

Patent Infringement Damages awarded by the *Tribunal de Grande Instance* of Paris

2000-2007

Presentation by Pierre Véron at the conference organised by the 3rd chamber of the *Tribunal de Grande Instance* of Paris and the Paris Bar Association on 1st October 2008

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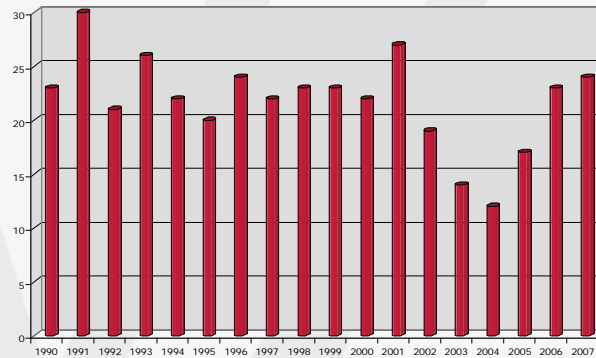
This study was based on a statistical analysis of data taken from judgments issued by the *Tribunal de Grande Instance* of Paris in patent infringement cases, from 1st January 2000 to 31 December 2007 (in some cases, extending over the period 1990-2007).

It includes judgments ordering an expert inquiry while awarding an advance payment, judgments awarding damages without an expert inquiry, and judgments ruling on the amount of damages in light of an expert report.

The statistical information was collected and processed by Chantal Nouvellet, Research and Documentation, and Céline Ruste, Economic Litigation Consultant, at *Véron & Associés*.

Each year, an average of 20 judgments award damages for patent infringement

Number of judgments ruling on the damage caused by patent infringement



On the average, over the period 1990-2007, the *Tribunal de Grande Instance* of Paris issued approximately twenty decisions each year on the damage caused by patent infringement.

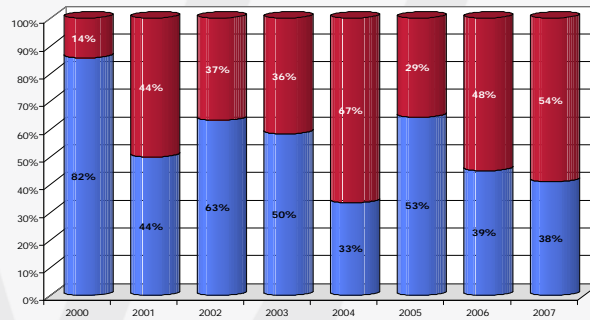
During the period 1990-2000, the annual number of decisions ruling on damages remained relatively stable, with nearly 23 decisions issued each year and a record high of 30 decisions in 1991.

Between 2002 and 2005, the lowest number of decisions were handed down each year, with annual figures ranging between 12 and 19 decisions.

Both 2006 and 2007 witnessed a high rise in the number of decisions being handed down, with 23 and 24 decisions respectively, ruling either provisionally or definitively, on the damage caused by patent infringement.

The *Tribunal* has ordered an expert inquiry in 55% of cases
 (Falling percentage)

Number of judgments ruling without an expert inquiry (lump sum payment)



Number of judgments ordering an expert inquiry and awarding an advance

NB: Since 2005, the *Tribunal* has issued 3 judgments ordering the production of accounting documents by the defendant instead of an expert inquiry



