

Patent Litigation in France

Statistical study

1990-1999

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Ministry of Justice Statistics

First Instance Courts

(averages 1990-1999)

Tribunal de Grande Instance	New cases	Closed cases	Average duration (in months)
Paris	172	155	17.3
Lyon	33	31	24.1
Rennes	20	16	14.6
Lille	15	13	20.6
Marseille	10	8	18.5
Bordeaux	9	6	15.3
Strasbourg	9	7	15.0
Toulouse	9	7	29.8
Nancy	7	7	18.0
Limoges	3	3	35.3
Others	64	62	17.1
France in whole	351	315	20.6

This table summarises data from the French Ministry of Justice which, every year, centralises statistics on the activity of each French court.

The title of the category shown is "*claims brought for patent infringement and/or for unfair competition.*"

It shows the number of new cases, closed cases and also the average duration of proceedings and calls for the following comments:

- very large predominance of the Paris *Tribunal de Grande Instance* which deals with the half of the cases
- the Paris court is followed -well after- by the Lyon *Tribunal de Grande Instance* and then the Rennes and Lille *Tribunal de Grande Instance*
- the other 6 courts handle less than 15 cases per year
- this raises the question of whether the number of courts having jurisdiction should be restricted
- it is perhaps surprising to note the number of cases brought before the "other courts" which do not have jurisdiction over such cases: it is probably not a sign that practitioners have poor knowledge of the rules relating to jurisdiction. It is rather a sign that files are categorized erroneously?
- The notion of average duration bears little meaning in practice insofar as the statistics make no distinction between cases which are closed following the handing down of a judgment and those which are closed through withdrawal of the case from the case list.

Ministry of Justice Statistics

Courts of Appeal

(averages 1997-1999)

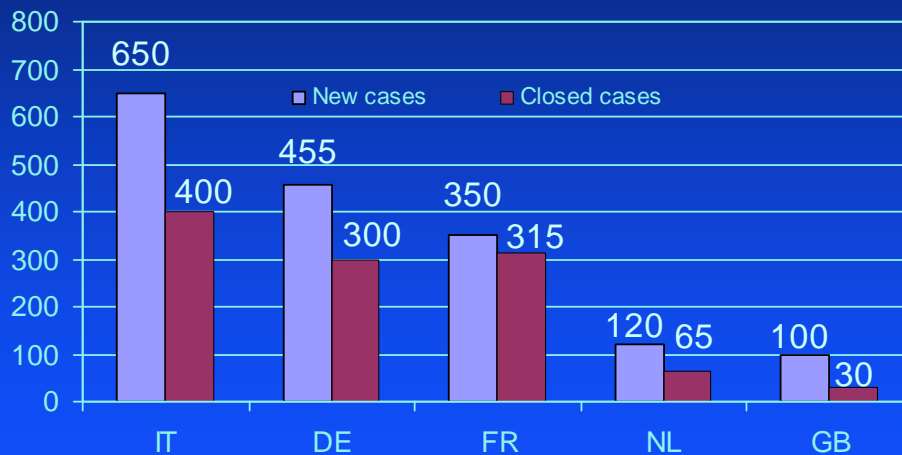
Court of Appeal	New cases	Closed cases	Average duration (in months)
Paris	38	36	21.9
Lyon	13	12	23.4
Aix-en-Provence	12	10	24.4
Rennes	10	8	17.0
Douai	7	3	14.1
Bordeaux	6	5	27.2
Colmar	4	5	25.4
Nancy	4	3	26.6
Toulouse	3	6	32.5
Limoges	3	3	29.4
Others	30	26	17.0
France in whole	132	117	22.1

This table also summarises data from the French Ministry of Justice relating to the cases brought before the Courts of Appeal.

It shows the average number of new cases and closed cases per year as well as the average duration of proceedings and calls for the following comments:

- the predominance of the Paris Court of Appeal is not so marked than in first instance: it deals only with around 30 % of the cases in France against 50 % of the new cases in first instance for the Paris *Tribunal de Grande Instance*;
- it is perhaps surprising to note the great number of cases brought before the Courts which do not have jurisdiction over such cases normally; undoubtedly it is a sign that files are categorized erroneously rather than a mark of obstinacy from the plaintiffs;
- the average duration of proceedings, like in first instance, does not seem significant.

European comparison



The data presented here are taken from a study performed by Edward Nodder, a British solicitor of Bristows in the framework of E.P.L.A. (European Patent Lawyers Association), on the feasibility of a single European court system for patent cases.

