

Question Q229

National Group: Belgium

Title: The use of prosecution history in post-grant patent proceedings

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Questions

The Groups are invited to answer the following questions under their national laws.

By way of preliminary remark, Belgian patents – when applied for directly on a national level – are so-called “registration patents”. Although a novelty report with written opinion (which may be subject to comments from the patent holder) is published upon grant of such patent, Belgian patents of the above-mentioned type are not subject to prosecution (*i.e.* examination or opposition).

As a consequence, European patent applications filed with the European Patent Office (“EPO”) which have Belgium as one of their designated countries, are the only patent applications covering the Belgian territory subject to prosecution.

1) What types of post-grant proceedings are available in your jurisdiction? Are post-grant proceedings available both at a patent office and at a court?

We have limited the answer to this Question 229 to post-grant proceedings in which reference to prosecution history may be made. As a consequence, unilateral post-grant proceedings at the request of the patent holder, e.g. limitation proceedings available before the Belgian Intellectual Property Office (“BIPO”)¹ and the EPO², have not been withheld for the purpose of this Question 229.

¹ Limitation *ex nunc*: Article 42 of the Belgian Patent Act of 28 March 1984, to be replaced by Article 48*bis* of the Belgian Act of 10 January 2011 in execution of the Patent law treaty and the Act revising the Convention on the

Considering the specific nature of Belgian patents (see our preliminary remark above) no post-grant proceedings at the BIPO, *i.e.* opposition proceedings, are available. As a consequence, only opposition proceedings before the EPO, limited to European patents which have Belgium as one of their designated countries, are to be considered as post-grant proceedings at a patent office. Due to their not strictly national character, however, this type of post-grant proceedings has not been withheld for the purpose of this Question 229.

The following types of post-grant proceedings are available in Belgium at a Court:

(1) provisional proceedings (*i.e.* both *inter partes*, and *ex parte* – in which case third party opposition proceedings might be initiated by the person subjected to the provisional measures awarded), whereby no limitation or revocation of the patent is possible, consisting of:

- preliminary injunction proceedings³; and
- descriptive seizure proceedings (“saisie en matière de contrefaçon” / “beslag inzake namaak”).⁴

(2) proceedings on the merits, consisting of:

(a) infringement proceedings (whereby limitation or revocation can occur as a consequence of a counter-claim filed by the alleged infringer in the same proceedings):

- fast track proceedings (“action en cessation” / “stakingsvordering”) (without the possibility for the Court to award damages in case an infringement is found);⁵ and
- common proceedings (with the possibility for the Court to award damages in case an infringement is found).⁶

(b) revocation proceedings (with the possibility for the court to award damages in case a counterclaim for infringement is filed).

2) In your country or region, may the prosecution history be taken into account for purposes of interpreting claim scope during post-grant proceedings?

There is no statutory basis to take prosecution history into account for the purpose of interpreting claim scope during post-grant proceedings. Also, the highest Court in Belgium (*i.e.* “Cour de Cassation” / “Hof van Cassatie”) did not yet pronounce itself on this issue.

However, we have identified an approximate number of 10 decisions issued in the last 15 years by lower Courts (in relation to the alleged infringement of a patent), taking prosecution history into account for purposes of interpreting claim scope (for an

grant of European patents, and amending different provisions concerning patents (yet to enter into force); and limitation *ex tunc*: Article 48ter to be included in the Belgian Patent Act of 28 March 1984 on the basis of the above-mentioned Belgian Act of 10 January 2011 (yet to enter into force).

² Limitation *ex tunc*: Article 105bis of the European Patent Convention.

³ Article 1369ter of the Belgian Judicial Code.

⁴ Article 1369bis/1 and following of the Belgian Judicial Code.

⁵ Article 110 and following of the Belgian Act of 6 April 2010 concerning market practices and consumer protection *juncto* Article 3, §1 of the Belgian Act of 6 April 2010 in relation to the arrangement of certain procedures within the framework of the act of 6 April 2010 concerning market practices and consumer protection.