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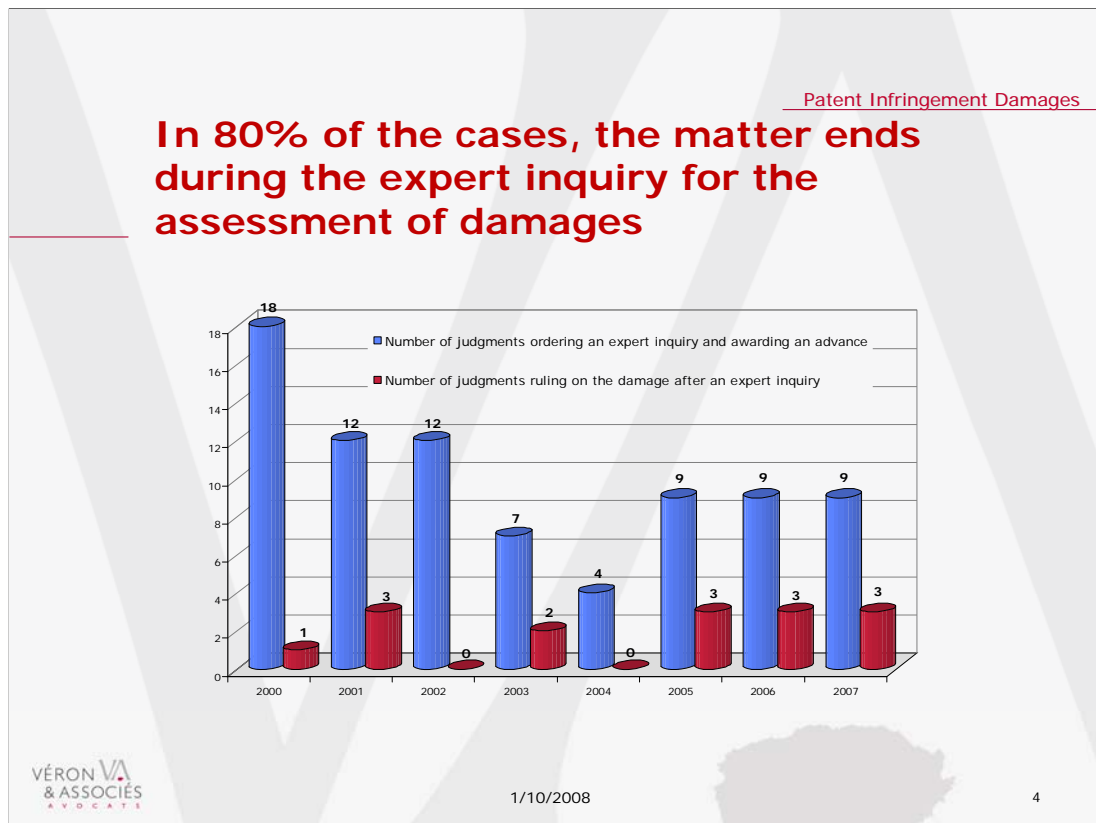
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In this bar chart, the following distinction is made amongst judgments ruling on the damage caused by patent infringement:

- ▶ the percentage of judgments ordering an expert inquiry while awarding the patentee an advance on the final amount of damages,
- ▶ the percentage of judgments issued without an expert inquiry, whereby the *Tribunal* awards damages in a lump sum.

On the average, over the period 2000-2007, the *Tribunal* ordered an expert inquiry in more than 50% of the cases. There is, however, a clear downward trend in the courts to resort to expert inquiries, with 82% of the decisions ruling on the issue of damages ordering an expert inquiry in the year 2000, as compared to 38% in 2007.

The *Tribunal* increasingly tends to assess the damage suffered by the patentee without resorting to an expert inquiry when it considers that it has sufficient information available to quantify damages; since 2005, three decisions have been issued whereby the judge ordered the production of accounting documents by the defendant rather than an expert inquiry.



This bar chart makes an annual comparison of the following two situations*:

- ▶ the number of judgments ordering an expert inquiry and awarding an advance payment,
- ▶ the number of judgments ruling on the damage caused by the patent infringement after an expert inquiry.

Therefore, in 80% of the cases for which the *Tribunal* has ordered an expert inquiry, such matter ends before the court has definitively ruled on the damage.

Most frequently, in light of the expert's work, the parties decide to settle the matter either during the expert inquiry or on the basis of the expert's findings.

* There is an interval of time that is not being taken into account, corresponding to the length of the expert inquiry, the period of time between the judgment ordering the expert inquiry and the judgment ruling on the damage after the expert inquiry. This interval of time can be between one to two years long, which is the average length of an expert inquiry. In other words, it would be more accurate to individually count those cases for which the *Tribunal* ordered an expert inquiry and where such case was not the object of a judgment on the merits, but this is a complex task. The adopted method, by overlooking the above-described one or two year interval, provides however a realistic approximation.



Factors taken into account in average damage award calculation:

- ▶ Amount of damages awarded as an advance, an expert inquiry being ordered to determine the final amount
- ▶ Amount of lump sum damages awarded, without an expert inquiry
- ▶ Amount of final damages awarded, in light of an expert report

The amounts awarded pursuant to Article 700 of the French Civil Procedure Code are not considered in this calculation.

