

## **Summary Report**

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### **Question Q229**

#### **The use of prosecution history in post-grant patent proceedings**

This question examines national and international legislation and judicial and administrative practice with respect to the use or non-use of prosecution history in post-grant patent proceedings. Particularly, it considers the types of prosecution history that may be considered binding or persuasive during claim interpretation, and the applicability of this doctrine to various types of post-grant proceedings.

For the purposes of this question, “prosecution history” has been defined to include arguments and amendments made during the examination process, and to exclude statements or definitions made only in the originally filed specification. Use of the term, “the examination process” in the working guidelines has given rise to some questions of interpretation by the Groups. It is intended that “the examination process” include any examination process at a national or regional office, regardless of whether that process be the original examination or a subsequent examination, but that it exclude court proceedings. “Post-grant proceedings” include both proceedings before a national or regional office and court proceedings.

This question additionally considers national and regional opinions on potential harmonisation through standardised use of prosecution history, examining whether the doctrine of ‘file wrapper estoppel’, well known in the US (under which statements made by or on behalf of the patentee during the course of prosecution may be taken as binding on issues of interpretation), should exist more generally. Finally, this question considers whether prosecution history in one jurisdiction can or should be considered during claim interpretation in another jurisdiction.

The Reporter General has received 42 Group Reports from the following countries (in alphabetical order): Argentina, Australia, Austria, Brazil, Bulgaria, Canada, Czech Republic, Chile, China, Denmark, Ecuador, Estonia, Finland, France, Germany, Hungary, Indonesia, Israel, Italy, Japan, Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Paraguay, Peru, Philippines, Poland, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, United States. Reports received after September 1, 2012, are listed above but are not included in the summary below.

The Reports provide a comprehensive review of judicial and administrative practice in respect of the use of prosecution file history under national law. This Summary Report cannot attempt to reproduce the detailed responses given by each National Group. If any question arises as to the exact position in a particular jurisdiction, reference should be made to the original Group Reports.

## Analysis of current law and case law

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

Post-grant proceedings are available under the laws of all reporting countries. National Groups reported available post-grant proceedings in varying levels of detail.

In the majority of reporting countries (where appropriately detailed), post-grant proceedings such as re-examination (Australia, Canada, Denmark, Indonesia, Italy, Japan, Norway, Singapore, United States<sup>1</sup>), opposition (Austria, Denmark, Estonia, Finland, Germany, Norway, Poland, South Africa, Switzerland, United Kingdom) and amendment or limitation (Canada, Chile, Denmark, Finland, France, Germany, Italy, Japan, Norway, Paraguay, Peru, Poland, Portugal, Singapore, Switzerland, United Kingdom) are available in national patent offices, with appeals to national courts. Invalidity proceedings are divided between reporting countries with proceedings being either before the national patent office or before the court or both, with the majority of reporting countries in the former category specifically noting the right to appeal a local patent office decision on invalidity to a national court.

In all Group Reports that expressly mention declarations of non-infringement as post-grant proceedings, these are made by the court with the exception of Hungary, where declarations of non-infringement are available at the national patent office and then appealable to the court. The Report from the Czech Republic indicates that a declaratory judgment post-grant proceeding is available at the national patent office for the purpose of interpreting claim scope.

Certain reporting countries have no post-grant proceedings in the national patent office and all patent proceedings are ruled upon by the court (Indonesia, Netherlands,<sup>2</sup> Spain, Thailand, Turkey and Ukraine).

It should be noted that South Africa and Switzerland are non-examining countries and accordingly a patent application is not judged on the merits of its novelty and/ or inventive step. No substantive examination takes place, and therefore prosecution history simply does not include the patent application or any associated examination process.

2. *May the prosecution history be taken into account for purposes of interpreting claim scope during post-grant proceedings?*

Reporting countries that take prosecution history into account are: Argentina, Australia, Brazil, China, Denmark, Ecuador, Finland, France, Indonesia, Israel, Japan, Mexico, Netherlands, Paraguay, Philippines, Singapore, Sweden, Turkey and the United States. Of these, Australia, Denmark, Mexico, Turkey, Ukraine and the United States have statutory provisions positively allowing reference to prosecution history. The remainder rely on case law or general principles of law.

