



# ICLG

The International Comparative Legal Guide to:

## Patents 2013

**3rd Edition**

A practical cross-border insight into patents law

Published by Global Legal Group, in association with CDR, with contributions from:

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#### GLG Cover Design

F&F Studio Design

#### GLG Cover Image Source

Stock.xchng

#### Printed by

Ashford Colour Press Ltd  
August 2012

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ISBN 978-1-908070-34-0

ISSN 2044-3129

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# France

Catherine Mateu



Anna van Biesbrock



## Armengaud & Guerlain

### 1 Patent Enforcement

#### 1.1 How and before what tribunals can a patent be enforced against an infringer?

While patent infringements may be both a civil tort and a criminal offence, almost all patent infringement cases are judged by civil courts. In civil cases, plaintiffs must ask bailiffs to deliver a fully motivated complaint to a defendant, and then file the delivered complaint to the court.

For proceedings initiated after November 2, 2009, the Paris Civil Court of First Instance has exclusive jurisdiction. Before this date, patent infringement proceedings could be filed before one of the seven First Instance Civil Courts, which had territorial jurisdiction in the particular case. Patent infringement proceedings may be initiated upon a complaint from the patent owner, the exclusive licensee under the conditions set in the Intellectual Property Code (hereafter the IPC), or in case of criminal law proceedings, by the public prosecutor or by customs officials.

#### 1.2 What are the pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

In practice, patent infringement proceedings start with a seizure that may be carried out after an order from the President of the Paris Court. Seizure orders may be granted immediately, once the plaintiff discloses relevant pieces of evidence such as the title and any allegedly infringing actions. Seizures are performed by bailiffs who will perform any investigation authorised by the judge, describing or seizing allegedly infringing goods or any document linked to them. Bailiffs can be, if authorised by the court order, assisted by experts (technicians, computer specialists, accountants...) – other than employees of the plaintiff. Within 31 calendar days or 20 business days from the seizure, the plaintiff must deliver a complaint to the defendant. Once the case is filed at the court, there are pre-trial preliminary proceedings in which the plaintiff must show relevant pieces of evidence and the defendant must file a response. In certain cases, an expert may be appointed by the court. During pre-trial proceedings, parties may ask the judge to order the communication of relevant pieces of evidence, as well as to grant a provisional compensation. In straightforward patent infringement cases, pre-trial proceedings last from 12-18 months.

#### 1.3 Can a defence of patent invalidity be raised and if so how?

Patent validity can be challenged in the enforcement action as a counter-claim or in separate proceedings before the same court.

#### 1.4 How is the case on each side set out pre-trial? Is any technical evidence produced and if so how?

After filing the complaint, once the defendant is represented, the plaintiff's lawyer must disclose the pieces of evidence to the defendant's lawyer, who will then respond in writing and disclose relevant pieces of evidence. Parties will be allowed to respond to the opponent's claims or counter-claims. In matters involving complex technologies, a technical expert may be appointed by the court. In any case, the plaintiff must clearly show the infringement.

#### 1.5 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

In regular civil proceedings, while each party's attorney will present orally the case showing relevant pieces of evidence, the court is only bound by written submissions correctly presented during the pre-trial proceedings. Preliminary injunction proceedings like criminal law proceedings are, as a matter of principle, oral; nonetheless, written submissions will be carefully considered by judges.

During pre-trial proceedings, the parties exchange at least two times their written submissions, replying each time to the opponent's former submissions. This exchange of submissions in reply offers the opportunity to develop further the argumentation according to the opponent's arguments. It is possible to add new means of defence or to abandon arguments that have been mentioned previously.

However, once the pre-trial proceedings are closed, no new arguments or exhibits can be exchanged. Indeed, the Judge is bound by the last submissions filed before the closing of the pre-trial proceedings. Oral pleadings should only back-up the written submissions.

#### 1.6 How long does the trial generally last and how long is it before a judgment is made available?

Usually, patent infringement trials last from a couple of hours to half a day. The ruling is made available a few weeks later.

### 1.7 Are there specialist judges or hearing officers and if so do they have a technical background?

In France the 3rd chamber of the Paris Court of First Instance, composed of a total of 12 judges and divided into 4 sections, specialises in patent cases and has exclusive jurisdiction in France for patent cases. The 5th pole of the Paris Appeals Court is the section which specialises in patents. These judges do not have a technical background.