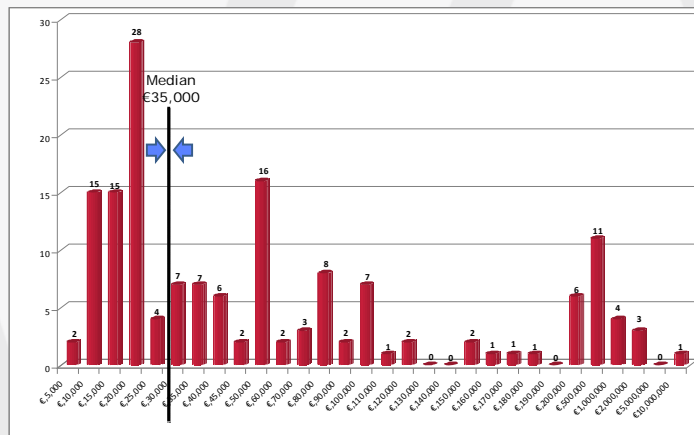
The average amount of damages thus awarded in 158 judgments is €180,000.

But this average amount does not take into consideration the real amounts of the judgments rendered on a day to day basis, as it is increased by a handful of exceptional decisions.

It is for this reasons that the median damages amount is presented on the next slide.

Patent Infringement Damages

The **median** amount of damages awarded is € 35,000



(median value: as many values above as below the line)

The median amount of damages corresponds to the middle amount awarded (as many values above as below the line).

When the values are very disparate (as is the case here, where one judgment awarded €10,000,000 but dozens of other judgments award less than €50,000), the median amount gives a more accurate picture of reality.

Over the period 2000-2007, the median amount is €35,000.

The top 10 largest payment advances awarded by the *Tribunal* since 1990

Date	Parties	Total Damages (outside Article 700)
09/02/07	Ethypharm v. Laboratoires Fournier	€10,000,000
29/06/04	Technogenia v. Martec, Ateliers Joseph Mary, BMI	€2,000,000
06/06/07	Rotanotice v. M.Y. Healthcare France	€500,000
09/10/01	Citec Environnement v. K.A France, Ssi Schaeffer	€304,899
16/11/94	L'Oréal v. Estée Lauder	€304,898
07/07/95	Peaudouce v. Celatose, Theeten, Martin et Loeuille	€304,898
09/10/01	Sara Le-DE v. La Johnson Française	€250,000
13/03/96	Guillot Electrique v. FTSA	€228,674
28/03/00	Glaxo Operation UK Limited v. Laboratoire Flavelab	€228,674
11/03/05	Valois v. Rexam Dispensing System Anciennement Sofab	€200,000
05/10/05	Zodiac Pool Care v. Arch Water Products Tematech, Aquaproducts	€200,000
01/12/05	Giora, Recherche Et Developpement Concept Acoustique, Soproci v. Socarel, Bec	€200,000
26/09/07	Mutzel v. Institut Pasteur, Philippe Marliere, Didier Fondeur, Evologic	€200,000
03/10/07	Treves v. Visteon Systemes Interieurs	€200,000

This table lists the top largest amounts of advances awarded by the *Tribunal de Grande Instance* of Paris since 1990.

The advances awarded have exceeded €1,000,000 in two cases:

- ▶ In *Ethypharm v. Laboratoires Fournier*, Ethypharm was awarded the highest amount ever with €10,000,000 in 2007
- ▶ Technogenia was awarded a €2,000,000 advance in compensation for the infringement of its patent by Martec, Ateliers Joseph Mary and BMI

Since the early 2000s, the amount of advances awarded has increased: out of the 15 decisions awarding an advance exceeding €200,000, 11 decisions have been issued over the last eight years.

Patent Infringement Damages

The largest amounts of damages awarded by the *Tribunal* since 1990?

