

Patent infringement litigation in France

Comparison with Germany and the UK

Thomas Bouvet
Véron & Associés
Attorney at law

53, avenue Maréchal Foch
F 69006 Lyon
Tel. + 33.4.72.69.39.39
Fax + 33.4.72.69.39.49
E-mail: thomas.bouvet@veron.com

6, square de l'Opéra Louis Jouvet
F 75009 PARIS
Tel. + 33.1.53.05.91.91
Fax + 33.1.53.05.91.98
<http://www.veron.com>

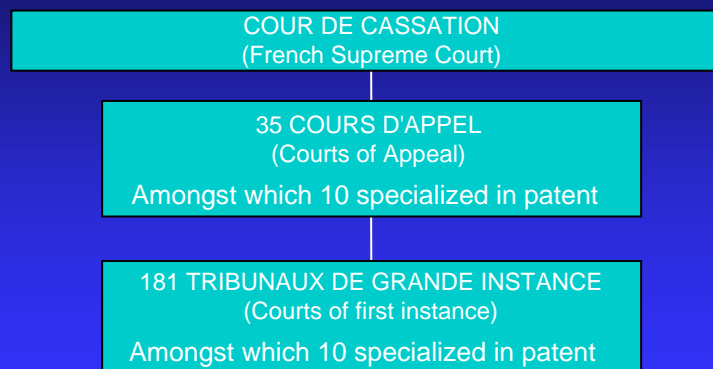
Contents

- Litigation actors
 - ◆ The French Courts having jurisdiction in patent litigation
 - ◆ The role of patent attorneys
 - ◆ The specialized lawyers
- The course of the litigation
 - ◆ Institution and instruction of the case
 - ◆ The judgment
 - ◆ The appeal
- The scope of protection

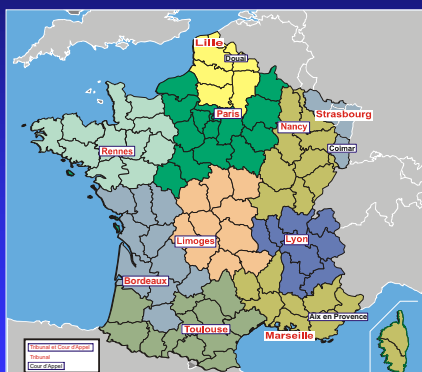
Courts of general jurisdiction deal with patent infringement and validity at the same time

- No opposition procedure exists
- The revocation of a patent is generally raised during an infringement trial

The French judicial system



10 Courts specialized for all of France



Thomas Bouvet

December 12, 2002

5

The Court of Paris

- 1 division (3 × 3 judges) specialized in intellectual property
- 170 new cases per year (60 % of French cases)
- 150 patent judgments per year

Thomas Bouvet

December 12, 2002

6

The Court of Appeal of Paris

- Appeal rate: 20 %
- 40 patent decisions per year

The claims for unfair competition related to claims for infringement

- The claims for unfair competition would usually fall within the jurisdiction of commercial courts
- The 10 courts specialized in Intellectual Property have exclusive jurisdiction to deal with the claims involving a patent infringement and a related issue of unfair competition

The lawyers only can represent the parties

- The patent attorneys are not entitled to represent the parties before the Court ; they work with the lawyers
- There is no such distinction between solicitor / barrister

The specialized lawyers

- 10 to 20 French law firms have a regular practice in patent litigation
- The official mention « *specialist in Intellectual Property* »
- The Industrial Property Lawyers Association

The litigation course

- Institution and instruction of the case
- The judgment
- After the judgement

The “*saisie-contrefaçon*”

- This is the usual preliminary of nearly all infringement cases in France
- An efficient measure to prove infringement

Submission before the Court

- To commence proceedings the plaintiff must serve summons on the opposing party
- The plaintiff has to register the summons before the Court office

The preliminary injunction

- Conditions :
 - ◆ The claim should be initiated within a short time (6 months)
 - ◆ The claim should seem to be serious
- Very seldom in fact
- The deposition of a bond is not frequent

Procedure on the merits

- 18 to 30 months
- No limitation in the number of written pleadings exchanged
- The Judge managing the case controls the instruction of the procedure

The evidence of infringement

- Infringement can be proved by any means
- The *saisie-contrefaçon* is very frequent
- An adversarial analysis can be ordered
- Concerning patents relating to process for the production of a product, the reversal of the burden of proof is possible

The oral hearing

- Judges do not know the case's exhibits before the hearing
- The pleadings are systematic
- The examination of witnesses and experts is exceptional

Thomas Bouvet

December 12, 2002

17

The expert report

- Expert reports on the merits of the case:
 - ◆ rare
 - ◆ limited
- Expert reports on the assessment of damages: systematic

Thomas Bouvet

December 12, 2002

18

The provisional enforcement

- It is not a right
- It is granted:
 - ◆ upon request of a party
 - ◆ if the circumstances justify it
 - ◆ the deposition of a bond is rarely required

The litigation costs

- The involvement of the Court is free of charge
- The lawyers' fees are generally calculated on an hourly basis
- The actual « litigation costs » are symbolic
- The loser can be ordered to pay a part of the lawyers' fees of the opposing party but it is usually much below the actual amount

The cost

- The cost of patent action in France is similar to that of Germany
- Less expensive than in the UK

The appeal

- Full re-hearing of the case as to the facts and the points of law
- It is necessary to retain an *avoué*
- The same lawyers are entitled to plead in first instance and in appeal
- 85 % of first instance judgments are confirmed

The appeal before the “*Cour de Cassation*”

- Review of the judgment of the Court of Appeal is limited to the points of law only
- No expert appointed
- It is compulsory to retain an “*avocat au Conseil d’État et à la Cour de Cassation*”
- 85 % of the appeal before the *Cour de Cassation* are dismissed

The scope protection (1/3)

- The Courts identify the “essential means” of the patent, in consideration of the function performed,
- Equivalence: a means different, but performing the same function, to achieve the same result, as the patented means.

The scope protection (2/3)

- Improving is infringing,
- The obviousness of the equivalent and the intention of the patentee are not taken into account

The scope protection (3/3)

- The theory of partial infringement can apply when the main integers (but not all) of a claim are reproduced

Conclusion

- The judicial courts deal with the validity as well as the infringement
- The “*saisie-contrefaçon*”
- The rhythm of the litigation course
- A relatively broad scope of protection

- The rhythm of the litigation course (1/2):
 - much slower than the UK procedure
 - slightly slower than the German procedure.

- The rhythm of the litigation course (2/2):
 - still slower than the UK procedure
 - however, the interlocutory injunction speeds up the procedure.