The “new cases” represent the average number per year of cases brought before a first instance court. Likewise, the “closed cases” gather the decisions handed down by the first instance courts alone in average during one year.

Italy is the country which has the greatest number of new cases (650) and of closed cases (400).

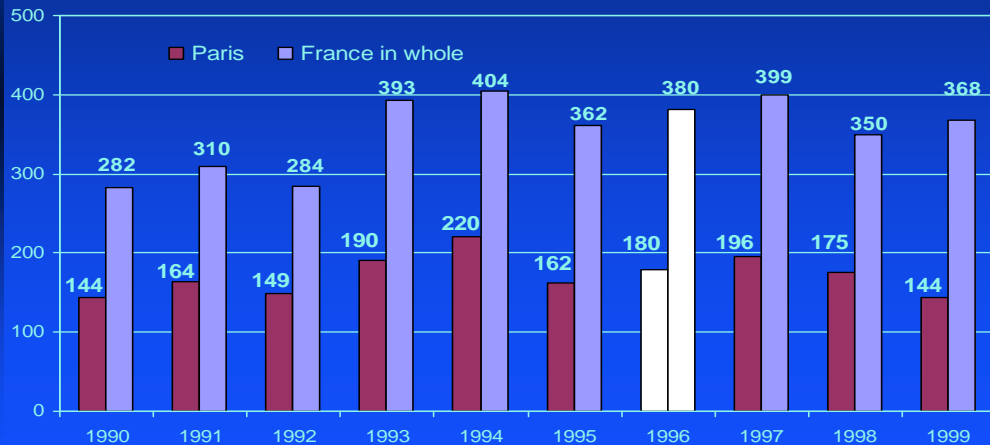
Germany has in average 455 new cases and 300 closed cases per year.

As for **France**, it is behind Germany as to the new cases (around 350) but above of it as to the closed cases (around 315).

In **The Netherlands**, the Court of The Hague, the only court having jurisdiction in relation to patents, is seized in average of 120 cases per year (including a great number of *kort gedding*) and closes around 65 cases. Most of these cases are patent infringement claims and involve foreign parties and European patents. A large number of proceedings for interim injunctions are to be noted like in Germany.

In **The United-Kingdom**, the number of initiated actions is by comparison lower (100) and the one of closed cases is even much lower. A high rate of settlement is to be noted (around 2/3 of the cases).

New cases (Paris / France) Evolution from 1990 to 1999



This chart illustrates the increase in the number of new cases from 1990 to 1999, despite a slight decrease in 1992, 1995 and 1999.

The total number of cases, around 350 per year, should be viewed against the background of the 345 600 patents in force in France according to the I.N.P.I. (French Industrial Property Institute).

We can therefore consider the litigation rate to be in the order of 1 case for every 1000 patents per year.

N.B.:

- The figures of 1996 have been obtained by interpolation.
- The figures of 1998 have been adjusted in order to take into account the creation of the 3rd Section of the 3rd Chamber of the Paris *Tribunal de Grande Instance*.

Decisions in JURINPI

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	Total	Average
Paris T.G.I.	101	96	89	92	111	99	118	119	120	133	1078	108
Paris C.A.	59	68	52	55	49	43	51	53	45	43	518	52
Cour de Cassation	12	22	17	23	30	23	12	11	13	13	176	18
Total	172	186	158	170	190	165	181	183	178	189	1772	177

The Ministry of Justice statistics do not show the nature of the cases nor their outcome.

For this reason, we were obliged to study statistics from another source.

The JURINPI database, produced by the French Industrial Property Institute, is available on the QUESTEL server.

It includes, in principle, **all** the judgments issued in relation to patents by the Paris *Tribunal de Grande Instance*, the Paris Court of Appeal and the *Cour de Cassation* (even orders recording the withdrawal of the plaintiff at the level of the Paris *Tribunal de Grande Instance*, but not the administrative decisions recording the withdrawal of the case from the case list by simple annotation appearing on the file).