(excluding advances)

Date	Parties	Total damages (outside Article 700)
04/03/94	<i>Ciba Geigy Rhône Poulenc Agrochimie v. Interphyto, Laureau et Chavanne de Dalmassy</i>	€6,148,848
14/09/07	<i>Philips Electronics v. Manufacturing Advanced Media Europe</i>	€2,000,000
14/05/03	<i>Dentsply Research & Development Corporation v. Electro Medical Systems</i>	€1,256,178
29/06/95	<i>Prodel Jacques et Société Prodel v. Renault Automation</i>	€1,036,653
09/11/04	<i>Schneider Electric Industries v. Wenzhou Fly-Dragon Electric</i>	€1,000,000
26/06/96	<i>Van Der Lely NV et Lely Industries v. Macchine Agricole Remac Srl</i>	€990,919
12/09/07	<i>SEB v. De Longhi</i>	€989,858
30/03/99	<i>Isover Saint-Gobain v. Fibraver et Tictor</i>	€722,884
08/03/06	<i>Citec Environnement v. K.A. France, Ssi Schaeffer</i>	€693,653
13/09/95	<i>Van Der Lely NV et Lely Industries v. Ouivogne</i>	€584,974
26/10/95	<i>Doublet v. Altrad Développement et Select Etam</i>	€561,163
03/03/95	<i>Thomann (Chantal) v. Thomann (Bernard)</i>	€550,036
10/07/02	<i>Sedac-Mecobel v. J.P. Gruhier SA, Styling</i>	€517,036

This table lists the top 13 largest amounts of damages awarded by the *Tribunal de Grande Instance* of Paris since 1990, excluding advances and sums awarded pursuant to Article 700 of the French Civil Procedure Code.

Since 1994, the record has been held by the *Ciba v. Interphyto* case, in which the court issued a compensation award in excess of €6,000,000 (equivalent to FRF 40,000,000 at the time).

Since 2000, the amount of damages has reached over €1,000,000 on only three occasions.

U.S. top nine largest damages awards since 2005

Chart 2D. Damages Awards Exceeding \$100 Million, 2005–2007

Year	Defendant	Plaintiff	Technology	Award (in MM)
2007	Microsoft	Alcatel-Lucent	MP3 technology	\$1,500.0
2007	Medtronic	DuPuy Spine	Spinal implant devices	\$226.3*
2007	WL Gore & Associates	C.R. Bard Inc.	Vascular and stent-grafts	\$185.0
2007	Microsoft/Autodesk	z4 Technologies Inc.	Anti-piracy software program	\$160.0*
2006	Hynix	Rambus	Memory chips	\$133.0
2005	AT&T Wireless/Alltel	Freedom Wireless Inc.	Prepaid wireless service	\$128.0
2006	Alcon Inc.	Advanced Medical Optics	Fluidics for eye surgery	\$121.0
2007	Vonage	Verizon	Internet telephony technology	\$117.5
2006	DirecTV	Finisar Corp.	On-demand television	\$115.9

*These damages have been upheld by the Court of Appeals for the Federal Circuit (CAFC).

Damages awards in the United States* remain considerably higher than damages awards in France since they frequently exceed \$100,000,000 (approximately €75,000,000), which represents more than 12 times the highest amount of damages ever awarded by the *Tribunal de Grande Instance* of Paris.

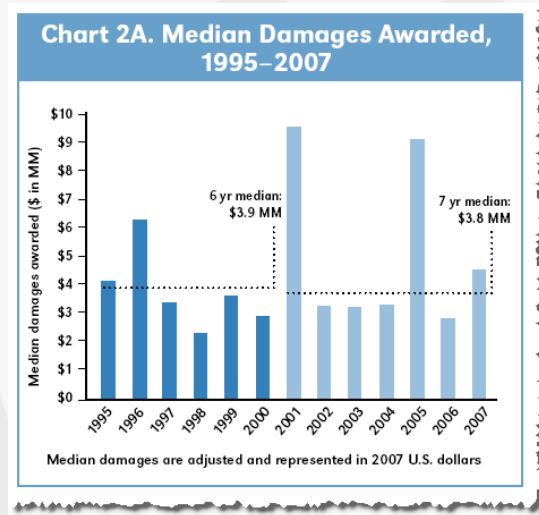
This disproportion is explained initially and above all by the difference in scale; the U.S. market represents 300,000,000 consumers while the French market counts only 60,000,000 consumers; the scale factor of the "total infringing sales" is thus generally 5 to 1.

