

France

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In France, the question of injunctive relief for infringement of patents has only given rise to a very limited number of academic studies.¹ Although there are quite a lot of court decisions dealing with this topic, the courts generally do not explain their reasoning on this particular point. In France, patent injunctions can only be handled² by the specialized IP chambers³ of the general jurisdictions of Paris, which are the Tribunal Judiciaire (formerly known as the Tribunal de Grande Instance) de Paris on first instance, where the judgment is generally delivered within eighteen months, and, on appeal, the Cour d'appel de Paris, where the cases are generally adjudicated within twelve months. The highest court, the Cour de cassation only deals with matters of law, and not fact.⁴ On average, 170 court decisions on patent litigation were delivered per year in France between 2015 and 2019.

A major distinction must be made in French law between preliminary injunctions and permanent injunctions, since they are not based on the same legal grounds.⁵ Therefore, the requirements to grant permanent injunctions are different from the requirements to grant preliminary injunctions. As discussed in greater detail in Section A.1, permanent injunctions are automatically granted every time a valid patent in force has been infringed, since a patent is a property right. However, a preliminary injunction must be based on other legal grounds,⁶ which are more

¹ See, however, Rodà 2012, and Stenger 2019, 10–34.

² In practice, injunctive reliefs for patent infringements are only pleaded by a very limited number of attorneys, who might be partners within an intellectual property (IP) department of a large multinational firm, or in small IP boutiques. Since they are all members of the Paris bar, deontological rules are the same as for any member of the Paris bar.

³ However, these chambers are composed of judges who are not technicians, but specialists of law, and, like any judicial judge, have studied in the Ecole Nationale de la Magistrature.

⁴ Usually, the Cour de cassation only deals a handful of patent cases per year.

⁵ In practice, permanent injunctions are almost always requested in infringement procedures, whereas preliminary injunctions proceedings are far less frequent.

⁶ Article L. 615-3 of the French Intellectual Property Code.

demanding, hence the relative scarcity of these preliminary injunctions. Indeed, at the time of the litigation for preliminary injunctions, the validity of the patent has not been challenged, and the infringement has not been established by the courts.⁷

More generally, since French law belongs to the civil law tradition, judges only have limited powers, which are granted to them by statutory law. Since the statutory bases for a permanent injunction do not give the judge any significant discretion whether or not to grant that relief, the courts cannot consider the fact that the plaintiff is a non-practising entity, and cannot even apply a balance of interests, contrary to preliminary injunctions, or grant compensatory relief instead of injunctive relief when they deem it more appropriate.⁸

A. THE REQUIREMENTS FOR GRANTING A PERMANENT INJUNCTION FOR INFRINGEMENT OF A PATENT IN FRENCH LAW

Since a patent is a property right, every time a valid patent in force has been infringed, a permanent injunction must be issued, except on very rare occasions.

1. *Permanent Injunctions Must Be Granted Automatically When a Valid Patent in Force Has Been Infringed*

When the infringed patent is in force, the legal grounds of patent law explain why such injunctions must be granted every time.

a. The Legal Basis of Permanent Injunctions

The majority of the countries in the world are bound by international conventions relating to intellectual property rights, such as the Paris Convention for the protection of industrial property, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. Nonetheless, some differences still remain between the member states of the European Union, which led to the enactment of the Enforcement Directive⁹ number 2004/48 of 29 April 2004 (Directive), which has been transposed into the French Intellectual Property Code (the Code) by law number 2007-1544 of 29 October 2007.¹⁰ Therefore, today, the legal bases of injunctive relief are within the French Intellectual Property Code, which must be interpreted according to the European Directive.

⁷ On the requirements for preliminary injunctions, *see* Section A.2.b.

⁸ *See, e.g.*, Paris Court of First Instance, 12 February 2010, *Propriété Industrielle Bulletin Documentaire (PIBD)* 919, III, 339 (2010) (affirmed by Paris Court of Appeal, 22 May 2013, *PIBD* 988, III, 1313 (2013)).

⁹ Official Gazette of the European Union dated 30 April 2004, issue L. 157.

¹⁰ Official Gazette of the French Republic (JORF) dated 30 October 2007.

The French Intellectual Property Code does not expressly allow the judge to grant a permanent injunction to stop an infringer from infringing a patent. Nonetheless, the majority of legal writers and case law consider that, because of the legal monopoly which derives from the patent title,¹¹ and the definition of infringing acts,¹² a judge who is requested by the patent holder to grant a permanent injunction for the future must do so every time a valid patent in force has been infringed. Since a patent gives its holder a property right, the patentee has an exclusive right which allows him to request a remedy in case of any encroachment on that property. The injunction which forbids the infringer from continuing the infringing acts is therefore considered a natural consequence of the infringement ruling.¹³ This is why Article 11 of the Enforcement Directive, which provides for such a remedy, did not need to be implemented in French law.¹⁴ As a consequence, case law prior to the Enforcement Directive can still be invoked in such situations.

b. The Infringed Patent Must Be in Force

This is a mandatory requirement for granting an injunction: after the patent expires, the infringer cannot be prohibited from performing acts that would have constituted an infringement of the patent when it was in force.¹⁵

The invalidation of the patent has an impact upon injunctive relief.¹⁶ When the patent has been invalidated during the course of the infringement proceedings, no infringement can be found, and therefore no injunction can be granted.¹⁷ Similarly, when a patent has been invalidated in a first proceeding, this invalidity can be invoked against the patentee during other court proceedings for infringement which

¹¹ Article L. 611-1, al. 1^{er} of the French Intellectual Property Code provides that “an industrial property title may be granted by the Director of the National Institute of Industrial Property to any invention, conferring on the holder or his successors in title an exclusive right to work the invention”.