### 1.8 What interest must a party have to bring (i) infringement (ii) revocation and (iii) declaratory proceedings?

According to general civil law, plaintiffs must have a personal legitimate interest to bring proceedings. For infringement cases, as a matter of admissibility, proceedings may be initiated by the owner of the patent or by the beneficiary of an exclusive licence, except as otherwise stipulated in the licensing contract, if, after notice, the owner of the patent does not institute such proceedings. Revocation proceedings may take place as a counter-claim, or as a principal claim by parties who may have an interest in seeing the patent invalidated (e.g. the action initiated by the buyer of a patent to the Paris Appeals Court, October 19, 2005, PIBD 2006-IIIB-47) as long as the interest is not illegitimate (inadmissibility of an invalidity action filed as a retaliation to unlinked unfair competition proceedings (Paris Appeals Court, July 6, 2007, *SIDER v. PRONTEX*)). Non-infringement declaratory proceedings may be brought by any person who proves to have a legitimate industrial operation on the territory of a Member State of the European Economic Community, or showing real and effective preparations to that effect (article L615-9 of the IPC).

### 1.9 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

While there are no discovery proceedings under French law, based under general civil law, a pre-trial judge may order the production of documents. More specifically, since the implementation of the Directive on the Enforcement of Intellectual Property Rights 2004/48/EC, French law expressly provides a “right of communication” to enable plaintiffs to find out the origin of allegedly infringing goods. These pieces of information may be obtained upon a petition presented to the jurisdiction.

### 1.10 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of but not all of the infringing product or process?

Primary infringement is defined in articles L613-3 (prohibition of manufacturing, use, offering for sale and detention) and L613-4 of the IPC. Specifically, article L613-4 of the IPC prohibits the supply or offer to supply, on French territory, of the means of implementing on that territory the invention with respect to an essential element thereof, where the third party knows that such means are intended for putting the invention into effect. This provision does not apply when the means of implementation are staple commercial articles, except where the third party induces the person supplied to commit acts prohibited by article L613-3.

### 1.11 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

Yes, according to article L 613-2 and L 613-3 of the CPI, a party can be liable for infringement of a process patent by importing the product into France even if the process has not been carried out on the French territory.

### 1.12 Does the scope of protection of a patent claim extend to non-literal equivalents?

French case law has acknowledged infringement by equivalents (where a similar function is performed by a different item of the infringing goods, Supreme Court January 26, 1993, PIBD 1996-608-III-175), as well as partial infringement (reproduction of the essential characteristic of the protected system, the Supreme Court February 19, 1991, PIBD, 1991-503- III-391).

### 1.13 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

Article L613-25 of the IPC provides that a patent may be invalid if:

- its subject matter is not patentable within the terms of the IPC;
- it does not disclose the invention sufficiently clearly and completely to be carried out by a person skilled in the art; or
- its subject matter extends beyond the content of the patent application.

### 1.14 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

Courts may stay on the proceedings for good administration of justice (i.e. other proceedings pending) and must stay on the proceedings for infringement of a French patent that covers the same invention as a European patent applied for by the same inventor until the French patent ceases to have effect (because the European patent has been granted) or until the date on which the European patent application is refused, withdrawn or the European patent revoked.

### 1.15 What other grounds of defence can be raised in addition to non-infringement or invalidity?

The theory of “essential facilities” from EU law or exhaustion of rights can be raised. Also, there is the possibility to oppose prior rights of possession of the invention (article L613-7 of the IPC).

### 1.16 Are (i) preliminary and (ii) final injunctions available and if so on what basis in each case?

Preliminary injunctions may be granted prior to trials on the merits (article L615-3 of the IPC), should plaintiffs establish that the infringement is plausible. Successful plaintiffs on the merits are very commonly granted injunctive relief. Under French practice, injunctive relief is granted under penalties per day of delay or per infringement to the injunction with the benefit of immediate execution (there is no suspension of the injunction even if an appeal is lodged).

### 1.17 On what basis are damages or an account of profits estimated?

As a matter of principle, damages tend to repair the damage resulting from the infringement. Their assessment will determine whether the plaintiff is entitled to lost sales or to a “licence fee” depending on whether the patent is used. In any case, upon the plaintiff’s request, the jurisdiction may allocate a lump sum which shall be no less than the royalty fee the infringer would have paid if he had been authorised to do so (article L615-7 of the IPC).

### 1.18 What other form of relief can be obtained for patent infringement?

In a successful infringement action, the patent owner will also most often be granted the publication of the ruling (in publications, as well as on the defendant’s website), and, if appropriate, the recall of the goods, the destruction of infringing goods or of machinery used to produce them.

### 1.19 Are declarations available and if so can they address (i) non-infringement and/or (ii) claim coverage over a technical standard or hypothetical activity?

Declaratory non-infringement proceedings may be initiated as mentioned in question 1.8.

### 1.20 After what period is a claim for patent infringement time-barred?

Three years from the last infringement.

### 1.21 Is there a right of appeal from a first instance judgment and if so is it a right to contest all aspects of the judgment?

