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Cross-Examination of French Judges (Interview Part I: National Introspection)

Matthieu Dhenne (Ipsilon) · Monday, March 8th, 2021

It's an understatement to say that it's not easy to be a French patent litigator in transnational litigation, in any case a good dose of humor is needed: how many jokes have I heard about our jurisdictional system? Then you have to accept that France is almost systematically considered as the territory at the bottom of the pack. The main reason for this is that our Courts are still underestimated, often seen as anti-patentee, slow, unable to order preliminary injunctions, or even and (especially) not "specialized" in Patent Law... In short, they would be just (and perhaps) good at ordering seizures (i.e. "saisie-contrefaçon"), and still... At the end of the day the idea of Paris as an epicenter of the UPC has been recently mocked (see comments from a previous post [here](#)).

The (sadly) famous Robert Ailes – founder of Fox News –, and nonetheless an outstanding communicator, had a slogan: "[you are the message](#)". Taking up this famous idea, it seemed interesting to me to take advantage of this blog space to lead a "cross interview" of three French Judges coming from the three levels of jurisdictions: **Paris High Court** (i.e. "Tribunal Judiciaire" with **Ms. Nathalie Sabotier**), **Paris Court of Appeal** (i.e. "Cour d'appel de Paris" with **Ms. Françoise Barutel**), and French Supreme Court (i.e. "Cour de Cassation" with **Mr. Philippe Mollard**).

This interview will be divided into two series of 5 questions aimed at shedding light on the practice of French Judges: the first part will be devoted to an introspection of the practice of the Courts and the second part will focus on the "positioning" of these courts in relation to global issues.

Finally, before giving them the floor, I would like to thank Judges Sabotier, Barutel and Mollard for having agreed to take part in the discussion. Let's go !

Can you briefly tell us about your training and career? Have you been trained in particular in patent law? If so, how?

Ms. Sabotier (High Court): *I have been a Judge for 25 years. I have a "DEA" (now Master 2 research) in private property law (Sorbonne University – "Paris I") and I have always worked as a civil Judge. Before being appointed to the 3rd Chamber (i.e. of the High Court, Chamber which is specialized in Patent Law), I was referendary Judge at the Cour de Cassation. I trained in patent law with my most experienced colleagues of the High Court.*

Ms. Barutel (Court of Appeal): *I think it would be more interesting to give a general answer on the profile and training of the Judges of the two Chambers of the Court of Appeal.*

At the Paris Court of Appeal, there are two chambers specializing in intellectual and industrial property within the economic and commercial division, each composed of a president and two councilors.

The Judges who sit on these panels have a rich and diverse background both in terms of the intellectual and industrial property training they have received at: the University, the National School for Magistrates [i.e. “École Nationale de la Magistrature”, abbreviated “ENM”], and at the European Offices specializing in trademark and patent law, and in terms of their previous experience, in the Courts, particularly in civil and commercial matters, but also in companies, at the Competition Authority [i.e. “Autorité de la Concurrence”] or as Attorney-at-Law. These profiles and backgrounds correspond to European standards in terms of specialization, technicality, efficiency and guaranteed impartiality. Every year some of us take part in exchanges between European judges organized by the European Patent Office and the European judicial training network.

Mr. Mollard (Supreme Court): *After a scientific baccalaureate (bac C), I continued my studies at the Faculty of Law and obtained a “DEA” in private law (i.e. Master 2 research). I then passed the magistracy examination and followed the training provided by the ENM. I worked as an investigating Judge for four years and then for five years as a district judge. I was then seconded to the Court of Justice of the European Union for ten years to serve as a referendary judge. On my return in France, I was Referendary Advocate General at the Commercial Chamber of the Cour de Cassation for eight years and then President of the Economic Regulation Chamber at the Paris Court of Appeal for three years. Since January 2020, I have been an adviser to the Commercial Chamber of the Cour de Cassation.*

I did not receive any University training in intellectual property. I have no recollection of training in this field at the ENM.

I discovered intellectual property at the Court of Justice. As regards patents in particular, I was able to learn about cases in this area through the issue of supplementary protection certificates.

It is above all as Referendary Advocate General at the Cour de Cassation that I have had to deal with cases dealing with substantive patent issues. I drafted some thirty opinions on this subject between 2009 and 2016.

