

CP12 DRAFT COMMON PRACTICE FEEDBACK – DEADLINE: 20/01/2020

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CP12 Evidence in Trade Mark Appeal Proceedings
Draft Common Practice Feedback

3. Comments on Chapter 2: General Comments

Evidence + Admissibility of evidence at the stage of appeal proceedings

The recommendation provides very useful definitions of the different types of evidence.

However, it does neither give any conclusion nor recommendation, as to the types of evidence that should or should not be accepted.

It might be useful to add that more specific recommendation, such as it is recommended to appeal bodies to:

- accept New Evidence,
- refuse First Time Evidence,
- accept Supplementary/Additional Evidence,
- refuse Belated Evidence,

but to also indicate that Appeal bodies, when assessing the acceptability of any evidence, will take the different circumstances of the matter into account.

Providing definitions that from a practical perspective might overlap does not contribute to the clarity purpose of the common practice, whereas evidence would be better classified according to its practical consequence.

In particular, any evidence that is not timely submitted should be classified as belated evidence. In turn, belated evidence should be subject to scrutiny and be admitted if:

- Evidence was unknown or not available before
- Such evidence is likely to be relevant to the outcome of the case

The right to be heard shall always be maintained.

4. Comments on Chapter 3.1: Means and sources of evidence

This chapter is very useful and well drafted.

3.1.2.1

It is suggested to delete the third paragraph re: Hyperlinks, given that the issue is treated more thoroughly in 3.1.2.8. Its reference here might give rise to controversy.

3.1.2.5 under 'Recommendations', there is a typo in the following phrase: "It is advisable that a party **files** a full, not partial..."

5. Comments on Chapter 3.2: Establishing the relevant date of evidence

Very useful information.

6. Comments on Chapter 3.3: Ways to present evidence

3.3.3.2 page 42, 2d paragraph: the sentence “*However, to a certain extent, until that sample reaches at least 95% confidence level and at most a 5% margin or error, the representativeness is proportionate to the number of respondents*” is not really clear and leads to a certain confusion.

We suggest to erase that sentence or to better explain/clarify it.

3.3.3.5, pages 44 and 45

Chart of questions

Question 11: is the confidence level of the sample at least 95% and the margin or error at most 5%?

Same remark as above – this should be explained or erased.

7. Comments on Chapter 3.4: Confidentiality of evidence

3.4.2

It should be possible to keep confidential the same confidentiality request. Indeed, by motivating the request, the party might disclose information that would like to maintain in secret.

In order to reduce discretionality, which might lead to inconsistency of decisions, the reasons under which confidentiality of a document is requested could be categorised.

8. Further or general comments

Although the document is entitled "Evidence in Trade Mark Appeal Proceedings", it largely deals with evidence in trade mark proceedings in general (with some specific reference to appeal proceedings) and its potential applicability certainly goes beyond appeal proceedings.

Therefore, it is suggested that the objectives of the CP12 document are further clarified (and its title potentially amended), to better reflect the potential broader reach of this document. In particular, the following reference at page 5 (the part in red) could be re-phrased: "It serves as a reference for Appeal Bodies, UAs and parties ... on the CP12 Common Practice. It goes without saying that it may also be used by the European Union Intellectual Property Office (hereinafter EUIPO), Benelux, and Member States' Intellectual Property Offices (hereinafter collectively referred to as MS IPOs) in their first instance proceedings role."

Also, the document refers to "UAs, the parties and their representatives" a number of times. However, in the context of the document, it would appear more appropriate if the order of the stakeholders were changed to "the parties, their representatives and the UAs", as the document primarily gives guidance to the parties of the proceedings and in some cases the reference to UAs (user associations) even appears as redundant.