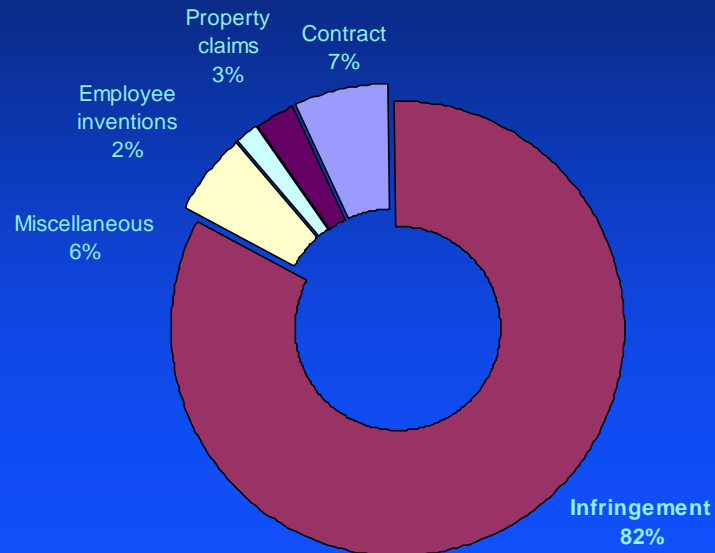
The number of closed cases in first instance is increasing, from around 100 in 1990 to more than 130 in 1999.

The number of decisions of courts outside Paris included in the JURINPI database was too low to provide a true statistical view.

Finally, it should be noted that unfortunately *référé** decisions (including those in relation to interim injunctions for infringement) are not systematically included in the JURINPI database.

* *référé* are quite similar to Dutch *kort geding*, accelerated proceedings for interim measures without binding decision on the merits of the case.

Nature of cases (Paris T.G.I.)

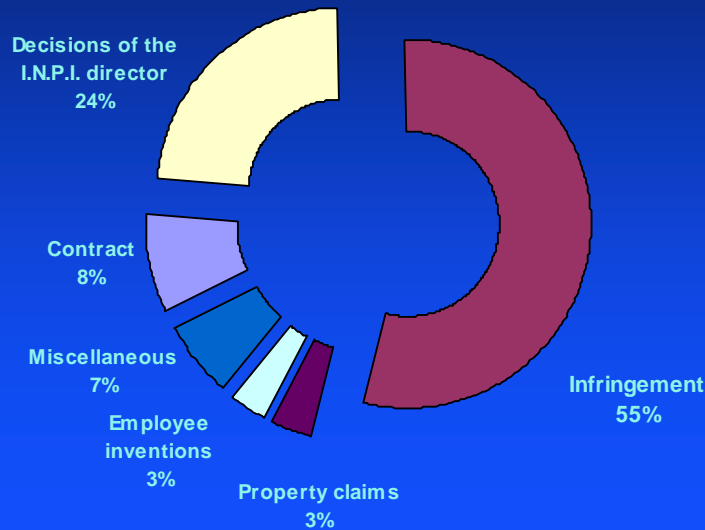


Infringement litigation represents the large majority of first instance cases (**82 %**).

Contractual disputes fall very far behind at 7 %.

Property claims account for 3 % and employee inventions only 2 %, i.e. around 2 cases per year.

Nature of cases (Paris Court of Appeal)



The Paris Court of Appeal rules on a very specific type of litigation: appeals brought against decisions of the Director of the French Industrial Property Institute.

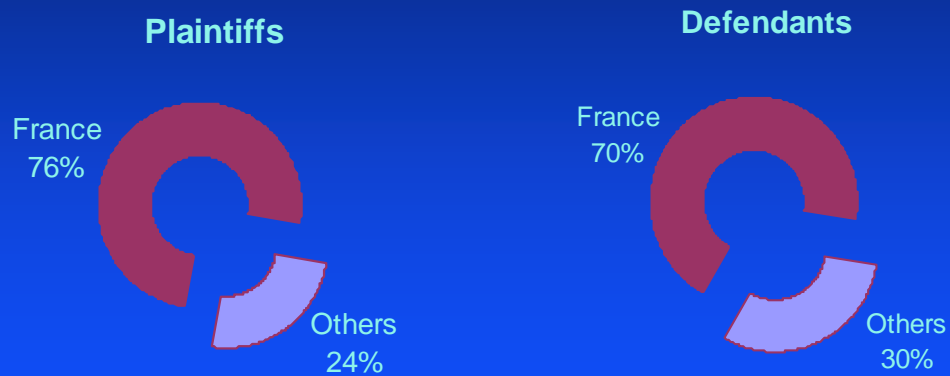
This specific litigation accounts for around ten cases per year.

Infringement cases account for a slightly smaller proportion of cases (55 %) than at first instance level (82 %).

In correlation, the other types of cases are more frequent.