⁶ Article 52 and following of the Belgian Patent Act of 28 March 1984.

overview see the annex to this document),⁷ while we have identified no cases in which the Court explicitly refused to do so.

Also, Belgian legal scholars are generally favourable to the use of prosecution history for purposes of interpreting claim scope (for an overview see the annex to this document).

As a consequence, on the basis of Belgian case-law and the writings of legal scholars it might be concluded that prosecution history may be taken into account for purposes of interpreting claim scope during post-grant proceedings.

Considering (i) the absence of a statutory provision or an authoritative decision by the highest Court in Belgium providing for the same, and (ii) the scarce number of lower Court decisions identified and – more importantly – the often casuistic approach which is taken in relation to this issue in these decisions, however, it is not possible to provide for an exhaustive theoretical framework in relation to this issue. More precisely, any answer below should not be interpreted as being limitative in relation to the corresponding question.

a) Please explain the types of prosecution history that may be considered. For example:

i. Does applicable prosecution history include amendments, arguments, or both?

The cases we have identified refer to prosecution history consisting both of arguments and/or amendments.

ii. Could applicable prosecution history include a limiting interpretation that is implied through the applicant's arguments, or would it include only explicit definitional statements?

The majority of the cases we have identified refer to prosecution history consisting of explicit statements by the patent holder, and – to a lesser extent – statements of the examiner of the EPO and/or opposition division of the EPO. Only a minority of the cases we have identified refer to implied statements by the patent holder, or the examiner of the EPO and/or the opposition division of the EPO (see annex: cases 6 and 8).

iii. Does applicable prosecution history include only amendments to the claims, or does it also include amendments to any aspect of the disclosure?

We have not identified any cases which refer to prosecution history consisting of amendments to any aspect of the disclosure other than the claims.

⁷ We have also identified a number of cases in which the Court refers to prosecution history in order to determine the validity of a patent (see, Court of First Instance Antwerp, 9 April 2001, 98/1204/A, *not published*; Court of First Instance Antwerp, 22 March 2002, *I.R. D.I.* 2002, 249; and Court of First Instance Brussels, 15 October 2009, 2006/AR/3172, *not published*). Considering the specific scope of this [question 1] (*i.e.* use of prosecution history for purposes of interpreting claim scope), and by extension this Question 229, we have not withheld these cases for the purpose of the latter.

iv. Does it matter if the amendments and/or arguments are made to overcome prior art versus being made to address sufficiency or some other formal requirement?

All the cases we have identified refer to prosecution history consisting of amendments and/or arguments which are made to overcome prior art. One case we identified also referred to prosecution history in relation to amendments and arguments made in reaction to a remark by the examiner of the EPO in relation to the requirement of clarity in the claim drafting (see annex: case 8).

v. Does it matter if the prosecution history has the effect of broadening the interpretation of the claim, versus narrowing it?

We believe that the purpose of claim interpretation should be to determine the exact scope of protection of a claim. Therefore, we have interpreted this [question 2.a.v] as meaning “interpreting the claim to the advantage or disadvantage of the patent holder in relation to the specific circumstances of the case, including the interpretation of the claim asserted by the patent holder in the prosecution phase and the proceedings before the Court, and the interpretation of the claim asserted by the alleged infringer⁸ in the proceedings before the Court.”

In nearly all of the cases we have identified the claim is interpreted by the Court to the disadvantage of the patent holder (*i.e.* narrower than the interpretation asserted by the patent holder in the proceedings before the Court). In these cases the Court adopts such “narrow” interpretation of the claim on the basis of an (explicit) statement by the patent holder in the prosecution phase by which the patent holder adopted such narrow interpretation of the claim himself in reaction to a remark of the examiner of the EPO or the opposition division of the EPO in relation to prior art.