¹² Article L. 613-3 of the French Intellectual Property Code provides that: “The following shall be prohibited, save consent by the owner of the patent: a) Making, offering, putting on the market, using, importing, exporting, transshipping, or stocking a product which is the subject matter of the patent; b) Using a process which is the subject matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the owner of the patent, offering the process for use on French territory; c) Offering, putting on the market, using, importing, exporting, transshipping the product obtained directly by a process which is the subject matter of the patent or stocking for such purposes.”

¹³ Foyer & Vivant 1991, 349.

¹⁴ Rodà 2010, 26; Stenger 2019.

¹⁵ Cass. Com., 1 March 1994, no. 92-11.506; Cass. Com., 17 March 2015, no. 13-15.862, PIBD 2015, no. 1027, III, 335; see also, among others, Paris Court of Appeal, 18 February 2005, no. 02/08524, PIBD 811, III, 388 (2005); Paris Court of Appeal, 23 February 2016, no. 13/20365, Paris Court of Appeal, 27 June 2017, no. 14/25023.

¹⁶ As a principle, there is no bifurcation in French patent law.

¹⁷ Cass. Com., 4 March 1986, no. 83-16.848, Bull. IV, no. 36, *Dossiers brevets* 1986, V, p. 1. More generally, on that question, see Py 2008, 618, and Py 2011.

are still pending, and this then precludes any action for infringement.¹⁸ When a decision of invalidity rendered in a first litigation has been appealed, and, meanwhile, there is another litigation concerning infringement of the same patent, the defendant may request the postponement of that decision until the final decision concerning the validity of the patent has been rendered. However, the judge is not required to grant the defendant's request, and may take into account the likelihood of invalidity, as he does when an opposition is filed before the European Patent Office.

A major reform of the grant system for French patents has recently introduced¹⁹ an opposition procedure before the French National Industrial Property Institute (INPI), which is based on the European procedure. It allows any person, except the patentee, to challenge the validity of the patent within nine months of the publication of its grant in the *Bulletin officiel de la propriété industrielle*. The decision of the general director of the INPI produces the same effects as a court decision according to Article L. 111-3 al. 6° of the Code of Civil Execution Procedures,²⁰ which means that it is an executory title. Whereas the preparatory works stated that the decision of the general director of the INPI had the authority of *res judicata*, the articles which were finally enacted do not use that expression. Whether a decision rejecting the opposition has the authority of *res judicata*²¹ would depend on its jurisdictional nature, which is discussed among legal writers.²² In any case, the decision of the general director of the INPI may be amended by the Paris Court of Appeal, which will consider elements of both fact and law.²³ If several provisions deal with the articulation of the opposition procedure with the limitation procedures,²⁴ and the revocation procedures,²⁵ nothing is said concerning the articulation between opposition procedures and actions for infringement. The judge may stay his decision in the interest of proper justice, but, as for the European opposition procedure, is not required to do so. The judge might decide on a stay if the opposition seems serious enough, but if the judge doesn't stay, there is a risk of contradictory decisions, since a patent upon which an infringement decision has been based may later be revoked.

¹⁸ At least if the decision of invalidation has become *res judicata*: see Cass. Com., 6 December 2017, no. 15-19.726, Propr. industr. 2018, comm. 8, note Py 2018; Gisclard 2018.

¹⁹ Ordinance no. 2020-116 of 12 February 2020 creating an opposition procedure to patents, JORF no. 37 of 13 February 2020: this new regime came into force on 1 April 2020 and applies to patents whose delivery has been published in the *Bulletin officiel de la propriété industrielle* since that day. This ordinance has been complemented by decree no. 2020-225 of 6 March 2020 concerning the opposition procedure for patents.

²⁰ Article L. 613-23-2 of the French Intellectual Property Code.

²¹ Article 1355 of the French civil code.

²² Galloux 2020; see also Pollaud-Dulian 2020, who claims it is a “quasi-judicial” decision; for a more comprehensive analysis, see Py & Raynard 2021.

²³ Article R. 411-19, al. 2, of the French Intellectual Property Code.

²⁴ Article L. 613-24 of the French Intellectual Property Code.

²⁵ Article R. 613-44-10, 1 of the French Intellectual Property Code.

