internet Archive, which provides the date on which the image was stored. It was argued that this date can be taken to be the earliest publication date of that image. However, in the Decision, the Board noted that these “images” were not necessarily instantaneous snapshots of the website, and that the archived website would not always be displayed in its original format or with all its functionality (including any links present) intact. The Board therefore concluded that the authenticity and integrity of the material stored by the Internet Archive could not be taken for granted; this affected the evidentiary value of the material retrieved. In the Decision, various other sources, including a Decision of the German High Court, were used to support the finding that the Internet Archive is unreliable at least to the level of proof required.

3. Recently, however, the EPO has issued a Notice advising that, during Examination, Examiners would now rely on the dates and images provided by the Internet Archive as prior art without any further

proof being required as to the veracity of the disclosure. Only if the Applicant provided some evidence disputing the date, would the Examiner look behind the Internet Archive date. However, this Notice completely ignored the Decision mentioned above (and other Decisions of the Boards), especially their finding of fact that the Internet Archive is unreliable. Accordingly, we expect that this matter will be taken to Appeal in the future.

4. As far as the UK is concerned, the standard of proof in such situations has always been the balance of probabilities and, in a recent case at the UK Patent Office, the Hearing Officer declined to accept the findings of fact of the EPO decision referred to, and chose to follow the EPO Notice and take the date and image provided by the Internet Archive as sufficient evidence (on the balance of probabilities) of what was disclosed. It is possible that if sufficient evidence was provided in a particular case to show that the Internet Archive was incorrect for a particular document, it would not be accepted, but it appears that more general evidence that the Internet Archive is unreliable is not sufficient.

5. Practice Tips/ Advice

In the EPO, it seems clear that there is an inconsistency between the recent Notice and the finding of the Boards of Appeal.

Accordingly, in a suitable case where the Examiner is relying on a date and document provided by the Internet Archive, an Appeal should be filed.

In the UK, if the Examiner relies on such a date and document, more detailed evidence will need to be provided to overturn the Internet Archive.

This may include evidence from the actual author/publisher of the document concerned specifying when the document was put onto the Internet, if later than the date provided by the Internet Archive and/or, perhaps more likely, that the content had changed after that date, but the Internet Archive had provided the later content with the earlier date, which was incorrect.

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