In only two cases the claim was interpreted to the advantage of the patent holder (see annex: cases 4 and 6):

- In case 4, the Court’s interpretation of the claim was based on a statement by the opposition division of the EPO, confirming the interpretation of a word in the claim by the Court.
- In case 6, the Court considered the reason for amending the claim (*i.e.* to overcome a specific piece of prior art) by the patent holder – and not the amended wording of the claim as such – decisive in its decision to adopt a “broader” interpretation thereof. In the view of the Court this interpretation was confirmed by the fact that the patent holder had maintained the drawings as included in the original patent application, when amending the wording of the claim.

It should be noted, however, that the Court in the above-mentioned case 6 specified that: “*Reference can only be made to elements from the prosecution file in order to determine the ‘correct’ meaning of a claim and cannot be used to extend the extent of protection of terms which are not subject to interpretation.*” As a consequence, it should in any event be considered that

⁸ All cases we have identified in the table below refer to prosecution history within the framework of proceedings in relation to the alleged infringement of a patent.

prosecution history cannot be referred to by the patent holder as a basis for interpreting a claim in contradiction with the clear wording thereof (in combination with the description and drawings).

- b) Does the applicability of prosecution history depend on when the prosecution history occurred? For example, does it matter if a particular statement by an applicant was made during initial examination as opposed to during a later invalidity proceeding?**

For the purpose of this Question 229, we have considered prosecution history as referring to statements made during the prosecution phase, *i.e.* examination phase and opposition phase, and not during subsequent invalidity proceedings.

We have identified cases which refer to prosecution history consisting of statements made during both the examination phase and the opposition phase. In these cases no difference is made between prosecution history emanating from either of these phases.

- c) Does the applicability of prosecution history depend on the type of post grant proceeding, or on the authority before which the proceeding is held? For example, would prosecution history be more applicable in an infringement action at court than in a post-grant patent office invalidity proceeding?**

As mentioned in our answer to [question 1], above, only post-grant patent proceedings at a court are available in Belgium (*i.e.* provisional proceedings and proceedings on the merits).

The majority of the cases we have identified as making reference to prosecution history cover proceedings on the merits.

Due to the specific nature of provisional proceedings (*i.e.* only the *prima facie* validity of the patent and the presence of a *prima facie* infringement are assessed), the cases in relation to provisional proceedings we have identified as referring to prosecution history are more limited (see annex: case 3).

- d) Is the applicability of prosecution history limited to infringement proceedings where equivalents are an issue?**

The majority of the cases we have identified refer to prosecution history for the purpose of determining the essential features of a patented invention, which is subsequently used to determine whether a literal patent infringement or a patent infringement by equivalent has occurred.

- e) Could prosecution history from a corresponding foreign application be considered in a post-grant proceeding in your jurisdiction? If so, under what circumstances?**

We have not identified any cases which refer to prosecution history as such (*i.e.* statements by the patent holder, or the examiner and/or opposition division) from a corresponding foreign application. We have identified one case, however, which refers to (the wording of) the claim (as well as the description and drawings) of a corresponding foreign application (not contradicting the interpretation of the claim by the Court) (see annex: case 1).

f) Is the use of prosecution history authorized by statute or by case law in your jurisdiction?

See our introductory answer to [question 2] (*i.e.* use of prosecution history is based on case-law from lower courts, and generally endorsed by Belgian legal scholars).

g) Explain the policy reasons for considering prosecution history during the claim interpretation process.

Although the cases we have identified rarely refer to any policy reasons for considering prosecution history, it is generally admitted by Belgian legal scholars that this practice is based on the idea that a reasonable degree of legal certainty should be awarded to third parties.⁹ More specifically, Belgian legal scholars consider that a patent holder should not be allowed to assert a narrow interpretation of a claim in reaction to a remark in relation to prior art in the prosecution phase, while asserting a broader interpretation of a claim in relation to an alleged infringement of such patent in post-grant proceedings.¹⁰

A question which is narrowly connected to the above-mentioned reasoning, is whether reference can be made to prosecution history to the advantage of the patent holder in post-grant proceedings?