Reporting countries that strictly do not allow for any use of prosecution history for the purpose of interpreting the claims are: Canada, Czech Republic, Chile, Hungary, Norway, Portugal, South Africa. Of these, Chile, Hungary and Norway have statutory provisions either explicitly preventing the taking account of prosecution history, or have interpreted statutory provisions providing that the scope of protection granted by a patent is limited to

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<sup>1</sup> As of September 16, 2012, the The America Invents Act (AIA) allows new post grant proceedings in the US Patent and Trademark Office, including Inter-Partes Review (IPR) and Post Grant Review (PGR). PGR is filed within 9 months of grant, and IPR may be filed thereafter.

<sup>2</sup> Although for Dutch national patents, invalidity proceedings before the Court should be preceded by a request for advice on validity by the national patent office.

the content of the claims. Portugal and South Africa rely on case law and judicial interpretation.

There are reporting countries that occasionally take account of prosecution history in limited circumstances or have varying decisions on the issue. These include: Austria, Germany, Peru, Poland, Spain and the United Kingdom.

The Austrian Report details that prosecution history may be used in administrative proceedings but not court proceedings.

The German Report explains that the European Patent Convention Article 69 is interpreted as indicating that only the currently existing claims and existing description may be used to construe the basis of the patent. However, prosecution history may be relevant in assessing ambiguous elements of the claims as circumstantial evidence. Additionally, prosecution history may be used where the defendant in infringement proceedings is the plaintiff in opposition proceedings, to ensure that contradiction in bad faith does not occur.

In Russia and the United Kingdom, the use of prosecution history for interpreting claim scope is not prohibited by statute or binding precedent. The prosecution files for Russia and the United Kingdom patents are publicly available. In the United Kingdom, prosecution history can be referred to in order to elucidate the meaning of a claim. It assists in deriving an understanding of the patentee's rationale for including or excluding material from the claim (albeit in practice, prosecution history is rarely invoked). Arguably, the courts do not therefore use prosecution history for claim construction but to reassure themselves of the logic behind the claim.

There are reporting countries where there is little or no case law on the topic (or where the case law provides limited guidance), so that this issue has had to be addressed theoretically or without definitive responses to the ways in which prosecution history might be used. These include: Bulgaria, Estonia, Italy, Netherlands, New Zealand, Switzerland and Thailand.

### 3. *Policy reasons for decisions to allow or prohibit the use of prosecution history in post-grant proceedings*

In reporting countries that allow for the use of prosecution history in post-grant proceedings, the majority have the same motivations and policy reasons for doing so, namely, preventing a patentee from running conflicting arguments in different proceedings in bad faith, and an obligation to consider all lawful evidence in proceedings. There is a great deal of emphasis in the Group Reports on the former, with national Groups (Argentina, Australia, Denmark, Israel, Italy, Japan, Paraguay, Philippines, Spain, Switzerland, United States) noting the moral importance of not allowing deliberate and advantageous contradictions on behalf of the patentee to go un-noted. Other justifications include awareness of all of the true facts and prevention of extension of the scope of the monopoly.

Legal certainty is cited as the main justification for not taking account of prosecution history in post-grant proceedings. Some European national Groups specifically mention European Patent Convention Article 69, which states that "the extent of the protection conferred by a European patent or a European patent application shall be determined by the claims". This is strictly interpreted by some European national Groups as providing that no other matter will be relevant in claim interpretation (Bulgaria, Netherlands and United Kingdom). The Czech Report refers to the Czech Patent Act, which provides that for interpretation of the patent claims, the description and the drawings shall be used (and not prosecution history).

In Group Reports where reference to prosecution history could be made in certain circumstances, the main reason given is to resolve ambiguities existing in the claims, and the utilisation of prosecution history to assist in evaluating the patentee's intention in the original application.

#### 4. *Analysis of reporting countries approach to the consideration of prosecution history*

##### (a) *Types of prosecution history considered*

- (i) *Does applicable prosecution history include amendments, arguments or both?*

Where prosecution history is taken into account, reporting countries generally state that prosecution history can include both amendments and arguments. Some reporting countries state that this would be judged on a case by case basis (including Austria, where prosecution history is only applicable in the Patent Office and not in court proceedings). The Ecuadorian Group highlights that whilst prosecution history is applicable in the format of either amendments or arguments, the application of prosecution history is at judicial discretion.