Moreover, litigation before U.S. Courts, in fact concerns to a large extent, the worldwide production of the concerned products (when the products are manufactured in the U.S., the manufacture of such products constitute an infringement of the U.S. patent wherever in the world such products are later distributed).

The different rules of law, which permit the award of punitive damages are not very often applied and cannot explain the disproportion between the figures in France and those in the U.S.

* Source: *Patent Litigation Trends In Damages Awards, Success Rates And Time-To-Trial*, Aron Levko and Vincent Torres, *les Nouvelles* 2008.09

Median amount of damages awarded by U.S. courts since 1995



As a reminder, the median amount awarded by the *Tribunal de Grande Instance* of Paris from 2001 to 2007 is €39,000 compared to \$3,800,000 awarded by the U.S. courts.

Patent Infringement Damages

Attorney fees
Article 700 of the French Civil Procedure Code

The average amount (2000-2007) awarded pursuant to Article 700 of the French Civil Procedure Code (attorney fees), in patent infringement cases is

€10,892

The median amount is

€7,611

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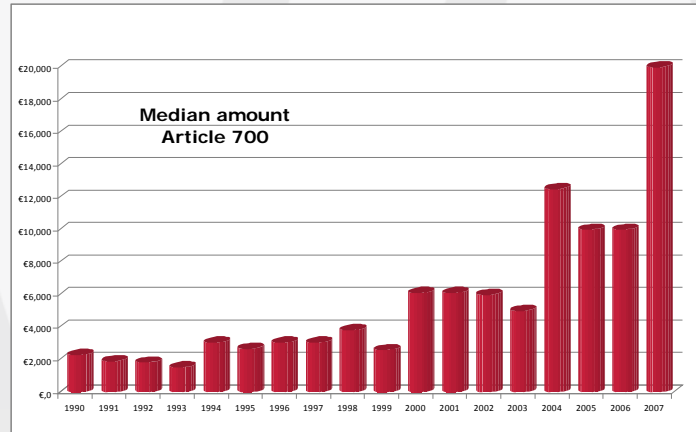
Article 700 of the French Civil Procedure Code refers to attorney fees and related expenses. It provides that the court has the discretion to grant whatever amount it deems "equitable" as compensation.

Article 700 (attorney fees): the largest sums awarded by the *Tribunal*

Date	Parties	Article 700
29/06/04	<i>Technogenia v. Martec, Ateliers Joseph Mary, BMI</i>	€150,000
08/03/06	<i>Citec Environnement v. K.A. France, Ssi Schaeffer</i>	€75,000
09/02/07	<i>Ethypharm v. Laboratoires Fournier</i>	€50,000
04/03/94	<i>Ciba Geigy Rhône Poulenc Agrochimie v. Interphyto, Laureau et Chavanne de Dalmassy</i>	€45,735
09/11/04	<i>Charles Breda, Pascal Cuypers, Lieberherr Associates v. Maitres Valliot et Bellahsen-Poiteau</i>	€44,000
01/10/04	<i>Seiko Epson Corporation v. Armor (cartouches d'encre et appareils d'impression)</i>	€40,000
06/04/04	<i>Marcel Arteon v. Deha Ankersysteme GmbH & Co. KG, Deha France</i>	€30,000
09/11/04	<i>Schneider Electric Industries v. Wenzhou Fly-Dragon Electric</i>	€30,000
14/02/07	<i>Multivac France v. Serop Concept, Herta</i>	€30,000
06/06/07	<i>Rotanotice v. M.Y. Healthcare France</i>	€30,000
03/10/07	<i>Treves v. Visteon Systemes Interieurs</i>	€30,000
05/12/07	<i>De'Longhi SPA v. Wineurope, CAMIF Particuliers, Zhejiang Sanhe</i>	€30,000

The list of the largest sums awarded pursuant to Article 700 (attorney fees) since 1990 shows that judges have revised upwards their assessment over the past few years: among the 12 cases listed, only one case dates prior to 2000.

Development between 1990 and 2000 of the median amount awarded pursuant to Article 700 (attorney fees)



The upward trend of the median amount awarded pursuant to Article 700 (attorney fees) by the *Tribunal de Grande Instance* of Paris began in 2000 and has been confirmed over the past years, having reached almost €10,000 by 2004; and then double such amount, reaching €20,000 in 2007.

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