

'Abuse of Rights' in Belgian and French Patent Law

A Case Law Analysis

by **Amandine Léonard***

Abstract: This paper examines what types of actions undertaken by patent holders have been considered as abusive in the framework of French and Belgian patent litigation. Particular attention is given to the principle of the prohibition of "abuse of rights" (AoR). In the jurisdictions under scrutiny, the principle of AoR is essentially a jurisprudential construction in cases where judges faced a particular set of circumstances for which no codified rules were available. To investigate how judges deal with the prohibition of AoR in patent litigation and taking into account the

jurisprudential nature of the principle, an in-depth and comparative case law analysis has been conducted. Although the number of cases in which patent holders have been sanctioned for such abuses is not overabundant, they do provide sufficient leads on what is understood by Belgian and French courts to constitute an abuse of patent rights. From this comparative analysis, useful lessons can be learned for the interpretation of the ambiguous notion of 'abuse' from a broader perspective..

Keywords: Patent Law; Patent Litigation; Abuse of Rights; Over-Enforcement of Patents

© 2016 Amandine Léonard

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Amandine Léonard, 'Abuse of Rights' in Belgian and French Patent Law – A Case Law Analysis, 7 (2016) JIPITEC 30 para 1.

A. Introduction

- 1 This paper is based on current statements from – mainly US – commentators claiming that patent holders "abusively" exercise their patent rights¹.

1 Commentaries, blogs and other articles referring to the term 'abuse': T. Molino, "Strengthening the Patent System by Ending Patent Abuse" (March 2015). R. Bell, "Litigation as an Abuse: European Commission and US Courts Draw a Line under 'Patent Wars' while Adopting a Common Approach on Standard Essential Patents", *Business Law International*, 15.3 (Sept. 2014). M. Street, "Turning the Tide on Patent Abuse: Vermont's New Law Already Inspiring Other States to Act", *ABA Banking Journal*, (Feb. 2014). M. Jones, "Application for central amendment of a patent after revocation at first instance does not of itself render an appeal an abuse of process", *J.I.P.L.P.* (2014). P. Hall "Patent Law Broken, Abused to Stifle Innovation" (July 2013). T. Worstall, "Is This Apple Abusing The Patent System Or The USPTO Abusing It?" (Nov. 2012).

However, there is no clear view regarding what "abuse" precisely means; even less so from a European perspective embedded in civil law tradition. This paper aims to shed some light on what "abuse" could mean in the field of patent law by analysing Belgian and French case law, in which the principle of the prohibition of "abuse of rights" (AoR) has been invoked before national courts. It appears that in the jurisdictions under scrutiny, the principle of AoR is essentially a jurisprudential construction where judges found themselves empty-handed when facing a particular set of circumstances for which no codified rules were available. Due to its jurisprudential nature, it is interesting to conduct a case law analysis and to investigate how judges deal with AoR, in order to better understand its scope of application in patent litigation. Although the number of cases in which patent holders have been sanctioned for these abuses is not overabundant,

they provide sufficient leads on what is understood by Belgian and French courts to constitute an abuse of patent rights.

- 2 The leading research question of the present paper can be formulated as follows: how do Belgian and French judges interpret the principle of AoR in the framework of patent litigation, and what does it entail? Given the state of the art regarding the principle of AoR in general, the following hypothesis is put forward: since, in Belgium and France, patent cases lie in the hands of non-specialised judges², national judges refer to and use the AoR principle in the same fashion as their colleagues do in more "traditional" civil law cases (which do not include elements of IP). Nonetheless, since the principle of AoR is fact-based and must be assessed in light of all the circumstances of the case, a certain pattern in the behaviour of patent holders can be determined to help judges identify abuses in the specific framework of patent litigation.
- 3 This paper will first discuss the principle of the prohibition of AoR from a theoretical perspective (B). Some insights on the general civil law principle known in Belgium and France will be provided (B.I). Particular attention will be given to Art. 1382 of the respective civil codes (liability with fault), which constitutes the essential legal basis for the application of the prohibition of AoR. It will then be examined how the general civil law principle is applied in litigation (B.II). The paper will then turn to the case law analysis in order to fully comprehend how Belgian and French judges interpret the principle of AoR in the framework of patent litigation (C). An initial limitation must be clarified regarding the scope of this paper. Naturally, it is not only patent holders who may abusively exercise their exclusive rights. It also happens that (alleged) infringers abuse their rights or even the judicial system. However, in light of the initial statement that patent holders are responsible for "abuses", this paper focuses solely on cases in which it has been argued (and upheld by courts) that a patent holder has abused his or her rights. After introducing the methodology applied in order to compile the cases, a detailed assessment of the cases will be presented. The analysis of the