Belgian legal scholars generally consider that this is not possible,¹¹ arguing that in principle a claim should be interpreted restrictively, to the disadvantage of the patent holder (since a patent constitutes a far-reaching restriction on the freedom of competition).

However, we have identified two cases in which the Court referred to prosecution history to the advantage of the patent holder (see annex: cases 4 and 6, and our analysis of these cases in our answer to [question 2.a.v]). At the same time, from the above-mentioned case 6 it also appears that prosecution history cannot be referred to by the patent holder as a basis for interpreting a claim in contradiction with the clear wording thereof (in combination with the description and drawings).

In addition, some Belgian legal scholars have adopted the point of view that prosecution history may not be referred to in case the wording of a claim is clear for the person having ordinary skill in the art.¹² Their reasoning is largely based on the principle that “what is clear, does not require interpretation”, in combination with the provision of Article 69 of the European Patent Convention and the Protocol on the Interpretation of Article 69 of the European Patent Convention.

Only one case we have identified (see the above-mentioned case 6) arguably confirms this point of view, but only in relation to the situation whereby the patent holder himself relies on prosecution history as a basis for asserting an interpretation of the claim to his advantage.

⁹ K. Van Lint, “Het verleningsdossier van Europese octrooien als instrument in procedures voor de Belgische rechtbanken” in B. Dauwe a.o. (red.), *Liber amicorum Ludovic De Gryse* (Larcier, 2010), 301 and following.

¹⁰ C. De Preter and K. Roox, “De interpretatie van octrooien aan de hand van het verleningsdossier en andere extrinsieke elementen. Mag wie A heeft gezegd naderhand nog B zeggen?”, *I.R. D.I.* 2008, 134.

¹¹ C. De Preter and K. Roox, *o.c.*, 147; and K. Van Lint, *o.c.*, 305 and following.

¹² P. De Jong, O. Vrins and C. Ronse, “Evoluties in het octrooirecht – Overzicht van rechtspraak 2003-2006”, *T.B.H.* 2007, 423, 448-449; C. Ronse, “Enige overwegingen bij de bepaling van de beschermingsomvang van een octrooi en de schadebegroting in het kader van een inbreukvordering”, *I.R. D.I.* 2009, 260, 264; and P. De Jong, O. Vrins and C. Ronse, “Evoluties in het octrooirecht – Overzicht van rechtspraak 2007-2010”, *T.B.H.* 2011, 393, 426.

More generally (and despite the above-mentioned “controversies”), it is important to point out that:

- In a majority of the cases we have identified as referring to prosecution history, such reference was only made as a confirmation of the interpretation of the claim by the Court on the basis of the wording thereof, in combination with the description and drawings.
- In any event, in the majority of the cases we identified as referring to prosecution history, the statements by the patent holder referred to were a reaction to a remark in relation to prior art (by either the examiner of the EPO or the opposition division of the EPO). In combination with the possibility for the Belgian courts to re-examine the validity of the patent on the basis of the same prior art and the same arguments as referred to in the prosecution phase (see our answer to [question 4]), any interpretation which would be asserted by the patent holder in the proceedings before the Court which would run contrary to his earlier statements in the prosecution phase could lead to a finding of invalidity of the patent by the Court (without having to make explicit reference to the prosecution history).

h) Is the disallowance of use of prosecution history mandated by statute or by case law in your jurisdiction?

N/A

i) Explain the policy reasons for not considering prosecution history during the claim interpretation process.

N/A

3) Assuming that at least some countries will consider foreign prosecution history as part of claim interpretation in their jurisdictions, does this have implications for how you would handle prosecution of a patent application in your country? Is this problematic?

The difference between various jurisdictions in relation to the use which is made of prosecution history leads to a situation whereby patent attorneys in jurisdictions in which less use is made of prosecution history tend to orient their prosecution approach towards the more prosecution history sensitive jurisdictions or try to develop approaches which are at least compliant with the practices in both types of jurisdictions.

Obviously such situation arises especially if portfolios with corresponding national or regional patent applications are to be managed in both types of jurisdictions. Moreover, this situation is further enforced (e.g. via corporate guidelines) when working with multinational companies having IP departments which are familiar with the practices in both types of jurisdictions.