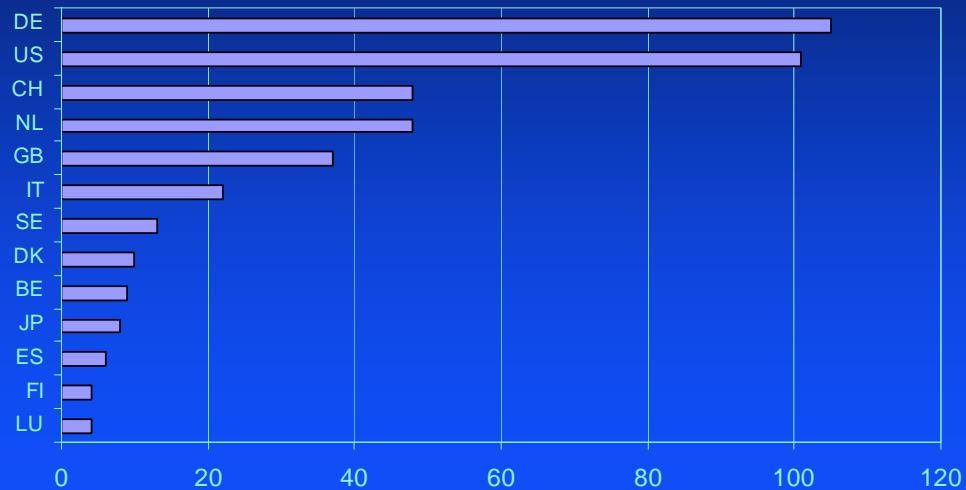
Perhaps this is a sign that the case-law relating to the validity and the infringement is better established (better known by practitioners) which would explain the lower level of appeals.

Nationality of Parties



French parties account for about the same proportion, between 70 % and 80 %, whether as plaintiffs or defendants.

Nationality of foreign plaintiffs



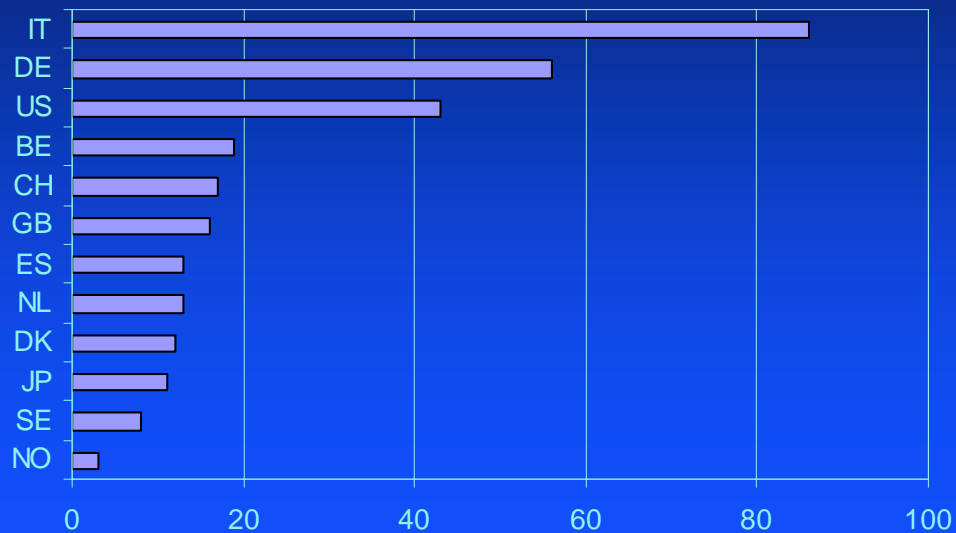
French plaintiffs account for 76 % of plaintiffs in infringement cases.

This proportion is almost reversed in relation to the rate of domestic patents filed which currently stands at around 20 %.

In other words, the French patentees, which own almost 20 % of French patents, initiate 76 % of the infringement cases.

France's main trading partners naturally figure at the top of the league table of plaintiffs.