- (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?*

In the majority of reporting countries where prosecution history is applicable, both implications from argument and explicit statements by the patentee are taken into account. Numerous reporting countries (Argentina, Denmark, Germany, Netherlands, Norway) state that, whilst implied notions could be taken into account, they would have to be unequivocal or unambiguous. Brazil, China, Ecuador, Italy, Mexico, Paraguay, Spain and Turkey only allow for explicit statements to be taken into account.

Denmark and Israel are reporting countries where prosecution history has only previously been taken into account in limited circumstances or not at all. Denmark suggests that it would be likely that both implicit and explicit statements/arguments would be taken into account whilst Israel suggests that only explicit statements would be applicable.

The Singaporean Group notes that case law thus far has only included explicit statements but that implicit references could not be completely precluded.

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

Amendments to the claims are generally considered to be the more likely use of prosecution history. However, nearly all reporting countries state that applicable prosecution history would include amendments to any aspect of the disclosure.

Paraguay is the only reporting country only allowing amendments to the claims as applicable prosecution history. China emphasises that whilst amendments to any aspect of the disclosure would be included, this does not include amendments to the abstract of the description.

The US Group reminds the reader that amendments to the patent specification are not permitted if they serve to expand the original disclosure of the application in any

material fashion. Other national Groups remind the reader that while applicable prosecution history may include any type of amendments, such amendments must not widen the resulting scope of protection: this comment is made, in particular, by reporting countries where prosecution history could in principle only be applicable in narrowing the scope of the claims (Australia, Denmark, Finland, Japan, Mexico, Netherlands, Sweden, Turkey, United States) (see (v) below).

Those national Groups who justify the admissibility of prosecution history on the basis that all fair evidence should be assessed, are amenable to the application of prosecution history relating to all amendments regardless of the aspect of the claims/disclosure to which they relate (Austria, Japan and Mexico).

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

Universally, for reporting countries where prosecution history is admissible in post-grant proceedings, there is no restriction on the reasons for or intent behind amendments and arguments.

Aforementioned national Groups with limited or no prior case law on the issues addressed by this question (e.g. Israel) indicate that they cannot see there being a distinction drawn between the reasons for the amendments or arguments made in the prosecution history.

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

This question divides reporting countries. Where national Groups report that prosecution history, both broadening and narrowing the interpretation of the claim, is permissible (Argentina, Austria, Brazil, China, Ecuador, Indonesia, Israel, Italy, Paraguay, Philippines, Spain, Sweden, Ukraine), it is often noted that in reality, prosecution history will generally have the effect of narrowing the potential scope of the claim relative to the ordinary interpretation.

It is, however, possible that since the prosecution history is considered part of the record used to construe the claims, certain events may occur during the examination period that might elucidate the meaning of the claims relative to alternative constructions.

Certain reporting countries note that whilst, technically, prosecution history with the effect of broadening the interpretation of the claim would be allowed, the national authorities would be reluctant to accept such amendments (Brazil, Singapore) or that examples of broadening simply had not been seen (Finland, France, Israel, Netherlands).

The countries that allow only prosecution history effecting narrowing of the interpretation of the claim are: Australia, Denmark, Japan, Mexico, Turkey and United States. The Swedish Group report that there is a restriction on prosecution history broadening the interpretation of the claim in court proceedings but that at the national patent office, if the applicant can prove that the scope of the patent was intended to be interpreted more broadly since application, then such broadening evidence may be admissible.

- (b) *Does the applicability of prosecution history depend on when the prosecution history occurred?*

For the majority of reporting countries, the applicability of prosecution history does not depend upon when the prosecution history occurred. The Mexican and the US Groups highlight that commonly only prosecution history related to the specific proceedings in issue would be relevant.

The Israeli Group Report details that prosecution history from proceedings amongst the same parties would have more weight than statements made during initial examination.