The above may lead to inefficiencies in day-to-day practice (e.g. use of oral instead of written communications) and also to artificial responses in reaction to remarks of examiners, as it should also be made sure that any response has no negative effect in relation to the prosecution (or further litigation) of a corresponding patent in another jurisdiction.

- 4) **In your country or region, may a patent be invalidated in post-grant proceedings on the basis of the same prior art which was taken into account by the examiner of the patent office during prosecution of the patent? If so, may the patent be invalidated on the basis of the same prior art and the same argument used by the examiner or may the same prior art only be used if it is shown that there is a new question based on some other teaching or aspect of that prior art?**

In Belgium a patent may in principle be invalidated in post-grant proceedings on the basis of the same prior art which was taken into account by the examiner of the patent office during prosecution of the patent.¹³ Also, the patent may be invalidated on the basis of the same prior art and the same argument used by the examiner; it is not required that there is a new question based on some other teaching or aspect of that prior art.¹⁴

Proposals for harmonization

- 1) **Is harmonization of the applicability of prosecution history in post-grant proceedings desirable?**

The Belgian group considers that harmonization is desirable.

- 2) **Is it possible to find a standard for the use of prosecution history that would be universally acceptable?**

- 3) **Please propose a standard you would consider to be broadly acceptable for a) the types of prosecution history that should be considered, if any; and b) the type of proceeding and circumstances in which it should be considered.**

In this joint answer to [questions 2 and 3] we would suggest taking the following guidelines into account when setting a harmonized standard:

- We feel that prosecution history cannot be referred to by the patent holder as a basis for interpreting a claim in contradiction with the clear wording thereof (in combination with the description and drawings). In contrast, we feel that no such limitation should apply in relation to the reference to prosecution history made by an alleged infringer (or any other third party), especially if the (arguably clear) wording of the claim (in combination with the description and drawings) does not correspond to the (clear and unambiguous) statements made by the patent holder in the prosecution phase.
- Prosecution history should in any event only be considered if the accuracy can be guaranteed of the statements made by the patent holder in the prosecution phase.

At the EPO a patent application is normally examined by an examining division consisting of three technical examiners. As a general rule, one examiner – called the primary examiner – carries out the major part of the work up to a grant or refusal of the patent application.

¹³ Court of Appeal Brussels, 25 April 2006, 2003/AR/2243, *not published*.

¹⁴ Court of First Instance Brussels, 8 April 2008, *I.R. D.I.* 2009, p. 49.

During examination there exist different ways of communicating with the examiner. Amendments to the application and arguments in relation to patentability may be submitted in writing at least once in response to a communication of the examiner or on the applicant's own initiative. Further, the applicant may request a telephone interview or a personal interview with the examiner. Such a request should be granted unless the examiner strongly believes that such an interview would not be useful. Also, the examiner may take the initiative to call the applicant. An interview is not a formal procedure – contrary to oral proceedings – and the minutes of the interview depend on the nature of the discussion. In practice, often the minutes of an interview mention only very briefly what has been discussed. Also, if an agreement is reached, in certain cases only amended claims are filed and no minutes are available. As a final resort, the applicant has a right to be heard during formal oral proceedings before the complete examining division. During formal oral proceedings before the examining division minutes are taken and are usually quite complete.

In view of the considerations above, a Court should be careful when considering the prosecution file for determining the scope of protection of a patent. Every part of the prosecution file should be considered in its proper context, and it has to be born in mind that the prosecution file may not fully reflect all that has been said by the patent holder during the prosecution.