For the past year, I have been sharing industrial property litigation with Judge Sophie Darbois at Section 1 of the Commercial Chamber. To date, I have only dealt with one patent case as a rapporteur. But several others have recently been assigned to me.

How is the work on patent litigation organized in your jurisdictions (distribution of files between sections, organization of work between you on a case)? What is the approximate average duration of infringement proceedings before your Court?

Ms. Sabotier (High Court): *Cases (including patents) are divided equally by type of litigation (trademark, DA, D&M and patents), but randomly, between the 3 sections of the Chamber. These files are then assigned by the 3 section Presidents to each of the 9 Pre-Trial Judges for their investigation. The examination of patent files takes an average of 18 to 24 months, which in*

principle allows three to four exchanges of written submissions between the parties. Elements which may vary the duration of the proceedings are mainly: parallel proceedings before the EPO (opposition, request for limitation, etc.) which may result in a stay of proceedings, the foreign nature of one or more parties (requiring in particular translation delays and lengthy exchanges between counsel and client).

Ms. Barutel (Court of Appeal): *The two collegiate formations (6 magistrates) of the Court of Appeal are competent to handle patent files. The proceedings are prepared in each Chamber by two counsellors who receive parties counsel if necessary to set up a procedural timetable, and rule on procedural incidents, set the date for pleadings and close the proceedings before the pleading date. Two weeks before the oral argument hearing, the attorneys-at-Law file the writings and documents (at least in numerical form). The distribution of the files, and therefore of the workload between the six magistrates, allows the magistrate in charge of the report at the hearing to have the time necessary, prior to the pleading hearing, to examine the writings (which are often more than a hundred pages long) and documents. The reporter presents the case, the points under debate and gives the floor to counsel who present their case in an adversarial manner on each of the points at issue. The duration of proceedings on the merits before the Court of Appeal is approximately two years, and on appeal from an order for interim injunction and provisional indemnity of approximately one year.*

Mr. Mollard (Supreme Court): *The Chamber of Commerce has two sections.*

Industrial property litigation (trademarks, patents, designs, geographical indications), as well as unfair competition litigation, are assigned to section 1. With rare exceptions, industrial property cases are assigned either to Judge Darbois or to me. We are therefore both appointed as rapporteurs in patent cases. As for the choice of appointing one rather than the other in a given case, it is up to the President of the Chamber.

Each reporter works alone to draft the report, the note under consideration and the draft judgment. However, magistrates sharing the same case often consult each other prior to the submission of these documents. This is the case between Ms. Darbois and I. Moreover, each of us endeavors to read all the drafts drawn up by the other, even when we are not members of the bench (the ordinary law bench is made up of the president of the chamber, the dean of the section and the adviser-rapporteur), in order to guarantee the unity of the case law.

The length of proceedings varies greatly, depending on the complexity of the case. In 2019, the average duration of patent infringement cases was 19 months (13 months for the shortest case, 24 months for the longest). No patent infringement judgments were issued in 2020.

France is known for its “saisie-contrefaçon” system. What is your assessment of this system and its usefulness?

Ms. Sabotier (High Court): *It is an essential tool for providing proof of infringement when this proof is not easily accessible to the right holder. In practice, this procedure is also commonly used to establish “the origin, consistency and extent of the infringement” (Article R.615-2 of the Intellectual Property Code) and thus provide information on the damage suffered. As a result, the measure may lead to the seizure of sensitive documents, so that the requests are examined by the magistrates of the 3rd Chamber with great vigilance and after a careful examination of the proportionality of the measures requested and authorized.*

Ms. Barutel (Court of Appeal): *The “saisie-contrefaçon” is a much used and very useful evidentiary measure in patent infringement cases. It is designed to provide the patent owner with evidence enabling him to have infringements of his rights sanctioned. It constitutes a right for the patentee who presents elements that make the facts of infringement plausible, and who will thus be able to have a bailiff proceed with either the detailed description, with or without taking samples, or the actual seizure of the allegedly infringing products. The patentee may request that the bailiff be assisted by an expert, who may be his patent attorney, which may be relevant for the detailed description, and thus the proof of infringement.*

However, the rights of the seized are preserved in particular by the obligation of the plaintiff to take legal action within 20 working days, failing which, the seized may request the nullity of the operations.