The Spanish Group highlights that whilst applicability does not depend on when the prosecution history occurred, Spanish case law exists that may exclude the admission of legal arguments by counsel as valid prosecution history. Therefore it is noted that the degree of relevance of statements from invalidity proceedings may depend on the context in which they are made or reported.

- (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?*

Reporting countries that only maintain court proceedings as post-grant patent proceedings (see 1. above) emphasise this restriction in response to this part of Question 229, given that it bears relevance as to the authority which may draw upon the prosecution history.

The Mexican Group Report reiterates that only prosecution history from the specific patent at issue is relevant and applicable.

All other reporting countries state that the nature and location of proceedings bear no relevance on the admissibility of prosecution history.

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

The majority of reporting countries permitting prosecution history in post-grant proceedings are comfortable that authorities can take into account prosecution history from a foreign application. A number of reporting countries note that this is dependent, however, on judicial discretion and that it would be judged on a case by case basis. Countries implementing this non-binding discretionary admission of corresponding foreign post-grant evidence are China, Indonesian, France, Netherlands and Spain. The Indonesian Group Report additionally mentions that only prosecution history from "major countries" with "strong grounds" might be admissible in post-grant proceedings.

Some reporting countries allowing foreign prosecution history note that this happens rarely and only in exceptional circumstances (Italy and Netherlands).

The Australian and Mexican Groups report that foreign prosecution history would not generally be taken into account unless it was particularly relevant. The Ukrainian Group reports that foreign prosecution history would not be applicable.

Finally, Israel and Japan have yet to see a definitive judgment on this issue. In Japan there were previously precedents allowing foreign prosecution history in

Japanese post-grant proceedings, however, there are no modern precedents on this topic.

- (e) *Is this applicability of prosecution history limited to infringement proceedings where equivalents are an issue?*

In the majority of reporting countries applying prosecution history in post-grant proceedings, the applicability of prosecution history is not limited to infringement proceedings where equivalents are an issue.

The Finnish, Spanish, Ukrainian and United States Group Reports comment that the use of prosecution history is most common in infringement proceedings where equivalents are an issue.

Austria stands out as the only reporting country of those applying prosecution history in post grant proceedings where use of the file history is prohibited in infringement proceedings, due to the fact that prosecution history is only applicable in administrative proceedings rather than court proceedings.

The Italian, Thai and Turkish Group Reports accede to the general opinion that applicability is not limited to infringement proceedings where equivalents are an issue, however, they note that there is limited or no case law on this area to give a definitive answer.

5. *Implications of use of prosecution history in foreign jurisdictions on domestic patent prosecution*

The majority of Groups indicate that the consideration of foreign prosecution history will have effects on domestic prosecution practice, and would require additional care in presenting arguments and amendments. The Group Report from Argentina notes, “applying foreign prosecution history to claim interpretation will limit the ability of amending claims and also interpreting them.” The Canadian Group Report observes that the possibility that Canadian prosecution history may be considered in connection with claim interpretation in another country may impact the prosecution of a patent application in Canada. The Group Report from Hungary suggests that special care should be taken when drafting arguments to not include statements that may lead to a limiting interpretation in another country. Similar observations were made in the Group Reports from Austria, Brazil, Germany, France, the Netherlands, Norway, Poland, Portugal, Singapore, and the United States. The Group Report from Denmark notes that the possibility of use of foreign prosecution history in other jurisdictions is problematic because it may cause applicants to refrain from presenting arguments they otherwise would find appropriate, which involves the risk of prolonging Danish and European proceedings, increasing costs, and ultimately the risk of a less favourable outcome. A similar comment was made by the Japanese Group, noting that the most restrictive country must be considered, resulting in further constriction of the prosecution process.

The Report from Thailand notes, in practice, most of the patents granted in Thailand are based on the issuance of corresponding patents in foreign countries, and thus communications with the Thai Patent Office play a limited role in claim interpretation. The South African Group observes that this would have implications on local practice, particularly in light of the South African practice of amending the claims to conform to those of a corresponding foreign granted patent.

