

Doctrine of Equivalent – Patent Infringement Determination 专利侵权判定的等同原则



Reminder of the principles 暨原则回顾 From a Belgian point of view ——比利时视角

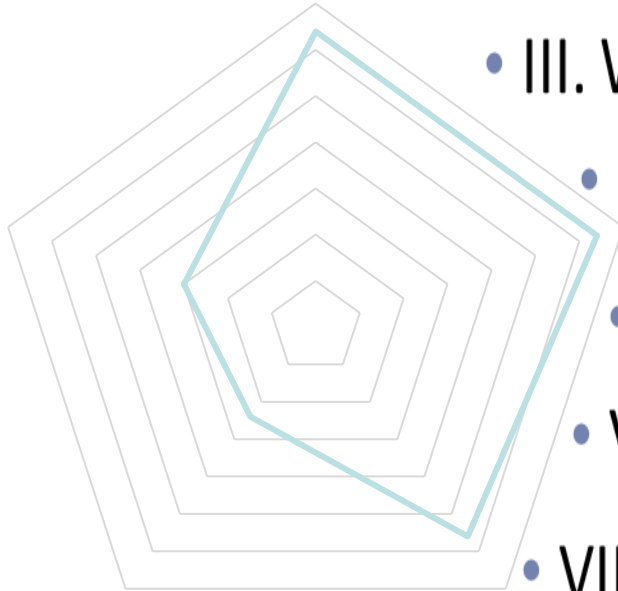
Pierre-Yves de Harven
Judge at the Brussels Business Tribunal /// 布鲁塞尔商业法庭法官
pierre-yves.deharven@just.fgov.be

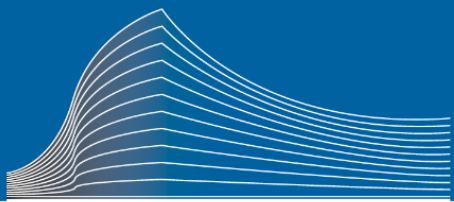


Suzhou /// 苏州
September 2023
/// 2023年9月

- I. What exactly is the doctrine of equivalent ?
 - II. What is an equivalent element ?
 - III. What is the Angora cat paradox ?
 - IV. What is the prosecution history estoppel ?
 - V. What is the “Gillette defence” ?
 - VI. What is the “Formstein defence” ?
 - VII How do we apply this in Belgium ?
 - VIII Do you apply it the same way ?

- 一、究竟什么是等同原则？
- 二、什么是等同要素？
- 三、什么是安哥拉猫悖论？
- 四、什么是禁止反言审批记录原则？
- 五、什么是“吉列”抗辩？
- 六、什么是“成型地砖”抗辩？
- 七、比利时的做法是什么？
- 八、中国的做法是什么？



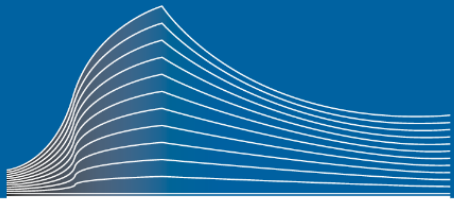


I. What exactly is the doctrine of equivalent ? 究竟什么是等同原则？

A. DEFINITION :The doctrine of equivalents is a means by which a holder of a patent may raise a claim of infringement even though each and every element of the patented invention is not identically present in the allegedly infringing product. /// **A、定义：**即使发明专利的各要素并非完全相同地存在于被控侵权产品中，专利权利人仍然可以提出侵权主张的一种途径。

B. CONSEQUENCE : /// **B、结果：**

In application of the doctrine of equivalents, the scope of protection of a patent claim can be extended beyond the literal wordings of the claims. /// **应用等同原则，对专利要求的保护范围可以超出专利要求的字面含义。**



II. What is an equivalent element ? 什么是等同要素？

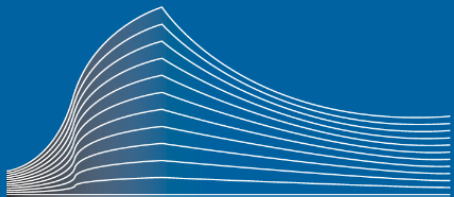
According to the WIPO an element (“the equivalent element”) shall generally be considered as being equivalent to an element as expressed in a claim if, at the time of any alleged infringement, either of the following conditions is fulfilled regarding the invention as claimed: /// 根据世界知识产权组织（WIPO）的规定，如果在任何被指控的侵权行为发生时满足任一下列条件，则该要素（“等同要素”）一般应被视为等同于专利要求中所表达的要素：

1. the equivalent element performs: /// 等同要素实现

- substantially the same function, /// 基本相同的功能,
- in substantially the same way, /// 通过基本相同的手段,
- and produces substantially the same result as the element as expressed in the claim, or /// 并且产生与专利要求中所表达的要素基本相同的效果, 或者

2. it is obvious to a person skilled in the art that the same result as that achieved by means of the element as expressed in the claim can be achieved by means of the equivalent element. /// 等同要素可以产生与专利要求中所表达的要素相同的效果, 这点对本领域技术人员而言显而易见。





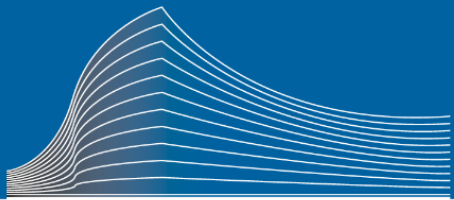
III. What is the Angora cat paradox ?