The most difficult question, which is somewhat similar to the latter, concerns what happens when a first decision grants a permanent injunction, and, later on, another decision invalidates the same patent. For the moment, French case law has only had to deal with that question in the case of damages that the infringer had to pay, making a distinction between infringers that had already paid such damages to the patentee and cannot ask for a refund of these damages,²⁶ and those that had not and will not be requested to pay them.²⁷ Scholars agree that permanent injunctions cannot be enforced after a court has declared the underlying patent invalid,²⁸ although they do not generally explain upon which statutory basis such an opinion could be based. The injunction should stop having effect, since there cannot be any infringement of an intellectual property right that does not exist. Since injunctions involve the future, whereas damages concern the past, it follows that the patent invalidation decision produces its effects *ex nunc*, and prevails over the infringement decision for the future, but not *ex tunc*, since it doesn't modify the past effects of the infringement decision.²⁹ On a procedural level, the *res judicata* of the infringement decision ceases its effects for the future, since such a limit is implicitly but necessarily included in the infringement decision. Similarly, an injunction ceases its effects when the patent becomes part of the public domain, as soon as it has expired.³⁰ Therefore, and contrary to trade secrecy law, there is no need to make any specific request to the judge.

c. An Automatic Remedy

Since permanent injunctions for infringement of a patent are based on the proprietary nature of the patent, it means that the judge must grant such injunctions whenever requested by the patentee to do so. Courts have been granting permanent injunctions for a long time,³¹ even though they do not explain clearly the legal basis of the grant of such permanent injunctions. For example, a decision of the Paris Court of Appeal explained in 2017 that the infringement of patent rights constitutes a violation of the exclusive right of the patentee to authorize or prohibit the exploitation of the product which is the subject matter of the patent, and that a remedy should thus be granted in order to reinstate the patentee's rights, which justifies the injunction.³²

²⁶ Cass. Ass. plén., 17 February 2012, no. 10-24.282, Bull. Ass. Pl. no. 2, PIBD 959, III, 233 (2012); Propr. industr. 2012, comm. 29, note Py 2020, 536 et seq.

²⁷ Cass. Com., 12 June 2007, no. 05-14.548, Bull. IV, no. 158, PIBD 858, III, 521 (2007).

²⁸ Raynard et al. 2016; Azéma & Galloux 2017.

²⁹ Raynard 2012, 444.

³⁰ Py 2020, 544-45.

³¹ See, e.g., Paris Court of Appeal, 16 May 1927, Ann. propr. ind. 1928, 13.

³² Paris Court of Appeal, 16 May 2017, no. 15/09506.

2. *When Injunctive Relief Is Not Mandatory*

Contrary to preliminary injunctions, which are strongly regulated, permanent injunctions may only be denied on very rare occasions.

a. Situations Where a Permanent Injunction May Be Denied

On very rare occasions, a court may deny the grant of a permanent injunction. We shall examine first the denial of injunctive relief against a certain type of defendant, or with regard to a certain type of plaintiff, then whether this is the case in situations of partial denial of injunctive relief for a sub-group of infringing acts, the cases of compulsory licences, and finally of other exceptions.

Permanent injunctions are still possible³³ for indirect infringers acting in good faith, who can normally not be held liable for an infringement, since they were not acting knowingly.³⁴ Indeed, the summons makes them aware of the infringement, so that any subsequent act becomes unlawful, which justifies an injunction for the future.³⁵ The grant of a permanent injunction against intermediaries might be possible under the general rules of civil procedure.³⁶

A very old court decision even granted injunctive relief against the French state.³⁷ However, nowadays, Article L. 615-10 of the French Intellectual Property Code provides for a notable exception:

[W]here an invention which is the subject of a patent application or of a patent is worked, in order to meet the requirements of national defense, by the State or its suppliers, subcontractors and subsidiary suppliers, without a license having been afforded to them, the ... Court may order neither the discontinuance nor the interruption of the working nor the confiscation provided for in Articles L. 615-3 and L. 615-7-1.

The principle of equality before the law means that the nature or reputation of the plaintiff cannot be considered in the decision whether or not to grant a permanent injunction.³⁸ More specifically, the fact that the patent holder is a non-practising entity (NPE) does not prevent the court from granting a permanent injunction. Indeed, in property law in general, case law considers that a mere action against an

³³ See Mathély 1991, 515; Stenger 2019, quoting Paris Court of First Instance, 13 April 1972, PIBD 89, III, 252 (1972).

³⁴ Indeed, article L. 615-1, al. 3 of the French Intellectual Property Code provides that remedies for some hypotheses of infringement of patent law, such as selling the invention, requires that the defendant acted knowingly.

³⁵ Passa 2013, 643.

³⁶ *Id.*, 644.

³⁷ Cass. Civ., 1 February 1892, Ann. propr. ind. 1892, 103.

³⁸ In the absence of any specificity concerning a NPE, see Paris Court of First Instance, 10 March 2017, no. 14/16022.

infringement of a property right cannot amount per se to an abuse of law.³⁹ It is, however, true that some legal writers are pleading that, as in US law, and more precisely since the *eBay* decision,⁴⁰ it might be possible to replace the injunction with damages.⁴¹ Indeed, and despite the automatic nature of permanent injunctions, these authors base their opinion upon the function of the patent, which is to promote research in order to be useful to the community.⁴² Therefore, when a person does not use the patented invention for its whole purpose, that person might not be able to use the whole set of available remedies.⁴³ However, for the moment, applicable French patent law does not take into account such ideas, since, contrary to European trademark law, the way the patent holder uses its right is not taken into consideration.⁴⁴ This is quite logical, since the notion of function of rights seems rather difficult to apply to, and be defined in, patent law.⁴⁵ Indeed, creating a duty to exploit the invention would seem out of step with current uses of patents, especially for a NPE designed to be the sole entity to deal with future licensees, and this explains why such a situation isn't regarded as an abuse.