Nationality of foreign defendants



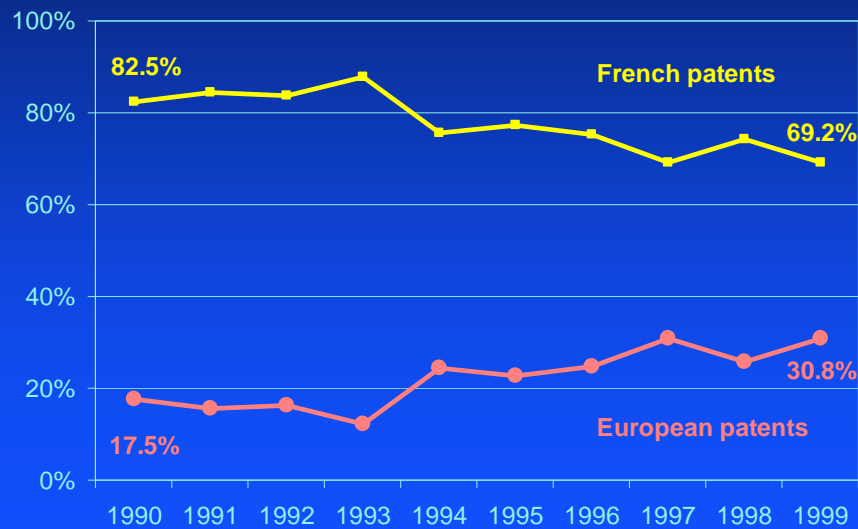
Not surprisingly, the French defendants represent the very large majority (70%) in number of the defendants.

Here again, France's main trading partners head the league table.

However, here, Italy ranks first, far ahead of Germany.

The United States fall far behind, followed by Spain, Belgium and Switzerland.

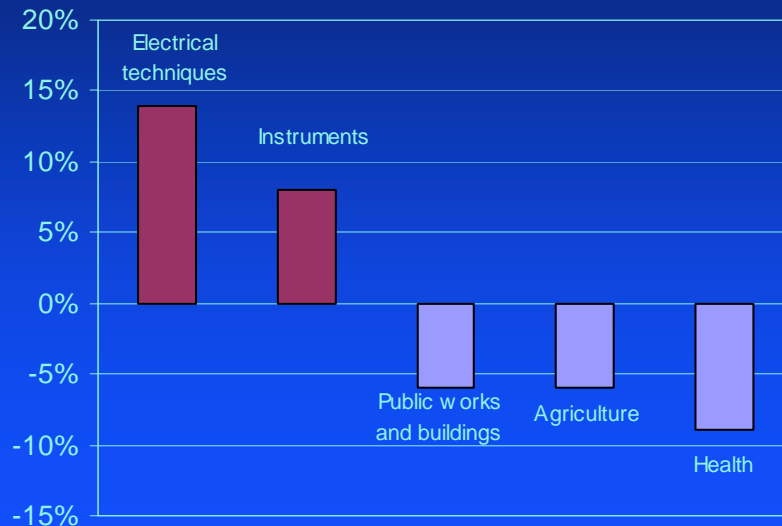
Nature (FR / EP) of patents invoked



The number and rate of European patents invoked is increasing steadily every year:

- 1990 : 17.5 % (22 European patents against 104 French patents),
- 1999 : 30.8 % (53 European patents against 119 French patents).

Litigation and IPC Classes



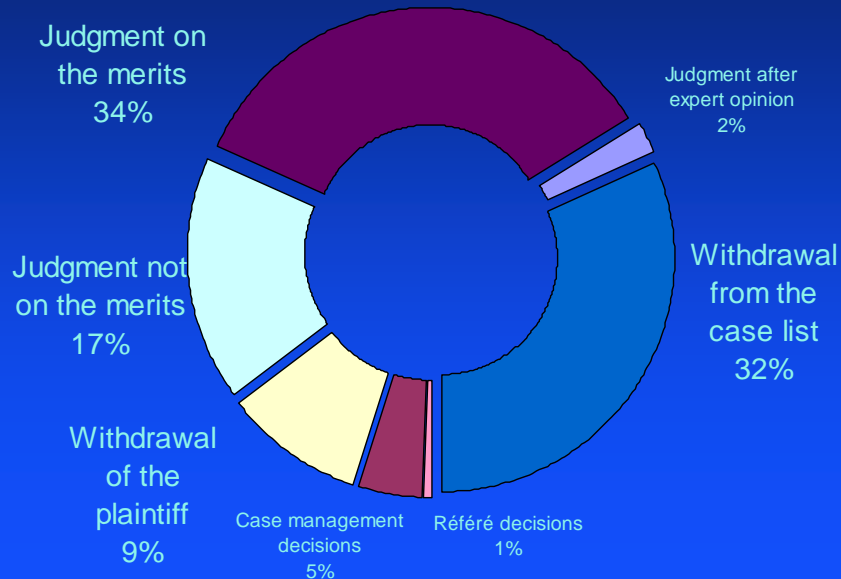
This chart shows the IPC classes which are proportionally over- or under-represented in litigation in relation to the number of patents filed.

The business sectors in which the number of patent suits is proportional (within 5%) to the number of patent applications are not illustrated.

The classes giving rise to most litigation are electrical techniques and instruments.