三、什么是安哥拉猫悖论？

The Angora cat paradox refers to the opposite approaches adopted by some patentees during prosecution and litigation. During prosecution, the claims are presented as being as narrow as a wet Angora cat, to better distinguish them from the prior art. Once granted however, and for the purpose of an infringement case, the same claims become far broader, like an Angora cat with thick, dry fur.

“安哥拉猫悖论”指的是一些专利权人在起诉和诉讼过程中采取相反的做法。在起诉过程中，为了更好地与现有技术进行区分，专利权人会把权利要求范围尽量往窄里描述，像一只毛发湿润紧贴的安哥拉猫；然而，一旦专利获批，在侵权案件里，专利权人就会把同样的权利要求范围往宽里描述，像一只毛发干燥蓬松时的安哥拉猫。



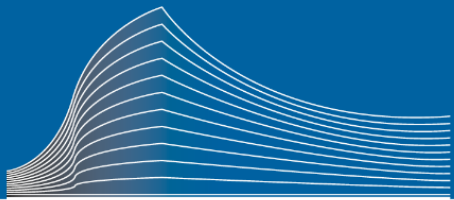


IV. What is the prosecution history estoppel ?

四、什么是禁止反言审批记录原则？

The doctrine of prosecution history estoppel (or “file wrapper estoppel”), provides that a statement made by the patentee, during the process for obtaining a patent, is binding on the patentee thereafter. In other words, in subsequent court proceedings, a patentee may not argue a claim construction different to that which he had argued before the patent office in the first place. In Belgium there is no direct legal basis for the prosecution history estoppel. However, for determining patent infringement, the courts of Belgium, can consider arguments raised by the patentee during patent grant or invalidity proceedings. /// 禁止反言审批记录原则（或“专利申请记录不容反悔原则”）指的是，专利权人在申请专利过程中所作的陈述，此后对该专利权人具有约束力。换言之，在后续发生的诉讼中，专利权人不得主张有别于当初向专利局申请的权利要求。在比利时，禁止反言审批记录原则并不直接依据相关法条。但是，比利时法院在进行专利侵权判断时，可以考虑专利权人在专利授予或无效程序中提出的相关陈述内容。





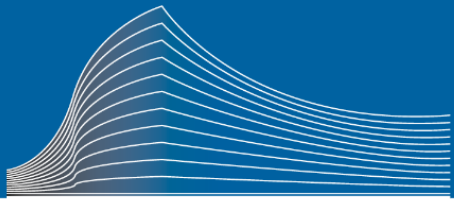
V. What is the “Gillette” defence ? /// 五、什么是“吉列”抗辩？

VI. What is the “Formstein” defence ? /// 六、什么是“成型地砖”抗辩？



The “Gillette” defense provides that a patentee cannot validly claim (via the doctrine of equivalent) something which:a) was not new or,b) was obvious at the priority date. The “Formstein” defense provides that if a patent is not infringed under a normal interpretation, but would be under the doctrine of equivalents, the scope of the patent will nevertheless be limited to a normal interpretation, if the consequence of the broad interpretation (under the doctrine of equivalents) is that the patent would be invalid. /// “吉列”抗辩指的是，专利权人不能（通过等同原则）对于（a）非新生事物或（b）在优先权日显而易见的事物提出主张。“成型地砖”（德语：*Formstein*）抗辩指的是，如果根据一般解释不存在专利侵权，但根据等同原则解释存在专利侵权，并且如果（根据等同原则）进行宽泛解释会导致专利无效，则专利权利范围仍应以一般解释为限。





VII. What do we do in Belgium ? 七、比利时的做法是什么？

We do apply the doctrine of equivalents /// 等同原则确实得到使用

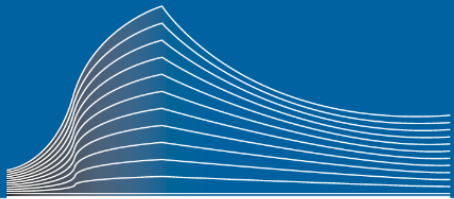
Performing the test “FUNCTION-WAY-RESULT”(cfr WIPO’s definition), checking if the equivalent element performs: /// 通过“功能-方式-结果”法（与WIPO定义相较），检验等同要素是否实现：

- substantially the same function, /// 基本相同的功能,
- in substantially the same way, /// 通过基本相同的手段,
- and produces substantially the same result, as the element as expressed in the claim. /// 并且产生与专利要求中所表达的要素基本相同的效果。

We do apply the following limitations /// 适用下列限制条件

- The doctrine of prosecution history estoppel can be used to interpret a patent. /// 禁止反言原则可以用于专利解释。
- The “Gillette” and the “Formstein” defences can be used in Court. /// “吉列”抗辩、“成型地砖”抗辩可以用于法庭辩论。





VIII What do you do in your home country ? 八、中国的做法是什么？

- Do you apply the doctrine of equivalents in the same way we do in Belgium ? /// 中国使用等同原则的做法，是否与比利时的做法一致？
- Do you have the same limitations we do have in Belgium ? /// 适用限制条件方面，是否与比利时一致？
- And last but not least, do you believe that the doctrine of equivalent should be excluded for some sectors, like chemistry and pharmaceutical industry ? /// 以及，您是否认为：在化工、制药等部分行业，不应使用等同原则？



THE END



才疏学浅
请多指教

**THANKS FOR
YOUR ATTENTION
AND
PLEASE DON'T ASK
TOO MUCH**