

Case Comment

France

Bagless vacuum cleaner patent litigation in France:

Evidence obtained through improperly conducted saisie-contrefaçon is vacuum cleaned by the Court of Paris

In the high profile patent case of *Dyson v. Hoover*, the judgment handed down by the English Court of Appeal on 4 October 2001 resulted in a full victory for the claimant. European Patent 0 042 723 for a bagless vacuum cleaner was held valid and infringed as it was found in the Patents Court.

The outcome of a similar case launched by Dyson in France was completely different, for purely procedural reasons. On 11 December 2001, the *Tribunal de Grande Instance* (Court of First Instance) in Paris dismissed the complaint of Dyson against the Korean manufacturer LG Electronics, based also on EP 0 042 723. The Court did not deal with validity nor with infringement. The case was dismissed just because the *saisie-contrefaçon* (search and seizure) was not properly conducted.

Saisie – as it is widely known – is a powerful way to obtain evidence of infringement: when shown a copy of the patent in force the Court must permit *ex parte* the patent holder to have an *huissier* (a bailiff, a public officer) conduct search and seizure in the premises of the alleged infringer. Article L.615-5 of the French Intellectual Property Code reads as follows:

“The owner of a patent application or the owner of a utility certificate application or the owner of a patent or of a utility certificate shall have the possibility of furnishing proof by any means whatsoever of the infringement of which he claims to be a victim.

He shall further be entitled, on an order given by the President of the First Instance Court of the place of the presumed infringement, to direct any bailiffs, accompanied by experts of his own choice, to proceed with a detailed description, with or without

effective seizure, of the allegedly infringing articles or processes. Such order shall be provisionally enforced. It may be subjected to a security on the part of the plaintiff. In that same order, the President of the Court may authorize the bailiff to carry out any enquiry required to ascertain the origin, nature and scope of the infringement.

The same right shall be enjoyed by the licensee of an exclusive right of working under the conditions laid down in the second paragraph of Article L. 615-2 and in the fourth paragraph of Article L. 615-2, by the holder of a license of right, a compulsory license or an ex-officio license in accordance with Articles L. 613-10, L. 613-11, L. 613-15, L. 613-17 and L. 613-19.

If the petitioner fails to institute proceedings before a Court within a term of 15 days, the seizure shall automatically be void, without prejudice to any damages.”

Therefore, the bailiff who performs seizure may have the assistance of experts chosen by the plaintiff who are usually the plaintiff's patent attorneys. In some cases, the plaintiff appoints other people such as university professors to assist the bailiff.

According to a leading judgment¹ of the *Cour de Cassation*, the French Supreme Court for civil cases, the expert who assists the bailiff for a *saisie* cannot be chosen among the plaintiff's employees. The rationale was in article 6-1° of European Convention on Human Rights: the Court held that the right to a fair trial means that the expert must be independent from the parties.

In the *Dyson v. LG Electronics* case, the bailiff was assisted by two Dyson employees (a technician who disassembled the vacuum cleaning unit to allow the description of its inner mechanism and the advertising manager who helped the bailiff in his description). The Court of Paris found that such assistance was not permitted and therefore held the *saisie* invalid. As the plaintiff did not submit any other evidence of the alleged infringement, the case was dismissed. This judgment shows that the *saisie* is a powerful tool

but that it must be used with care. Otherwise the evidence gathered will be... vacuum cleaned.

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¹ Cass. Civ. 1, 6 July 2000, Dalloz 2001, n° 31 p. 370, note P. Véron