² There are no specialised patent courts or patent judges in Belgium and France per se. However, patent litigation is centralized. In Belgium, since 2015, all patent litigation proceedings are brought before the District Court for Commercial Matters of Brussels (*Tribunal de commerce/Rechtbank van koophandel*). Before 2015, jurisdiction was shared between the district courts for commercial matters sitting at the headquarters of one of the five courts of appeal of the country. This concerned the district courts of Brussels, Antwerp, Ghent, Liège, and Mons. In France, it is the *Tribunal de Grande Instance de Paris* which exclusively deals with patent cases. Before 2009, the district courts of Paris, Lyon, Marseilles, Bordeaux, Rennes, Strasbourg, Limoges, Nancy and Toulouse had jurisdiction over patent cases.

cases has been built upon the tripartite structure of Art. 1382 of the Belgian and French civil codes, i.e. the question of fault (C.I), harm (C.II), and causal link (C.III). A section will also focus on the sanctions decided by the courts (C.IV). The paper will then conclude with the findings on what constitutes an "abusive scheme" from patent holders in the context of Belgian and French patent litigation (D).

B. The Principle of the Prohibition of Abuse of Rights

I. Abuse of Rights

1. Introduction

- 4 Traditionally, in civil law systems, all subjective rights can be subjected to the prohibition of AoR³ and a common concept of abuse is generally accepted, i.e. the exercise of a person's rights in a manner which is unreasonable, with consequent harm to another, whether there was an intent or mere carelessness or indifference as to resulting harm (or not).⁴ The AoR principle is commonly understood as an instrument, which allows judges to find a remedy for an imbalanced situation and a tool for recovery of distorted exercises of a right.⁵ An abuse can be considered as a crossing of internal limits, revealing that despite adherence to formal and external limits by a right holder (the exercise is not illegal), the exercise of a right may be considered reprehensible (the exercise is considered illegitimate).⁶ The

³ A. Lenaerts, "The relationship between the principles of *fraus omnia corrumpit* and of the prohibition of abuse of rights in the case law of the European Court of Justice", *C.M.L. Rev.*, vol.25, pp. 1703-1718 (2011). T. Leonard, *Conflicts entre droits subjectifs*, Larcier (2005). W. Van Gerven, *Algemeen deel, Beginselen van Belgisch privaatrecht*, I.R. Dillemans & W. Van Gerven (ed.), Standaard, Antwerpen (1973).

⁴ A. Lenaerts, "The general principle of the prohibition of abuse of rights: A critical position on its role in a codified European contract law", *E.R.P.L.*, Vol.6, pp. 1121-1154 (2010b).

⁵ V-L. Benabou, "L'abus de droit peut-il servir la cause de l'intérêt général en droit de la propriété intellectuelle" in *L'intérêt général et l'accès à l'information en propriété intellectuelle*, Université Libre de Bruxelles, colloque des 21 et 22 avril 2006, Bruylant (2008).