An appeal may be filed within one month from the notification of the decision. A two-month extension to this deadline is granted to parties located outside France. After a formal appeal, the appellant must present its motives within three months. In practice, most appeals cover the right to contest all the aspects of the judgment. Once the appeal is filed, the non-appealing party may also contest the first instance ruling within the appeal proceedings.

### 1.22 What are the typical costs of proceedings to first instance judgment on (i) infringement and (ii) validity; how much of such costs are recoverable from the losing party?

There are attorney fees for requesting seizure orders, bringing an action, presenting court petitions, pleading the case and counselling the client. For first instance proceedings, these fees range from EUR 25,000 to EUR 100,000 or more depending on the case.

In most cases, there are also fees for patent experts (*conseils en propriété industrielle*) who will assist the attorney and the bailiff during both the seizure and the infringement proceedings. These fees are from EUR 30,000 to EUR 150,000 or more depending on the issues raised in the case.

There are bailiff fees of a couple of thousand euros minimum for performing the seizure and a couple of hundred euros for executing the decision (notification, seizures of accounts...). The legal costs of first instance range from a couple of hundred euros to a couple of thousand euros.

There may be expert fees if an expert is appointed by the court. These fees range from EUR 10,000 to more than EUR 100,000 in cases involving complex technologies.

As a matter of principle, the loser has to pay the other party’s legal costs and attorney fees (more and more French courts grant a lump sum for attorney fees close to the fees justified by produced invoices). In certain cases the judge may not order compensation for the fees and expenses to the other party, if the judge decides to take into account the economic situation of the loser, or decides such payments would not be fair.

### 1.23 Can a defendant that is found to infringe and is ordered to pay damages by a final non-appealable decision of the Court apply to set aside the order if the patent is subsequently revoked by another party?

No, once the court rendered a final non-appealable decision, this decision must in any case be honoured, even if the patent is subsequently revoked.

In this context, the French *Cour de Cassation* (Supreme Court) decided in a recent decision dated 17 February 2012 that a party who has been condemned to pay damages for patent infringement by a final decision cannot ask for restitution of the sums already paid if the patent is subsequently invalidated.

## 2 Patent Amendment

### 2.1 Can a patent be amended *ex parte* after grant and if so how?

Since the law of 4 August 2008, the patentee may at any time limit patent claims before the French Patent Office (INPI) by filing a request and paying the relevant fees (EUR 250 in July 2012).

### 2.2 Can a patent be amended in *inter partes* revocation proceedings?

French Patent claims are solely amended before the INPI. European Patent claims can be amended before the EPO. French and European Patents can be totally or partially cancelled by French courts.

### 2.3 Are there any constraints upon the amendments that may be made?

Amended claims must be supported by the description and cannot be broader than initial claims.

## 3 Licensing

### 3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

A patent licence must be in writing and fulfil notably the conditions of competition laws such as EU Regulation n°772/2004 on technology transfer agreements.

### 3.2 Can a patent be the subject of a compulsory licence and if so how are the terms settled and how common is this type of licence?

While French law provides the possibility of compulsory licences,

these licences are extremely rare. A compulsory non-exclusive licence may be requested at the court for patents that have not been used according to articles L613-11 and *seq.* of the IPC. Also, the owner of a subsequent patent that cannot be used without the authorisation of the owner of a prior patent may request before the court a licence of the prior patent to the extent necessary for exploiting the patent of which he is holder and in as much as that invention constitutes, with regard to the prior patent, a substantial technical progress and is of considerable economic interest. Plant Variety Rights owners may also request a licence. *Ex officio* patent licences may also be requested for public health reasons (articles L613-16 and *seq.* of the IPC). There is also the possibility of *ex officio* licences for national defence requirements.

## 4 Patent Term Extension

### 4.1 Can the term of a patent be extended and if so (i) on what grounds and (ii) for how long?

While there is no possibility of a patent extension, in practice, an invention may be protected for a longer term in France:

- if a European Patent (EP) designating France is filed under the priority of a French patent (addition of almost a year of protection); or
- by requesting supplementary protection certificates in the case of pharmaceutical specialities and plant protection products covered by a marketing authorisation.

## 5 Patent Prosecution and Opposition

### 5.1 Are all types of subject matter patentable and if not what types are excluded?

Article L611-10 of the IPC expressly states as patentable all new inventions implying an inventive-step and susceptible to industrial application, and that shall not be regarded as inventions, discoveries, scientific theories and mathematical, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business, programmes for computers or presentations of information (Paris Court of First Instance March 19, 2010, RG 2008/01998: cancellation of a patent covering solely a method of presenting information). These provisions apply only to the extent to which the patent relates to such subject matter. Thus, patents referring to computer programmes may be valid (Paris Court of First Instance, November 20, 2007, PIBD-2007-867-III-59, regarding the patentability of a system of couponing including a computer programme).