In addition, there are some compulsory licences in French law, either ordered by courts or by the government. Among them are compulsory licences for lack of exploitation,⁴⁶ for dependent inventions,⁴⁷ for exportation of pharmaceutical products,⁴⁸ in the interest of public health,⁴⁹ to satisfy the requirements of the national economy,⁵⁰ and for national defence.⁵¹ In practice, such compulsory licences are rarely used (e.g., we are not aware of any case of compulsory licence in the interest of public health⁵² in France). We think that pending proceedings regarding a compulsory licence may have an impact on the grant of permanent injunction in a pending infringement case. Indeed, if the request for a compulsory licence is made during the proceedings for infringement of the same patent, the judge who decides there is an infringement but who grants the licence cannot prohibit exploitation of the invention for the future, at least within the scope of the compulsory licence.

³⁹ Cass. Civ. 3rd, 7 June 1990, Bull. civ. III, no. 140; Cass. Civ. 3^e, 10 November 2016 (three cases), no. 15-19.561, no. 15-21.949, no. 15-25.113. On abuse of law, see *infra* in this section.

⁴⁰ *eBay Inc. v. MercExchange* (2006). See Chapter 14 (United States).

⁴¹ Le Stanc 2014, 59.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ On trademark law, see Basire 2015.

⁴⁵ Py 2018, 5–27.

⁴⁶ Art. L. 613-6 *et seq.* of the French Intellectual Property Code.

⁴⁷ Art. L. 613-15 of the French Intellectual Property Code.

⁴⁸ Art. L. 613-17-1 of the French Intellectual Property Code.

⁴⁹ Art. L. 613-16 of the French Intellectual Property Code. For an example outside France, see Gisclard 2014.

⁵⁰ Art. L. 613-18 of the French Intellectual Property Code.

⁵¹ Art. L. 613-19 of the French Intellectual Property Code.

⁵² Gisclard 2020.

Being an infringer does not preclude requesting a compulsory licence,⁵³ and, indeed, that could even be a way for the infringer to prove that it is able to work the patented invention in an effective and serious manner,⁵⁴ which is a requirement of the French Intellectual Property Code for getting a compulsory licence for lack of exploitation.⁵⁵ Finally, when a compulsory licence has been granted after a decision of infringement, a permanent injunction which had been granted by the judge who ruled on infringement can no longer be enforced.

Potential infringers have tried to use anti-suit injunctions issued by American courts in order to avoid injunctions prohibiting future patent infringement by French courts. In a 2020 case,⁵⁶ Lenovo had an anti-suit injunction issued by a California court against a patent holder. However, the Paris Court of First Instance has deemed such an injunction illicit as fundamentally contrary to the French and international principles of patent law, and to the protection of property, to the rights to a fair trial and to an effective remedy granted by the European Court of Human Rights (ECHR). Since the anti-suit injunction only ended after the term of the patent, it would have deprived the patentee of the right to get an anti-infringement injunction. Therefore, such an anti-suit injunction constitutes an obviously illicit disturbance, and Article 835 of the French Civil Procedure Code allows the court to force its beneficiary to withdraw its use. Anti-suit injunctions are therefore not an efficient shield against injunctive relief for patent infringement before French courts.

Another situation where the courts may refuse an injunction is the lateness failure. Indeed, an injunction can also be denied to a patentee who requests a permanent injunction and, more generally, sues for infringement too late based on civil procedure rules, since Article L. 615-8 of the French Intellectual Property Code states that an infringement action is subject to a limitation period⁵⁷ of five years from the day where the owner of a right has known or should have known the last fact allowing its exercise.

On very rare occasions, a permanent injunction may be refused for other reasons, which are probably based more on practical uselessness rather than on legal grounds. Such situations may happen when infringing goods have been withdrawn from the market when the judicial proceedings began.⁵⁸ In addition, some decisions have refused to grant a permanent injunction when the defendant was bankrupt and

⁵³ Rennes Court of Appeal, 12 July 1972, PIBD 1973, III, p. 4.

⁵⁴ Paris Court of First Instance, 25 May 1983, *Ann. propr. ind.* 1984, 274.

⁵⁵ Art. L. 613-12 of the French Intellectual Property Code.

⁵⁶ Paris Court of Appeal, 3 March 2020, no. 19/21426.

⁵⁷ By contrast, article L. 615-8-1 of the same code states nowadays that the action for the revocation of a patent is not subject to any limitation.

⁵⁸ On trademark law, see Paris Court of Appeal, 30 November 2005, PIBD 824, III, 132 (2006), where the court considered that, since the infringer had decided to remove the goods from the market as soon as the proceedings began, there was no need for an injunction.

stopped their business, since such measures were no longer useful.⁵⁹ These situations remain exceptional, and even when the practical risk of infringement becomes very low, since infringing goods are not on the market, judges usually still grant the requested permanent injunction.⁶⁰ Thus, in very specific circumstances, it may happen that the court only grants damages for past infringements without prohibiting the infringer from continuing the infringing acts. Otherwise, a permanent injunction cannot be refused on the basis of the public interest, or for lack of proportionality,⁶¹ or due to considerations of follow-on innovation.

