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An occasion to seize!

Matthieu Dhenne (Ipsilon) · Monday, January 25th, 2021

As winter sales have just started in France, it is an ideal moment to mention an occasion to seize in Patent Law: the important judgment regarding the *saisie-contrefaçon* rendered by the Paris Court of Appeal on November 6, 2020 in the Manitou case.

The Manitou case is well known to followers of French case law: it has already led to no less than three decisions, including one from the Supreme Court ("Cour de cassation"). In this instance, company JCB realized a *saisie-contrefaçon* based on two patents (EP 1,532,065 and EP 2,263,965) at Manitou's premises. Manitou asked the judge to withdraw his *ex-parte* interim order to seize, which he refused to do. The Court of Appeal did not share the same opinion, considering that the participation in the seizure of a patent attorney who had previously prepared a private report for the benefit of the patentee violated the principle of impartiality of Article 6 of the ECHR. However, the Court of Cassation reversed this decision: the report established by the patent attorney at the initiative of a party did not constitute an expertise within the meaning of articles 232 and seq. of the French Code of Civil Procedure, as a consequence, it did not prevent his subsequent participation in the seizure, because in this context his mission was not submitted to the duty of impartiality (see here).

Thus, in the judgment of 6 November 2020, the Paris Court of Appeal ruled for the second time in this case, but after the intervention of the Supreme Court[1]. Unsurprisingly, the Judges took up the conclusion of the Supreme Court by applying it to the case in question: in this case, the patent attorney had not been appointed as a judicial expert but had only drawn up a report at the initiative of the person requesting the *ex-parte* order. The Court further adds that the profession of industrial property attorney is a regulated independent profession submitted to ethical rules, in order to infer that the impartiality of the industrial property attorney must be presumed until proven otherwise because of the statutory independence of this profession.

It is important to recall the jurisprudential context of this case. In the past, French case law was uncertain as to whether the industrial property attorney could assist the Bailiff in the context of seizure. Some decisions held that the presence of the usual industrial property attorney contradicted Article 6-1 of the ECHR[2]. Other decisions held the contrary[3]. Eventually, the Cour de Cassation ruled that the industrial

property attorney, even if he is the usual attorney for the right holder, is an independent professional whose status is compatible with his appointment as an expert for the party requesting an *ex-parte* order for a seizure, a task which does not constitute an expert opinion within the meaning of Articles 232 et seq. of the French Procedure Code.

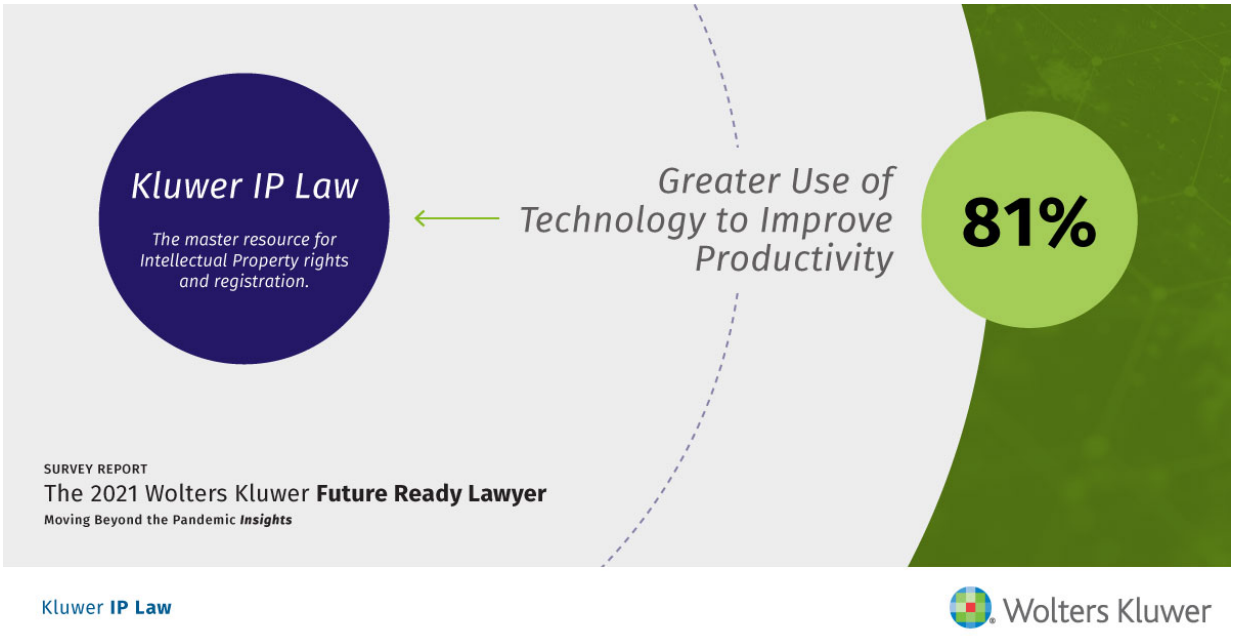
In its judgment of 17 March 2019, the Cour de Cassation therefore continued this trend by stating that the mere preparation of a report outside of any expert appraisal prior to its participation in the seizure did not affect the impartiality of the attorney. The Appeal Judges further added, relying on the ethics of the profession, that their impartiality is presumed in the absence of proof to the contrary. This position goes beyond the reasoning of the Supreme Court by extending this impartiality to all cases in which attorney intervenes and therefore, ultimately, to cases in which the attorney would have previously been a judicial expert for the person requesting the order, a case that the Supreme Court seemed to exclude (a contrario).

In any event, the now widespread mania of litigants to invoke human rights, via Article 6 of the ECHR, still has a bright future ahead of it in France, particularly with the recent introduction of opposition proceedings to French patents in which the Director of the INPI will be both judge of the opposition and party to the possible appeal before the Court of Appeal.

[1] The Cour de Cassation only ruled on points of Law.

[2] Notably two judgments handed down by the Toulouse Court of Appeal on 17 April 2004 and one judgment handed down by the Paris Court of Appeal on 10 December 2004.

[3] Notably the judgments of the Tribunal de Grande Instance de Paris of 4 July 2004 and 13 December 2002.



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