

# Patent Infringement Damages in France

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- Procedural law issues
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## Substantive Law Issues

### Who may sue ?

- The patentee
- The exclusive licensee
- The licensee may join in  
Need to register the license agreement with the French Patent Office
- The distributor of the patented product has **no** legal standing to claim damages

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## Substantive Law Issues

### Who infringes ?

- Anyone acting without the patentee's consent
- Possible to have a parent company held jointly liable if it takes part in the infringement
- Difficult to have the management held personally liable for infringement

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## Substantive Law Issues

When did the infringement occur ?

Statute of limitation of three years:

Article L. 615-8 IPC: "*Infringement claims (...) have a statute of limitation of three years from the day the acts of infringement occurred.*"

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## Procedural Law Issues

- **Jurisdiction of the courts**  
Same civil court to decide validity and infringement
- **Duration**  
Average length of proceedings on the merits (before discussion on damages):  
2 years
- **Provisional payment on damages**  
usually ordered by the Court  
(€10 000 to €500 000; top €2 000 000)

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## Procedural Law Issues

Court appoints an expert  
to gather relevant technical, financial and  
marketing information for the assessment of  
damages

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## Procedural Law Issues

Court expert holds meetings and  
must listen to the parties

- the parties may provide the expert with relevant documents and send him written submissions ("*dire* ") which he must take in account in his report
- confidential information is protected

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## Damages Calculation

- Legal Grounds For Compensation
- Lost Profit – Total Infringing Sales
- Lost Profit – Lost Margin or Lost Royalty?
- Lost Profit – Sales Actually Derived
- Lost Profit – Lost Margin
- Lost Profit – Lost Royalty
- Other Losses Suffered
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## Legal Grounds For Compensation

Article L. 615-1 IPC:

*"Patent infringement  
gives rise to the civil liability  
of the infringer"*

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## Legal Grounds For Compensation

### Compensation in the Civil Code:

- Article 1382  
Any harmful wrongdoing must be compensated
- Article 1149  
Compensation usually extends to the "lost profit" (*gain manqué, lucrum cessans*); and the "loss suffered" (*perle subie, damnum emergens*)

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## Legal Grounds For Compensation

### Impossible to claim for the infringer's profit: the "*Fishing reel*" case (1963)

- The plaintiff cannot ask for the infringer's profit
- Only the actual loss of the plaintiff may give rise to compensatory damages (be it higher or lower than the infringer's profit)

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## Lost Profit – Total Infringing Sales

The lost profit is based on  
“total infringing sales”  
(“*masse contrefaisante*”):

The total infringing sales include any  
product or process held infringing

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## Lost Profit – Total Infringing Sales

First extension  
of the “total infringing sales”:  
the theory of the “entire market value”  
(“*tout commercial*”)

- when the infringing means constitute only a part of a more general product sold by the infringer, or
- when the sale of the infringing product will induce the sale of accessories (convoyed sales)

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## Lost Profit – Total Infringing Sales

Second extension  
of the “total infringing sales”:  
the “springboard” effect

First Instance Court of Paris, May 7, 2001

*“the sale of the infringing product for 18 months gave to the defendants a competitive advantage acquired illegally for a part of its customers, an advantage which remains after the termination of the infringement acts”*

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## Lost Profit – Lost Margin or Lost Royalty?

Lost margin and reasonable royalty:  
does the plaintiff actually directly  
work out his invention?

-If “yes”: he is at least partially entitled to his lost margin

-If “no”: he is only entitled to a royalty based on the infringer’s turnover on the “total infringing sales”

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## Lost Profit – Sales Actually Derived

Would the plaintiff have made  
100 % of the infringer's sales?

*De facto* presumption that "yes"

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## Lost Profit – Sales Actually Derived

Would the plaintiff have made  
100 % of the infringer's sales?

### Application of balancing factors

- When the plaintiff was not in a position to make all the sales corresponding to the "total infringing sales" and/or
- To reduce the part of the "total infringing sales" to be taken into account to apply the "lost margin"

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## Lost Profit – Lost Margin

Determination of the lost margin of the plaintiff:

- Based on the turnover the plaintiff would have made on the additional products
- Deduction of the “proportional costs” but not the “fixed costs”

French approach is similar to the German approach in the case “*Gemeinkostanteil*”

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## Lost Profit – From Theory To Practice

Five highest awards of lost profit:

- 8 400 000 € Interphyto / Ciba Geigy
- 2 888 000 € Heriaut / Franquet
- 2 378 000 € Mécafrance
- 2 245 000 € Electrolux
- 2 000 000 € Technogenia

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## Lost Profit – Lost Royalty

Determination of the lost royalty of the plaintiff:

- Complement or replacement of the lost margin
- Basis to which the royalty rate will be applied: the infringer's turnover

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## Lost Profit – Lost Royalty

Judicial increase of the reasonable contractual rate:

*"An infringer must pay more than a licensee to reach an equivalent position because he is not in a position to refuse the conditions imposed on him"*

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## Lost Profit – Lost Royalty

Judicial increase of the reasonable contractual rate:

- Extent of the increase: average 50 %

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## Lost Royalty From Theory To Practice

The highest reported royalty rate: 12.5%

Court of Appeal Paris 24 April 1998  
L'Oréal v. Estée Lauder

*"the court expert mentioned that the standard royalty rate in the industry of fine chemicals varies between 10% and 15%; the royalty rate should therefore be set in taking in account the fact that the infringer is not a licensee who was in a position to discuss arm's-length; the royalty rate of 12.5% suggested by the court expert is not excessive"*

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## Other Losses Suffered

- Distinct from the lost profit
- Compensate the loss of advantages inherent to the monopoly
  - Price erosion
  - Depreciation of the patent
  - Lost licenses or assignments
  - Any other distinct loss

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## Ancillary Matters

- Compensation assessed until the day the decision is rendered by the court (depreciation of money taken in account)
- Costs of the proceedings:
  - No Court cost in France
  - Article 700 of the French Code of Civil Procedure  
The losing party will be ordered to pay all or part of the attorneys fees and court appointed experts fees (€ 10 000 to € 200 000)

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**Thank you for your attention**

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