The general principle of prohibition of abuse of law⁶² might, at least theoretically, be applied in the matter of intellectual property rights. In French civil law, several criteria of such abuse have been suggested by scholars,⁶³ among them negligence in exercising one's rights,⁶⁴ malicious intent,⁶⁵ and disregard of the social function of rights. However, according to court decisions, actions against encroachments of property rights cannot generally be considered an abuse of law *per se*.⁶⁶ In practice, albeit sometimes pleaded, abuse of law has only rarely been admitted by the courts, which consider that the patentee may make a mistake about the scope of its rights.⁶⁷ And even when an abuse of law is admitted by the court during an infringement procedure, it often results from the fact that there was no infringement in that particular case,⁶⁸ and is thus not a ground which would justify the refusal of an

⁵⁹ On trademark law, *see* Paris Court of First Instance, 6 September 2006, PIBD 841, III, 785 (2006); for copyright and industrial designs, *see* Paris Court of Appeal, 6 February 2009, no. 07/08965.

⁶⁰ Paris Court of First Instance, 12 February 2010, PIBD 919, III, 339 (2010) (affirmed by Paris Court of Appeal, 22 May 2013, PIBD 988, III, 1313 (2013)).

⁶¹ For an example of thoroughly explained denial of a preliminary injunction concerning an essential patent in telecommunications, *see* Paris Court of First Instance, 29 November 2013, no. 12/11922 (Ord. JME). However, if the notions of proportionality and balance of interests are clearly emerging in property law in general (*see, e.g.,* Reboul-Maupin 2018, 274 *et seq.*) and in patent law (Vivant 2016, 15), unfortunately, the courts have not applied it yet in the matter of permanent injunctions for infringement of patents.

⁶² *See* Josserand 1939, and the famous *Clément-Bayard* case.

⁶³ Goubeaux 1994.

⁶⁴ *See, e.g.,* Paris Court of First Instance, 10 January 2020, no. 16/04839.

⁶⁵ Paris Court of First Instance, 20 February 2001, PIBD 729, III, 530 (2001): as a principle, an action in infringement of industrial property rights cannot be an abuse *per se*; however, if such an action is not aimed at protecting the said rights, but is aimed at eliminating or hampering a competitor, such an action may be deemed abusive.

⁶⁶ Paris Court of First Instance, 24 May 2013, no. 11/09609, and Paris Court of First Instance, 7 June 2013, no. 10/08326: the exercise of an action constitutes as a principle a right, and can only degenerate into an abuse which can lead to damages in the case of wrongful intention, bad faith, or gross mistake. *See also* Paris Court of First Instance, 10 March 2017, no. 14/16022: *a contrario*, an abuse might be inferred from the circumstances of the initiation of the procedure, or from the damages requested.

⁶⁷ *See, e.g.,* Paris Court of Appeal, 15 November 2019, no. 16/03486.

⁶⁸ Cass. Com., 3 June 2003, no. 01-15740, where the patentee perfectly knew that the patent hadn't been infringed; *see also* Paris Court of First Instance, 10 October 2014, no. 12/06748, where the patentee knew that the patent had entered into the public domain.

injunction in the case an infringement has been ascertained. Therefore, the use of the concept of abuse of law for refusing an injunction seems somewhat theoretical. Since a patent gives the patentee a monopoly, whether exploited or not, rules of competition law prohibiting abuse of dominant position or agreements which constitute restraints of trade may be applied when deciding to grant a permanent injunction.⁶⁹

Nonetheless, as regards essential patents and FRAND (Reasonable And Non-Discriminatory) commitments, it should be noted that the Paris Court of First Instance granted a permanent injunction concerning patents on the *mp3* musical files format (ISO/IEC 11172-3 standard) against an infringer who had never applied for a licence,⁷⁰ although without any specific motivation or any balance of interests.⁷¹ The ECJ *Huawei* case,⁷² which was decided later, would therefore not change the approach in such a situation.

As regards the possibility of alternative measures, the Enforcement Directive provides in Article 12 that member states may provide that, in appropriate cases and at the request of the person liable to be subject to injunctive relief, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying injunctive relief if that person acted unintentionally and without negligence, if execution of injunctive relief would cause disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory. However, this is only a possibility offered to member states, which has not been used by the French legislature.⁷³ Contrary to injunctions, destruction and recall orders in case of a patent infringement are discretionary according to Article L. 615-14-2 al. 2 of the French Intellectual Property Code.

b. Differences between Preliminary and Permanent Injunctions

Preliminary injunctions are regulated by Article L. 615-3 of the French Intellectual Property Code. Any person having the right to bring an action for infringement may bring an action in summary proceedings before the competent civil court for an order, if necessary under penalty payment, against the alleged infringer or the intermediaries whose services used, for any measure intended to prevent an imminent infringement of the rights conferred by the title or to prevent the continuation

⁶⁹ See Paris Court of First Instance, 17 April 2015, no. 14/14124, about the determination of royalties for an essential patent.

⁷⁰ Paris Court of First Instance, 9 September 2008, no. 06/09277.

⁷¹ On the other hand, preliminary injunctions, which are subject to specific rules (*cf. infra* in this section), are much more motivated: *see, e.g.*, for a refusal, Paris Court of First Instance, ord. Juge de la mise en état (JME), 29 November 2013, no. 12/11922.

⁷² *Huawei v. ZTE* (CJEU 2015).