Annex – Sources (case-law and writings of legal scholars)

1. Case-law

No.	CASE REFERENCE	TYPES OF PROSECUTION HISTORY REFERRED TO	REASONING OF THE COURT AND OUTCOME OF THE CASES
1.	<p>Court of First Instance Ghent, anonymous, 6 February 1998, I.R. D.I. 1998, 95 (in relation to: EP 0330285)</p>	<p>(a) Reference is made to a statement by the patent holder in reaction to a remark of the examiner of the EPO in relation to the prior art.</p> <p>(b) Reference is made to the US patent application for a corresponding patent.</p>	<p>(a) This statement was used by the Court to determine the essential features of the patented invention.</p> <p>(b) This US patent application was referred to as not contradicting the Court's interpretation of a word (<i>i.e.</i> "beyond" in relation to the position of the "point of rotation") on the basis of the drawings included in the patent. The interpretation by the Court went contrary to the interpretation asserted by the patent holder in the proceedings before the Court (<i>i.e.</i> "beyond" in relation to the "position of the rotating arm").</p> <p>On these grounds the Court decided against an alleged direct infringement.</p>
2.	<p>Court of First Instance Ghent, SKA spa / Roxell nv, 12 June 2002, I.R. D.I. 2003, 122 (in relation to EP 0511942)</p>	<p>Reference is made to a statement by the patent holder in reaction to a remark of the opposition division of the EPO in relation to the obviousness of the patented invention. The statement by the patent holder confirms an interpretation of the wording of a claim by the opposition division to meet the non-obviousness requirement (including a statement of the opposition division that a certain feature could not be considered equivalent to an feature in the claim).</p>	<p>This statement is referred to by the Court as a confirmation of its determination of the essential features of the patented invention, as well as its interpretation of the words "a dish with spokes" as meaning "a dish with spokes forming an integral part thereof" (contrary to the patent holder's assertion in the proceedings before the Court). On that ground the Court decided against an alleged literal infringement.</p> <p>On that ground the Court also decided against an alleged claim of infringement by equivalent, considering that the patent holder in its statement confirmed himself that the feature "spokes which can be separated from the dish" should not be considered as an equivalent.</p>

3.	<p>President of the Court of First Instance Brussels (preliminary injunction), Medinol Ltd / Janssen Pharmaceutica nv a.o., 10 November 2003, I.R. D.I. 2004, 292 (in relation to EP 0762856)</p>	<p>Reference is made to a statement by the patent holder in reaction to a remark of the examiner of the EPO in relation to the novelty of the patented invention. In its statement the patent holder agreed to amend a claim, limiting the scope thereof. However, the patent holder omitted to amend the claim in the patent as granted.</p>	<p>This statement is referred to by the Court as a confirmation of the Court's interpretation of the word "a loop" as meaning "one loop". On that ground the Court decided against an alleged literal infringement and infringement by equivalent.</p>
4.	<p>Court of First Instance Antwerp, Alva bv / Erococ International bvba, 23 April 2004, 00/5757/A, not published (in relation to EP 0284113)</p>	<p>Reference is made to a statement by the opposition division of the EPO in relation to a word in the claim.</p>	<p>This statement is referred to by the Court as a confirmation of the Court's interpretation of the word "direct" in relation to the movement of a cursor on a computer screen as meaning "without any additional manual step to make the cursor move", and not "direct" in relation to the movement the cursor makes on the screen as asserted by the alleged infringer. On that ground the Court decided on a direct infringement.</p>
5.	<p>Court of First Instance Mons, Berewtec sa a.o. / Meura sa a.o., 13 January 2009, ICIP-Ing.Cons. 2009, 91 (in relation to EP 0207555)*</p>	<p>Reference is made to a statement made by the patent holder in reaction to a remark of the examiner of the EPO in relation to the novelty and obviousness of the patented invention. The statement consisted of the explicit exclusion of a specific feature from the scope of the claim.</p>	<p>This statement is referred to by the Court as a confirmation of the Court's interpretation of the claim as not covering that particular feature, on the basis of the wording of the claim. On that ground the Court decided against an alleged literal infringement.</p>
6.	<p>Commercial Court Antwerp, Ebema nv / Artstone Puurs nv, 3 April 2009, I.R. D.I. 2009, 253 (in relation to EP 0860258)</p>	<p>Reference is made to an amendment made by the patent holder in reaction to a remark of the examiner of the EPO in relation to the novelty of the patented invention.</p>	<p>The reason for amending the claim (<i>i.e.</i> to overcome a specific piece of prior art) – and not the amended wording of the claim as such – was decisive in the Court's decision in relation to the interpretation of the claim (<i>i.e.</i> the Court considered both a "beating" movement and a "rocking" movement as essential features of the patented invention on the basis of the wording thereof; on the basis of the above-mentioned prosecution history the Court nevertheless considered that the "beating" movement could be the function of the "rocking" movement</p>