The Belgian and Chinese Groups note that if foreign prosecution history is used, differences between various jurisdictions may lead to inefficiencies and different interpretations. The Chilean Group observes that the use of foreign prosecution history may be problematic if the statutory law is suddenly changed in the future. The French Group suggests it would be advantageous to mention in the prosecution history, as far as possible, that any deletions or amendments required by the EPO are made solely for the purposes of meeting the specific requirements of European law, and should not be interpreted as waivers or withdrawals in respect to any corresponding applications in other countries. The Group Reports from Israel and Mexico note the increased need for coordination with foreign agents.

Of the Group Reports that consider the use of prosecution history to be less problematic, the Estonian Group notes that while it may be problematic, its use should not be excluded if the prosecution history originates from a country where the patent legislation is unified with the EPC. The Report from Finland indicates that while utmost care must be taken, this is normally not problematic so long as the patent practitioner is aware of this consideration and of the jurisdictions of the interest to the applicant. The UK Group indicates that while the use of foreign prosecution history may have implications on domestic practice, it is generally not problematic for an informed patent attorney provided that the attorney considers how amendments or submissions are likely to be received by a foreign court.

The Reports from Australia, Bulgaria, Czech Republic, Ecuador, Indonesia, Italy, Paraguay, Peru, Russia, and Sweden indicate that the use of foreign prosecution would not be problematic because it would not be considered in their jurisdictions. The Report from the Philippines indicates that use of foreign prosecution history should not be problematic because their laws are patterned after United States patent laws, and thus U.S. law, jurisprudence and practice have, at the very least, persuasive effect on patent law and practice in the Philippines.

6. *Availability of post-grant proceedings on the basis of prior art and prior arguments from the prosecution history*

As a related topic, the Groups were asked whether 1) a patent may be invalidated in post-grant proceedings on the basis of the same prior art that was taken into account by the examiner during the original prosecution, and 2) if so whether this could rely on the same argument used by the examiner. The strong majority of the reporting countries replied yes to both questions. The Reports from Austria, Czech Republic, Finland, Russia and Norway indicated that while it is possible, it would be unlikely or more difficult if the invalidity argument was based on both the same prior art and the same argument. The Polish Group noted that the burden would be much heavier in this case.

The Canadian and U.S. Groups indicate that the same prior art and the same arguments can be raised before a court, but a new question would be required for an invalidity proceeding at the patent office. Similarly, the Reports from Mexico, Peru, and the Philippines indicated it would only be possible based on a new question or new rationale relating to the prior art.

The Estonian Report indicates that no regulation or case law exists on this point. The Indonesian group indicates it would be very unlikely to be able to invalidate based on the same prior art and the same argument.



## Proposals for Harmonization

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

Almost all reporting countries replied to this question in the affirmative. The Danish Group notes that this would create an improved legal certainty for patent proprietors and third parties and would reduce the risks of different national courts reaching different decisions with regard to validity and infringement of patents having essentially the same claims. The Chinese Group qualified their answer by noting that the laws in different jurisdictions shall be fully respected. The Japanese Group indicates that harmonization of criteria for claim interpretation should be achieved first. Similarly, the German Group considers that harmonization of the use of prosecution history in post-grant proceedings is only desirable if there is also harmonization of the method for determining the scope of protection. The Portuguese Group notes that this would be particularly desirable at the European level. The Report from Thailand suggests that this would eliminate some of the transaction costs in patent litigation and would have other positive benefits.

The Mexican and Czech Group Reports suggest that harmonization on this point is not necessarily desirable. Similarly, the Report from Peru indicates it would not be desirable due to the principle of territoriality, the objective system of technical examination, and different practices.

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

A majority of reporting Groups indicate that harmonization is possible. However, many Groups (Estonia, Finland, Indonesia, Paraguay, Peru, Singapore, South Africa, Spain, Thailand, and Turkey) noted that it would be difficult or unlikely. The report from the Polish Group indicates that it is not possible immediately, but is worth striving for. The Australian Group suggests that harmonization be focused on bad faith or fraud. The Mexican Group indicates that harmonization may be possible under the general principle of free evaluation of evidence. The reports from Portugal and Norway suggest that harmonization should be at a minimal level.

The reports from Austria, Bulgaria, Czech Republic, Ecuador, and Italy indicate that harmonization on this issue is not possible or, at least, very difficult.