⁷³ Compare with, for copyright law, the decision of Cass. Civ. 1ère, 15 May 2015, no. 13-27391, Bull. No. 116, which invited the Court of Appeal to balance the interests between the original work and the derivative work, but whose interpretation remains controversial.

of alleged acts of infringement. In summary proceedings or on application, the court may order the measures requested only if the evidence reasonably available makes it likely that the plaintiff's rights are being infringed or that such infringement is imminent. The court may prohibit the continuation of the alleged acts of infringement, make it subject to the provision of guarantees intended to ensure possible compensation to the plaintiff or order the seizure of or delivery into the hands of a third party the goods suspected of infringing the rights conferred by the title, in order to prevent their introduction into or circulation within the circuits of commerce.

Preliminary injunctions are thus very different from permanent injunctions since they are not automatically granted. The Code provides that the court "may" take such measures. Since those measures are temporary, the judges look at the case *prima facie*. Therefore, as the Code provides, the preliminary injunction can only be granted if elements of proof, which the defendant can reasonably have access to, make it plausible that the patentee's rights have been infringed or are about to be infringed.

Litigation concerning preliminary injunctions is therefore much more developed than for permanent injunctions since the claimant must prove the likelihood of an infringement. In recent years, case law has somewhat evolved concerning the question of the invocation of the invalidity of the patent at that stage of the proceedings. Beforehand, judges considered that they could not deny a preliminary injunction unless the patent was obviously invalid.⁷⁴ Nowadays, case law seems to be more rigorous as regards the likelihood of the infringement, by saying that it may be ruled out when there are serious issues of validity⁷⁵ or infringement.⁷⁶ This means that if the judge ruling on the merits subsequently denies any infringement, the patent holder that had enforced the preliminary injunction will be strictly liable towards the defendant, according to Article L. 111-10 of the French Code of Civil Execution Procedures. In addition, Article L. 615-3 of the French Intellectual Property Code states that the court may subject the grant of a preliminary injunction to a deposit of the patent holder.

B. THE EFFECTS OF PERMANENT INJUNCTIONS FOR INFRINGEMENT OF A PATENT IN FRENCH LAW

A permanent injunction may be formulated in more or less extensive ways, and its duration may vary. When those injunctions are not being complied with by the infringer, remedies are available.

⁷⁴ See, e.g., Paris Court of Appeal, 21 March 2012, no. 11/12942.

⁷⁵ Paris Court of Appeal, 16 January 2009, no. 08/12281; Paris Court of First Instance, summary judgment, 10 August 2012, PIBD 974, III, 823 (2012); Cass. com., 21 October 2014, no. 13-15-435.

⁷⁶ On these questions, see Galloux 2009, 350; Galloux 2013; Drillon 2015.

1. *The Scope of Permanent Injunctions*

Since there is no statutory basis for permanent injunctions in French patent law, the judge has some latitude to formulate them, provided they comply with the fundamental rules of civil litigation.

For example, some permanent injunctions refer to specific products with a very precise reference to infringing products,⁷⁷ notably for illicit imports.⁷⁸ In other situations, permanent injunctions refer both to the infringed claims and to the infringing objects, and to the prohibited acts: see, for example, a case where the Paris Court of Appeal “prohibit[ed] company D. to continue the sale of hand pieces and cartridges reproducing the claims 1, 5, 6, 7, 10 and 11 of the French part of European Patent 1 547 538”.⁷⁹

Other injunctions remain quite vague in their formulation, but nonetheless refer to the precise acts which have been committed by the defendant: for example, after having said that the defendant, “by importing and selling on the French territory, ‘Get Locky’ sealing rods that reproduced the claims of patent EP 1 572 548, has infringed the first, third and seventh claims of that patent”, the Paris Court of First Instance decided to “prohibit the continuation of such activities”.⁸⁰ Other injunctions seem more general at first glance, by “prohibit[ing] corporations M. and N. from continuing the patent infringing and unfair competition activities”,⁸¹ although one should probably consider that this was an implicit reference to the activities that were previously mentioned in the judgment.

Some injunctions have been granted with a somewhat wider scope by prohibiting, more generally, infringement of specific claims of a specific patent, such as a case of the Paris Court of Appeal, “prohibit[ing] corporation E. to sell products which reproduce the claims 1, 2, 5, 6 and 8 of French patent n°19.01136 owned by

⁷⁷ Paris Court of First Instance, 20 April 2017, no. 15/05831: “fait interdiction à la société R. de détenir et de commercialiser le déambulateur SPIDO EVOLUTION contrefaisant les revendications du brevet français FR 2 959 663”.

⁷⁸ See, e.g., Paris Court of First Instance, 7 September 2017, no. 15/07242: “interdit à la SARL W. . . d’importer, d’exporter depuis la France, de fabriquer, d’utiliser, d’offrir en vente, de vendre et de transborder sur tout le territoire français, directement ou indirectement, des tondeuses à gazon référencées TDTAC46T-BS625E ou tout produit comportant un boîtier de transmission identique ou reproduisant les caractéristiques des revendications 1 à 5 du brevet français no. 2 822 916 de la SAS F.”; see also Paris Court of First Instance, 20 April 2017, no. 14/14832: “fait interdiction à la société B. et à la société S. d’importer et de commercialiser en France les laminateurs à plat ‘B. Multi Applicator’ contrefaisants, dans un délai de 8 jours à compter de la signification du jugement à intervenir, et ce sous astreinte provisoire de 1000 euros par infraction constatée”.