More precisely, articles L611-16 and *seq.* provide that methods for treatment of the human or animal body by surgery or therapy and diagnostic methods are not patentable. However, this rule does not apply to products, in particular substances or compositions, for use in any of these methods. Thus, very commonly, pharmaceutical patents are validated (Paris Court of First Instance July 10, 2010, RG 2008/16206).

### 5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

No, there is not.

### 5.3 May the grant of a patent by the Patent Office be opposed by a third party and if so when can this be done?

French patents may not be opposed. European patents may be opposed up to 9 months after the publication of their granting.

### 5.4 Is there a right of appeal from a decision of the Patent Office and if so to whom?

The Paris Appeals Court has exclusive jurisdiction for appeals regarding decisions from the public administration that delivers patents also called INPI. Decisions from the European Patent Office (EPO) may be appealed to the EPO Boards of Appeal.

### 5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Article L611-8 of the IPC provides that where an application for the grant of an industrial property title has been made, either for an invention unlawfully taken from an inventor or his successors in title, or in violation of a legal contractual obligation, the injured party may claim ownership of the application or of the title granted. According to the IPC, actions claiming ownership shall be barred after three years from the publication of the grant of the industrial property title. The IPC also says that if the bad faith of the owner of the title at the time the title was granted or acquired can be proved, the time limit shall be three years from the expiry of the title.

### 5.6 What is the term of a patent?

The term of a patent is 20 years from the date of the application.

## 6 Border Control Measures

### 6.1 Is there any mechanism for seizing or preventing the importation of infringing products and if so how quickly are such measures resolved?

EU Regulations 1383/2003 and 1891/2004 have harmonised and set the conditions for seizures by customs authorities of infringing goods within the EU. Customs agents may act upon the patentee's request or during a customs control (in which case the patentee has 3 business days from the notification to present a request). Once goods are seized, the patentee must introduce proceedings to seek whether intellectual property rights are infringed within 10 business days. Then, regular proceedings will follow.

## 7 Antitrust Law and Inequitable Conduct

### 7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

EU competition law has established the principle of exhaustion of right that has limited the scope of patent rights and led to article L613-6 of the IPC. Also, several copyright law cases have generated the "essential facilities" doctrine, limiting intellectual property rights that could be applied to patent cases. We are not aware of rulings from the Paris courts implementing such theory in patent cases, even if it has been debated in cases we have worked on.

## 7.2 What limitations are put on patent licensing due to antitrust law?

General EU provisions regarding non-discrimination and free movement of goods within the EU, as well as competition law issues from EU treaties. More specific competition rules are found in Regulation n°772/2004, which expressly prohibits pricing restrictions or limiting production (article 4).

## 8 Current Developments

### 8.1 What have been the significant developments in relation to patents in the last year?

In patent infringement cases, patentees are now allowed more broadly to request patent limitations.

There has been abundant case law regarding preliminary injunctions and supplementary protection certificates.

Also, after a test period, the Paris Court of First Instance has decided not to accept “protective letters”, filed to avoid *ex parte* injunctions.



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## 8.2 Are there any significant developments expected in the next year?

International and EU negotiations regarding a single European Patent and implementation of the ACTA treaty against counterfeiting in general are expected in the next year.

## 8.3 Are there any general practice or enforcement trends that have become apparent in France over the last year or so?

Since the implementation of the enforcement directive, courts are more inclined to award higher damages and legal fees, based on produced invoices. It is also quite common for courts to order the recall of goods (Paris Court of First Instance, March 4, 2009, RG 2007/2589).

Also, the recent case law of Paris’ courts shows that Judges award legal fees more and more in relation to the real costs that have been borne by a party and not as symbolic sum, as it has often been the case before.



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Cabinet Armengaud & Guerlain, founded in 1993, is fully specialised in intellectual property (patents, trademarks, designs and models, and copyright) and the related issues of unfair competition, consumer law, advertising rights (particularly comparative advertising) and the Internet. Reflecting its well-recognised expertise, the firm has worked with a wide variety of French and international clients, from artists and inventors to blue-chip companies, governments and state-owned enterprises.

The firm places particular emphasis on maintaining lasting, high-quality relationships with its clients, combining competence and reactivity. Each file is treated in a collaborative manner.

Armengaud & Guerlain works with a network of foreign colleagues selected for their high level of technical competence and their use of work methods identical to ours, thereby enabling us to treat files simultaneously in several countries. In addition to French, the firm’s daily working languages include English, German and Spanish.

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