### 3. *Proposals for standards*

#### *a. Types of foreign prosecution history to be considered*

With regard to the types of foreign prosecution history that should be considered, if any, the Group Reports reflect a wide divergence of opinion. The Reports from the Mexican, Estonian, and Danish Groups indicate that free evaluation of evidence should be applied, with the Danish Group noting that the claims should always form the starting point for evaluation. The Indonesian Group indicates that prosecution history during substantive examination can be used. The Group Report from Israel notes that any type of foreign prosecution history could be considered, based on the discretion of the court or office. The Report from Ecuador suggests that the complete prosecution history should be considered and the foreign prosecution history should be considered as far as the cases are analogue. The reports from

Argentina and Singapore indicate that this should be limited to only claim amendments, and not arguments or other prosecution history. The U.K. Group suggests that a flexible and common sense approach should be used. The Report from the Philippines notes that a substantive discussion in the course of prosecution regarding novelty should be a broadly acceptable standard for use in prosecution history. The U.S. Group suggests that prosecution history should be considered as part of claim interpretation and should include both amendments and arguments presented during prosecution, because it seems fair to consider arguments made in one patent office in connection with the enforcement of a patent in another country provided that the factual arguments made in one country are made in a context that is relevant to the same or similar issue in another country. The U.S. Group notes that this should be considered carefully, however, as material differences in the legal standards related to patentability in different countries or material differences in the claims themselves may make the use of prosecution history in another country inappropriate or unfair. The French Group notes that prosecution history includes those originating from the applicant or those explicitly or implicitly but necessarily accepted by the applicant. The Report from Germany suggests that prosecution history may be used in cases where it is useful to determine the understanding of the person skilled in the art of certain claim terms, but in this case should have no greater significance than other sources of information. The German Group further suggests that in cases where the claim terms are clear, there should be no room for consideration of prosecution history.

Many of the Groups consider that foreign prosecution, if used, must be limited to explicit statements or amendments (Spain, Portugal, Paraguay, Norway, Netherlands, Finland, China, Chile, and Austria).

Other Groups note that the use of foreign prosecution history should be limited to situations where a proposed construction contradicts or is directly contrary to the prosecution history, or otherwise violates principles of good faith and equity (Switzerland, Russia, Poland, Hungary, Belgium, and Australia).

Some Groups propose a standard that would prohibit the use of foreign prosecution history (South Africa, Japan, Canada, and Bulgaria).

*b. Applicable proceedings for consideration of foreign prosecution history*

The Groups were also asked to propose a standard for the type of proceeding or the circumstances when foreign prosecution history might be considered. Most of the responding Groups proposed that a harmonized standard should be applicable to any type of post-grant proceeding (Argentina, China, Ecuador, France, Israel, Japan, Mexico, Norway, Singapore, and Sweden). The report from Australia notes that foreign prosecution history would most likely be relevant in revocation and infringement proceedings, but may have some application in extension of term proceedings. The U.K. Group proposes that the standard would be limited to court proceedings. The Report from the Philippines indicates that a standard would be most applicable in cancellation proceedings, but could also be applicable in actions for infringement. The Indonesian Group proposes that the standard would apply to a lawsuit having the same issue of interpretation of claim scope. The Report from Finland suggests that the standard would apply in any post-grant proceedings where the scope of protection is considered. The Chilean Group proposes applicability to infringement proceedings only.

#### 4. Possible avenues for harmonization

- a. Harmonization in this area must attempt to balance the notice role played by the claim terms themselves against equitable considerations of not allowing a patentee to take one position to overcome prior art and another, contradictory position to assert infringement. Consideration must also be given to avoiding situations where amendments or arguments made for reasons particular to one jurisdiction might be taken out of context when reviewed in another jurisdiction. Based upon the various suggestions from the Groups, possible approaches might include:
  - i. Considering prosecution history only when the meaning of a claim term would not be not clear to a skilled person;
  - ii. Limiting use of prosecution history to situations where it contradicts or is squarely contrary to a proposed construction;
  - iii. Limiting the scope of applicable prosecution history to explicit statements by the applicant and to statements by the examiner that are explicitly or implicitly accepted by the applicant; and
  - iv. Defining a level of persuasiveness of prosecution history relative to other extrinsic and intrinsic evidence.