⁷⁹ Paris Court of Appeal, 27 October 2017, no. 15/09926.

⁸⁰ Paris Court of First Instance, 19 May 2017, no. 15/15406. See also Paris Court of First Instance, 5 May 2017, no. 15/16348: “fait interdiction à la société défenderesse de proposer à la vente en France des ensembles bras et balais d’essuie-glace, reproduisant ces revendications”.

⁸¹ Paris Court of Appeal, 20 March 2018, no. 16/11444.

Mr. R.”⁸² The wording was probably suggested by the patent holder, and reproduced as such or with some modifications by the court in its decision.

It should be noted that sometimes injunctions also prohibit unfair competition acts which are linked to patent infringement activities, such as free-riding on the investments of the patent holder by making very similar technical documentations and catalogues.⁸³

2. Duration of Permanent Injunctions

According to Article L. 613-1 of the French Intellectual Property Code, the exclusive right of exploitation takes effect as of the filing of the application, even though it is only considered as perfect and definitive once granted. That’s the reason why Article L. 615-4 of the same code provides that, notwithstanding this former article, acts committed prior to the date on which the patent application has been made public or prior to the date of notification to any third party of a true copy of such application shall not be considered to prejudice the rights deriving from the patent. Moreover, as we have seen previously, the injunction stops as soon as the patent expires.

In addition, the judge may adjust the duration of the scope of an injunction. First, it is possible to postpone the effectiveness, as the Paris Court of First Instance did by “prohibit[ing] corporation R to possess and to sell the Spido Evolution walker which infringes the claims of French patent FR 2 959 663 within 8 days after the notification of the judgment”.⁸⁴ Other cases have a somewhat more ambiguous formulation, where one can wonder whether it is the injunction itself which begins after a period of time, or whether – which seems much more likely – the injunction begins as soon as the judgment has been issued to the defendant, but the *astreinte* (which is a daily penalty for refusal to comply with that injunction) can only be enforced after such a period of time has passed since the judgment has been issued.⁸⁵

⁸² Paris Court of Appeal, 22 September 2017, no. 15/09651.

⁸³ Paris Court of Appeal, 20 March 2018, no. 16/11444.

⁸⁴ Paris Court of First Instance, 20 April 2017, no. 15/05831.

⁸⁵ Paris Court of First Instance, 11 July 2016, no. 15/0319: “fait interdiction aux sociétés C et CP de fabriquer, d’utiliser, de détenir, d’offrir en vente, de vendre, de livrer ou d’offrir de livrer des coffres et corps de coffres de volets roulants reproduisant les caractéristiques de la revendication 1 du brevet français n° 0958029, ce sous astreinte de 200€ par mètre linéaire de coffre et corps de coffre fabriqué, utilisé, détenu, offert en vente, vendu, livré ou offert à la livraison, passé un délai de 2 mois à compter de la signification du jugement”. See also, for an extinctive term, Paris Court of First Instance, 8 June 2017, no. 15/14899: “fait interdiction à la société défenderesse de poursuivre de tels agissements, et ce sous astreinte de 50 euros par infraction constatée un mois à compter de la signification du présent jugement pendant 3 mois”. Extinctive (i.e. extinguishing) terms can be combined with suspensive terms: see, e.g., Paris Court of First Instance, 24 February 2017, no. 15/02169: “interdit à Monsieur Ludovic P. d’importer, d’offrir en vente, de vendre, de commercialiser et de détenir à ces fins des baguettes de scellage reprenant les caractéristiques du brevet EP 1 572 548, sous astreinte provisoire de 50 euros par infraction constatée passé le délai de 1 mois après la signification du jugement, et ce pendant 4 mois”.

Postponing the effectiveness of the *astreinte* can be justified when it is practically difficult for the infringer to put an immediate end to the infringement (e.g., by replacing an infringing component by a substitute), or when it appears reasonable⁸⁶ to allow the infringer to sell its remaining stocks.⁸⁷

Until recently, pursuant to the then applicable general civil procedure rules, an appeal stayed the execution of first-instance judgments,⁸⁸ which means that a permanent injunction only became effective once the Court of Appeal has affirmed it. However, at the request of the patent holder, the Court of First Instance could have ordered provisional execution of the decision, which renders the injunction enforceable as soon as the judgment has been issued, despite the appeal.⁸⁹ A decree of 11 December 2019 introduced a major change by reverting that principle.⁹⁰ Henceforth, provisional execution is the principle, since it automatically applies to first-instance decisions, unless the law or the judge decides otherwise. In that latter situation, the judge will have sole discretion to decide if provisory execution is not compatible with the nature of the case.⁹¹ If a decision which benefits from provisional execution is reversed on appeal, the patent holder that enforced the injunction granted in first instance will be held strictly liable⁹² for the damage caused by the enforcement of the injunction.⁹³ In order to mitigate the amount of such liability, the new legislation states that, in case of appeal, the first president of the appellate court can be asked to stop provisory execution “when there is a serious argument in favor of reversal and that there is a risk that the execution may lead to obviously excessive consequences”.⁹⁴

3. Remedies for Violation of Permanent Injunctions

Since French civil law has no equivalent for the notion of contempt of court, an injunction may be accompanied by an *astreinte*, which is a recurring penalty for

⁸⁶ On the discretionary character of the *astreinte* and its modalities, see *infra*.