The classes giving rise to the least litigation are health, agriculture and public works.

Nature of Decisions (T.G.I.)



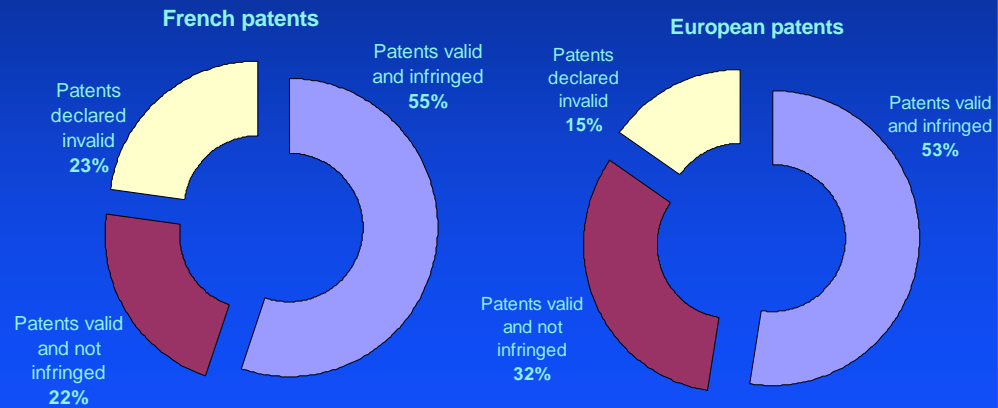
This chart combines the figures from the JURINPI database, which only records judgments, with the administrative measures of withdrawal from the case list, which account for around 50 cases per year.

If we add withdrawals of the plaintiffs recorded through order or judgment to these administrative measures of withdrawal of the case from the case list, we see that more than 40 % of cases are closed without a judgment, generally as a result of settlements (but also, sometimes, for lack of litigants, following "bankruptcy").

There is also quite a high rate (17 %) of judgments which do not consider the merits of the case (for example following the cancellation of a *saisie-contrefaçon*).

Judgments following expert opinions are rare (2 %) and concern mainly assessment of damages.

Validity and Infringement



This chart shows the outcome of the decisions of the Paris *Tribunal de Grande Instance* for the **419** infringement cases judged on the merits at first instance level between 1990 and 1999 and which concerned **431** patents (some cases involve more than one patent and some patents being involved in several cases).

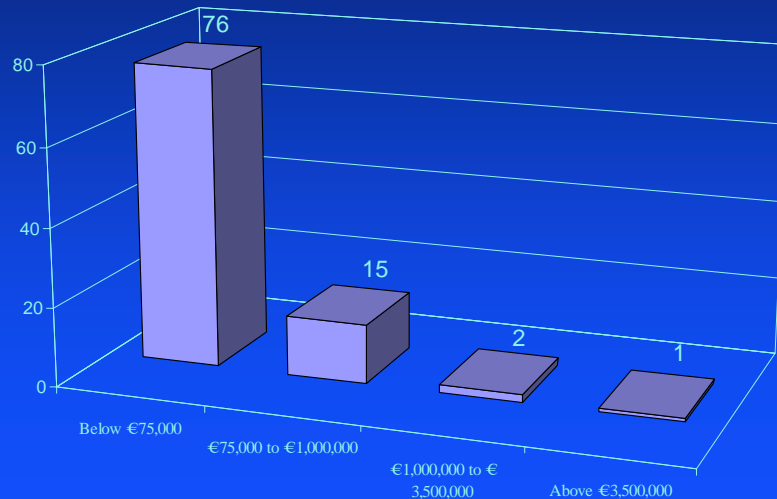
The French patents are declared invalid in 23 % of cases, whereas the French parts of European patents are revoked in 15 % of cases.

The European patent thus seems to have slightly higher guarantees as regards validity than the French patent.

The patent is declared or held as valid, but not infringed, in around 20 to 30% of cases depending on whether the action is based on a French patent or a European patent.

Infringement claim is therefore accepted in around 55 % of cases.

Most of the awarded damages are below €75,000



Mediane: €20,000
Average: €150,000

The Paris *Tribunal de Grande Instance* has handed down 94 decisions on damages.

This account does not include those decisions which awarded only provisional damages.

However, it includes both:

- decisions which fixed the final amount of damages without any expert opinion, when the court believed to have enough elements to enable it to do so,
- decisions which fixed the amount of damages after an expert opinion.

Accordingly, when we compare these 94 decisions to the number of decisions ruling upon infringement (419), we see that only 25 % of cases result in the final assessment of damages.