			<p>and did not need a separate catalyst, contrary to the alleged infringer's assertion in the proceedings before the Court).</p> <p>This interpretation was confirmed by the fact that the patent holder had maintained the drawings as included in the original patent application, when amending the wording of the claim.</p> <p>On the above-mentioned ground the Court decided on a literal infringement.</p>
7.	<p>President of the Commercial Court Antwerp (fast track proceedings), Merck & Co inc a.o. / Teva Pharma Belgium nv a.o. (Montelukast), 20 October 2009, I.R. D.I. 2010, 41 (in relation to EP 0737186)</p>	<p>Reference is made to a statement by the patent holder in reaction to a remark from the examiner of the EPO in relation to the obviousness of the patented invention. The statement consisted of a functional limitation of the otherwise non-limitative character (indicated by the use of the word "including" in the claim) of a feature mentioned in the claim.</p>	<p>This statement is referred to by the Court to determine the essential features of the patented invention, by interpreting the mention of a feature in the claim as meaning that feature with its specific function (<i>i.e.</i> making it possible to omit an otherwise necessary step in the patented process), contrary to the interpretation asserted by the patent holder in the proceedings before the Court. On that ground the Court decided against an alleged infringement by equivalent.</p>
8.	<p>Commercial Court Ghent, Adi Roelandt Import-Export sprl / Plantefort-Expansion a.o., 24 June 2010, I.R. D.I. 2010, 242 (in relation to EP 1405804)</p>	<p>Reference is made to an amendment made by the patent holder in reaction to a remark of the examiner of the EPO in relation to the novelty and obviousness of the patented invention, as well as the requirement of clarity in relation to the claim drafting. The amendment consisted of a specification that a newly added, specific patent feature was essential to the patented invention.</p>	<p>This amendment is referred to by the Court to include the specific feature as part of the essential features of the patented invention, contrary to the interpretation asserted by the patent holder in the proceedings before the Court. On that ground the Court decided against an alleged literal infringement and an alleged infringement by equivalent.</p>

* This decision has been overruled on other grounds than the reference made in the first instance proceedings to the prosecution history, on the basis of a decision by the Court of Appeal of Mons of 9 May 2011.

2. Writings of legal scholars

- P. De Jong, O. Vrins en C. Ronse, “Evoluties in het octrooirecht – Overzicht van rechtspraak 2003-2006”, *T.B.H.* 2007, 423, 448-449;
- P. P. De Jong, O. Vrins en C. Ronse, “Evoluties in het octrooirecht – Overzicht van rechtspraak 2007-2010”, *T.B.H.* 2011, 393, 426;
- C. De Preter en K. Roon, “De interpretatie van octrooien aan de hand van het verleningsdossier en andere extrinsieke elementen. Mag wie A heeft gezegd naderhand nog B zeggen?”, *I.R. D.I.* 2008, 134;
- C. Ronse, “Enige overwegingen bij de bepaling van de beschermingsomvang van een octrooi en de schadebegroting in het kader van een inbreukvordering”, *I.R. D.I.* 2009, 260 (Noot bij: Kh. Antwerpen, 3 april 2009, *I.R. D.I.* 2009, 253);
- K. Van Lint, “Het verleningsdossier van Europese octrooien als instrument in procedures voor de Belgische rechtbanken” in B. Dauwe a.o. (red.), *Liber amicorum Ludovic De Gryse* (Larcier, 2010), 301.