Mr. Mollard (Supreme Court): *For my part, it seems important to me to remind that this system inspired European legislation (Article 9 of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights), so that the French specificity is no longer as marked as it once was.*

Generally speaking, seizure appears to be an indispensable tool, regardless of the right in question (trademark, patent or design).

What elements seem to you to be decisive for the success of an action for preliminary injunction?

Ms. Sabotier (High Court): *The Judge must rigorously check the proportionality of the measure requested, particularly in view of the possible risk of patent revocation. If this risk appears serious, the Judge will not grant the preliminary injunction. The same will apply if the alleged infringement does not appear sufficiently plausible to the Court hearing the case (which does not, however, carry out an examination as thorough as that which falls within the sole jurisdiction of the court hearing the case on the merits).*

Ms. Barutel (Court of Appeal): *The “success” of an action for preliminary injunction requires, on the one hand, the absence of serious challenges to the validity of the patent, the plausible infringement, and, on the other hand, the proportionality of the preliminary injunction to the seriousness and irreparable nature of the damage allegedly suffered. The measures requested by the patentee must be both effective and dissuasive to ensure the protection of his rights, but also proportionate to avoid any misuse.*

Patent cases can be very complex. How do you manage this complexity? Do you find the explanations of the parties sufficient? Does the use of expertise seem to you to be a “plus”?

Ms. Sabotier (High Court): *The French system is based on the ability of lawyers, assisted by patent attorneys and/or private experts, to present the invention and the relevant prior art documents to the Court in the clearest possible manner, in order to enable the Court to assess the inventive step (it is the assessment of this condition of patentability that can be the most complex in practice). Thanks to all these elements, it is in fact quite rare for the parties to request the Court to appoint a Court expert for further clarification. In some cases, however, such an expert could indeed be a “plus”.*

Ms. Barutel (Court of Appeal): *The reporting counselor takes a thorough look at the parties’*

written submissions and exhibits in order to report back at the hearing. The oral argument hearing which lasts, depending on the case, from 2 to 4 hours, and can be spread out over two half-days if necessary, is an opportunity for the parties' counsel to give a concrete demonstration of both the patentability and the infringement, by presenting to the Court, as the demonstration progresses, the main documents, the relevant elements of which are put forward. The parties have had recourse to a patent attorney, who may be present at the oral hearing.

This in-depth analysis of the file, prior to the oral presentation and the adversarial debate at the pleading hearing, enables the Court to understand the issues at stake in the dispute. Also, it is quite rare for the Court to decide to order an expertise that results in a lengthening of the proceedings.

Mr. Mollard (Supreme Court): *The question does not arise in the same terms before the lower Courts and before the Cour de Cassation. The last one only rules in Law, which means that it must not substitute its assessment of the facts for that of the Judges on the merits. In my opinion, recourse to expertise only makes sense before the lower Courts, even if it cannot be ruled out that such expertise may one day appear indispensable to the Cour de Cassation in order to examine the appeal. However, this could only be exceptional.*

Having said that, I think it is necessary for the Cour de Cassation to have a minimum understanding of the invention covered by the patent. In this matter in particular, the reading of the writings of the parties before the Court of Appeal (which must be annexed to the appeal) is necessary in order for the rapporteur to form an opinion on the appeal.

Once again, many thanks to Mrs. Sabotier and Barutel and to Mr. Mollard for taking part in the interview, so as to dispel certain preconceived ideas about the French Courts. See you next week for the second part, where the Judges will be looking at global issues such as FRAND, cross-border injunctions and damages!

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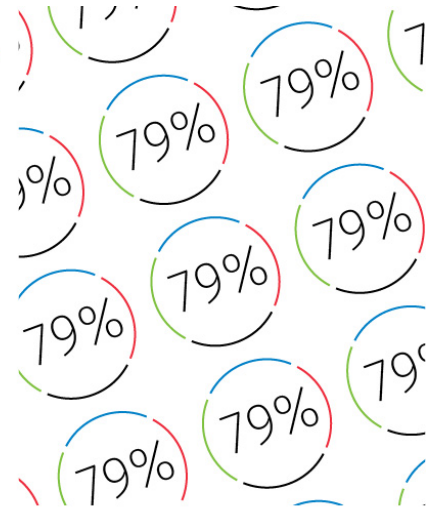
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