The bulk of cases are undoubtedly terminated through out of Court settlements or given up (for example bankruptcy of the parties).

The amounts awarded are self explanatory: less than 10 decisions out of 94 awarded more than €1,000,000.

The median line (as many decisions above as below) is situated at €20,000.

The average reaches €150,000 only as a result of the most severe judgments.

Damages: hit parade

CIBA GEIGY, RHONE POULENC AGROCHIMIE v. INTERPHYTO	FRF 40 333 800	€6 148 848
PRODEL v. RENAULT AUTOMATION	FRF 33 000 000	€5 030 818
VAN DER LELY v. MACCHINE AGRICOLE REMAC	FRF 15 600 000	€2 378 205
ISOVER SAINT-GOBAIN v. FIBRA VER, TICTOR	FRF 11 000 000	€1 676 939
VAN DER LELY v. QUIVOGNE	FRF 9 500 000	€1 448 266
DOUBLET v. ALTRAD DEVELOPPEMENT, SELECT ETEM	FRF 8 606 000	€1 311 976
THOMANN v. THOMANN	FRF 7 720 818	€1 177 031
NOEL MARQUET v. DELAMARE	FRF 6 800 000	€1 036 653
SAMEX v. PLYMOUTH	FRF 6 500 000	€990 919
GACHOT v. MECAFRANCE	FRF 4 741 806	€722 884
HK INDUSTRIES v. FICHET BAUCHE	FRF 4 716 000	€718 950
STEP v. COSTER	FRF 4 436 760	€676 380
COLOPLAST v. HOLLISTER	FRF 3 837 176	€584 974
HERRIAU v. FRANQUET, MATROT, MOREAU	FRF 3 680 990	€561 163
VISKASE v. VISCOFAN	FRF 3 608 000	€550 036
Average	FRF 10 938 757	€1 667 603

This table shows the 15 highest damages awarded by the French courts from 1990 to 1999.

Damages US Courts: hit-parade

POLAROID v. EASTMAN KODAK	\$873 000 000	€973 395 000
DIGITAL v. INTEL	\$700 000 000	€780 500 000
CORDIS - JOHNSON & JOHNSON v. BOSTON SCIC	\$324 000 000	€361 260 000
CORDIS - JOHNSON & JOHNSON v. MEDTRONIC	\$270 000 000	€301 050 000
HA WORTH v. STEELCASE	\$211 000 000	€235 265 000
EXXON CHEMICAL v. MOBIL CHEMICAL	\$170 000 000	€189 550 000
VISKASE v. AMERICAN NATIONAL CAN	\$165 000 000	€183 975 000
GUIDANT v. ST JUDE MEDICAL	\$140 000 000	€156 100 000
EXXON CHEMICAL v. LUBRIZOL	\$129 000 000	€143 835 000
PROCTER & GAMBLE	\$125 000 000	€139 375 000
X-IT/PRODUCTS v. WALTER KIDDE	\$116 000 000	€129 340 000
3M v. JOHNSON & JOHNSON	\$107 000 000	€119 305 000
VISKASE v. AMERICAN NATIONAL CAN	\$102 000 000	€113 730 000
FONAR v. GENERAL ELECTRIC	\$98 000 000	€109 270 000
SOUTHERN CLAY PRODUCTS v. SUED-CHEMIE	\$78 000 000	€86 970 000
Average	\$240 533 333	€268 194 667

It is enlightening to compare the 15 highest awards of damages in France for the period 1990-1999 with those awarded in the United States^[1] during the same period.

Even if we take into account the size of the market which counts around 6 times as many consumers, the damages awarded in the United States are still considerably higher.

Indeed, even the average for judicial awards, i.e. \$240,000,000 or €270,000,000, can not be compared with the highest amount ever awarded in France.

This cannot be entirely explained by the possibility for American Courts to award increased damages (which may be up to *treble damages*).

[1] In the decision *Litton v. Honeywell*, the judge had even awarded \$1,200,000,000 to the winner. However this decision was reversed in appeal.