⁸⁷ Stenger 2019.

⁸⁸ Former Art. 539 of the Code of Civil Procedure: “The time-limit for ordinary means of review action will stay the execution of the judgement. The review action brought within the time-limit will likewise suspend execution.”

⁸⁹ Previous versions of Art. 514 et seq. of the Code of Civil Procedure.

⁹⁰ Art. 514 of the Code of Civil Procedure: “As a matter of law, first instance decisions benefit from provisory execution unless otherwise stated by the law or the court decision.”

⁹¹ Art. 514-1 of the Code of Civil Procedure.

⁹² Art. L. 111-10 of the Code of Civil Execution Procedures: “Subject to the provisions of article L. 311-4, compulsory execution may be extended until its end pursuant to a provisional writ of execution. Such an execution is performed at the peril and risk of the creditor. Shall the title be later modified, the creditor shall reinstate the debtor in his rights in nature or by equivalent.”

⁹³ See Paris Court of Appeal, 31 January 2014, no. 2012/05485, where the patent was finally deemed invalid, and Paris Court of Appeal, 2 July 2019, no. 2016/18780. At this time, the impact on French law of the ECJ case of *Bayer v. Richter* (CJEU 2019), is not known yet.

⁹⁴ New Art. L. 514-3, al. 1 of the CPCEX.

refusal to comply with the injunction, in order to encourage the infringer to comply with that order.⁹⁵ Article L. 131-1 of the French Code of Civil Execution Procedures (CPCEX) provides that “any judge may, even of its own motion,⁹⁶ order an *astreinte* in order to ensure the enforcement of its decision”. The determination of the *astreinte* is a discretionary power of the judge, and does not require any motivation.⁹⁷ Such an *astreinte*, which may also be ordered by the specialized judge for the enforcement of court decisions,⁹⁸ is however not automatically ordered when requested.⁹⁹

Pursuant to the CPCEX, an *astreinte* may be provisional or irrevocable.¹⁰⁰ Whereas a provisional *astreinte* is liquidated later by the judge considering the behaviour of the debtor and their creditworthiness,¹⁰¹ the amount of an irrevocable *astreinte* is determined definitively by the judge when ordered.¹⁰²

Therefore, when a permanent injunction has been violated, the patent holder may ask the relevant judge to liquidate the *astreinte* which has been ordered, and, in practice, the patentee will generally also request a new *astreinte*.¹⁰³ Article L. 131-2 of the CPCEX provides that “the *astreinte* is independent from the damages”, which means that the amount of the *astreinte* has no relationship whatsoever to the amount

⁹⁵ If somebody refuses to comply with an injunction in a court order, they will only be requested to pay this daily fine, which requires asking the court to liquidate the *astreinte*, and, if refusal to pay continues, to ask for the seizure of that amount, which might not be possible in practice if the debtor is insolvent.

⁹⁶ See already the abovementioned case of Paris Court of Appeal, 16 May 1927, Ann. propr. ind. 1928, 13.

⁹⁷ Cass. Civ. 3, 9 November 1983, no. 82-14.775, Bull. III, no. 219; Cass. Civ. 2, 7 June 2006, no. 05-18.332.

⁹⁸ Art. L. 131-1, al. 2 CPCEX: “The specialized judge for the enforcement of court decisions may add an *astreinte* to a decision pronounced by another judge if the circumstances make it appear necessary.”

⁹⁹ Paris Court of First Instance, 10 March 2017, no. 15/16137, where the *astreinte* was denied since the patentee did not prove that the infringing products were sold.

¹⁰⁰ Art. L. 131-2 CPCEX: “The *astreinte* is provisional or irrevocable. Any *astreinte* is deemed to be provisional, unless the judge has said that it was irrevocable. A definitive *astreinte* can only be ordered after a provisional *astreinte* has been ordered, and for a duration that the judge determines. If one of these two conditions has not been met, the *astreinte* shall be liquidated as a provisional *astreinte*.”

¹⁰¹ Art. L. 131-3 CPCE: “The *astreinte*, even when irrevocable, shall be liquidated by the specialized judge for the enforcement of court decisions, unless the judge who ordered it is still dealing with the case, or expressly mentioned that he should enforce it himself.” On the liquidation of an *astreinte* in the matter of a trademark infringement, see Cass. Com. 14 November 2006, no. 04-11.344, Bull. IV, no. 221.

¹⁰² Art. L. 131-4 CPCE: “The amount of the provisional *astreinte* is liquidated by taking into account the behavior of the person against whom the injunction has been granted, and the difficulties he has run into when complying with it. The rate of the irrevocable *astreinte* can never be modified during its liquidation. The provisional or irrevocable *astreinte* is lifted wholly or in part if it is established that the non-performance or delay in performance of the injunction of the judge derives, wholly or in part, from external events.”

¹⁰³ Guerchoun 2017.

of losses suffered by the patent holder, and that it cannot be deducted from the damages to be paid, and must therefore be in addition to them.¹⁰⁴ New patent infringement proceedings may also be brought in case these injunctions are not complied with.¹⁰⁵

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