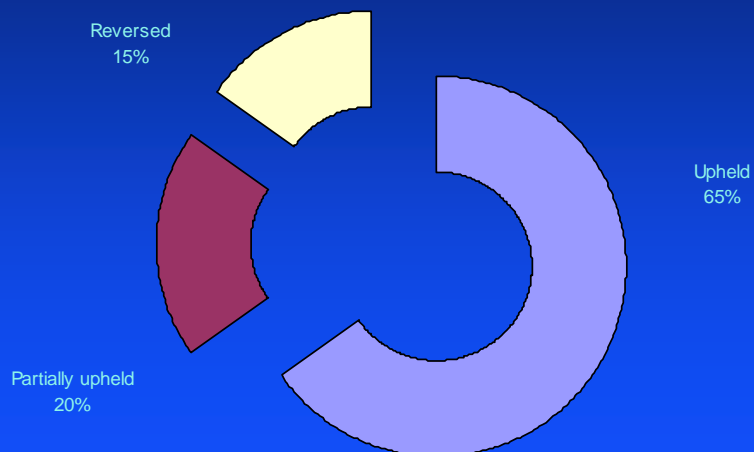
Ancillary sanctions (averages)

- Publication 3 journals
- Total cost of publications €6,000
- Costs €4,000
(maximum €45,000)

Counterclaims for abusive proceedings

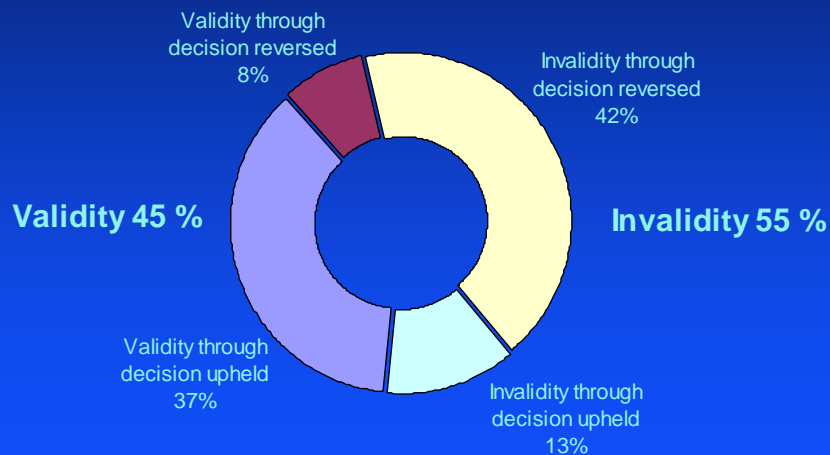
- Brought in 212 cases
- Admitted in 38 cases

Appeal: decisions upheld / overruled



The number of judgments upheld (either totally or partially) of 85 % is higher than the national average of decisions upheld for all cases, which amounted to 76 % in 1995.

Appeal: for or against the patent?

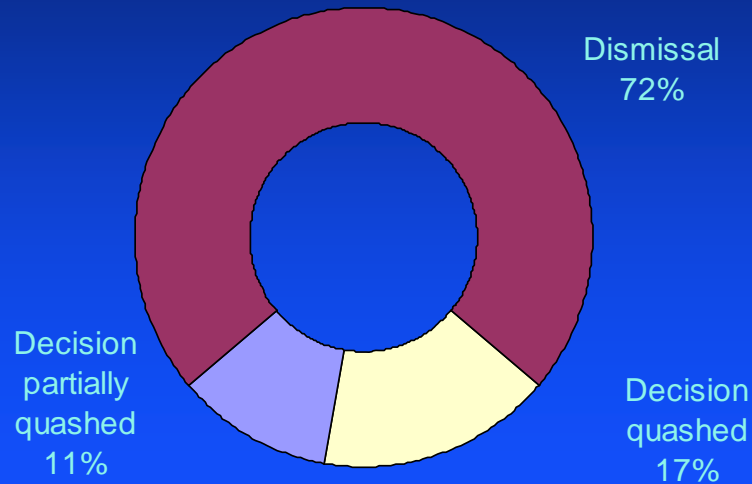


In addition to the number of decisions reversed, it was interesting to examine the outcome of decisions taken by the Court of Appeal:

Accordingly, we distinguished the following cases:

- cases where the Court reversed a first instance judgment which found in favour of the patentee
- cases where the Court upheld a first instance judgment which found against the patentee
- cases where the Court upheld a first instance judgment which found in favour of the patentee
- cases where the Court reversed a first instance judgment which found against the patentee.

Cassation: dismissals / decisions quashed



In the field of patents, the number of decisions quashed (28 %) is less than the number of decisions quashed by the Commercial Chamber of the Cour de Cassation for all fields, i.e. around 35 % over the given period.

Conclusions and Questions

- A uniform statistical view
(quantitative and qualitative stability)
- Should the number of courts having jurisdiction be reduced?
- Should interim injunctions be encouraged?

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- The Lyon *Tribunal de Grande Instance*
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