⁶ S. Stijns, "Abus, mais de quel(s) droit(s)?", *J.T.*, n 5533, pp. 33-44 (1990). For an overview of both European and national conceptions on abuse see; P-E. Moysse, "L'abus de droit: L'anténorme - Partie I", *McGill L.J.*, Vol.51.4, p. 859 (2012a). P-E. Moysse, "L'abus de droit: L'anténorme - Partie II", *McGill L.J.*, Vol.58.1, p. 1 (2012b). A. Lenaerts, "The role of the general principle of the prohibition of abuse of rights in a codified European contract law", in I. Samoy (ed.) *Evolutive van de basisbeginselen van het contractenrecht*, Metro n.50, Intersentia (2010a). G. Palombella, "The Abuse of Rights and the

principle rejects a rigid adherence to the letter of the law in the evaluation of an individual exercise of rights. In light of the creativity of right holders and their ability to circumvent rules, the principle of AoR proves to be a necessary complement to the principle of formal legality.

- 5 Long considered as a realm where right holders benefit from the most absolute freedom of conduct, the theory of AoR nonetheless has its roots in the field of property law (Art. 544 of Belgian and French civil codes). The well-known *Clement-Bayard* case of the French *Cour de cassation* provides the most striking example of the application of the theory of AoR in the field of property law. Mr Coquerel had acquired a piece of land near the airship hangar of the Clement-Bayard Company. He built two tall wooden scaffoldings bristling with iron spikes, which made it difficult for airships to take off and land from the hangar. The Court ordered Mr Coquerel to pay damages and to remove the iron spikes. Although it may have seemed as if Art. 544 of the French civil code granted an absolute right to the property owner to do whatever he deemed fit on his piece of land; the Court held that he had abused his property rights, given his intention to cause damage.⁷ It was clearly established in this case that if property rights holders are entitled to extract the best of their rights, it is only under the conditions of a legitimate exercise.⁸
- 6 In Belgium and France, the prohibition of AoR constitutes a jurisprudential construction built upon different provisions.⁹ The most common legal basis is Art. 1382 of their respective civil code for non-contractual (tortious) matter and its regime of liability with fault. This provision requires the fulfilment of three conditions in order for a right holder to be held liable for his actions. First, it is necessary to prove that the right holder is at fault.

Rule of Law” (2005), available at SSRN : <http://ssrn.com/abstract=992875>. M. Byers, “Abuse of rights: An old principle, a new age”, *McGill L.J.*, Vol.47, p. 389 (2002). A. Kjellgren, “On the Border of Abuse – The jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of community law”, *E.B.L.R.*, p. 179 (2000).

- 7 *Cour de cassation* (civ.) 3 aout 1915, *Recueil Dalloz*, 1917. I.79. J. Snell, “The notion of and a general test for abuse of rights: some normative reflections” in R. de la Feria & S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, p. 220 (2011).
- 8 F. Terré & Y. Lequette, “Propriété. Caractère absolu. Abus de droit” in *Les grands arrêts de la jurisprudence civile*, 12^e ed. p. 435 (2007).
- 9 Belgian and French civil codes; Art. 1382: “*Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*”. Art. 1383: “*Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*”. Art. 1134(3): “*Les conventions légalement formées [] doivent être exécutées de bonne foi*”.

Second the victim of this fault must demonstrate that he/she suffered a harm. Finally, the fault must be at the origin of the harm suffered (i.e. the causal link). Belgian and French courts have developed a set of criteria in order to assess if a right has been abused and therefore demonstrate that a right holder is at “fault”. These jurisdictions have adopted a “mixed test” of abuse, based on both a subjective and an objective element; in other words, determining the intention of the right holder and an assessment of all the circumstances of the case.

2. Belgium

- 7 Under Belgian case law¹⁰ an abuse is present if the limits of the normal exercise of a subjective right by a careful and cautious person placed in the same circumstances are manifestly exceeded (the *generic* criterion).¹¹ To assist the judge in the determination of what constitutes a manifestly unreasonable exercise of a right, a non-exhaustive and alternative list of *specific* criteria has been developed.¹²
- 8 A *first* criterion relates to a subjective element. Abuse will be considered to take place when the aim of the right holder is to harm third parties (the intention to harm criterion). A *second* criterion – sometimes perceived as including most of the specific criteria – is the proportionality criterion. There will be an abuse when, facing a choice between different ways of exercising his/her right, a right holder chooses the one which provides him/her a disproportionate benefit compared to the disadvantage inflicted on the other party. In such cases, judges operate a balance of interests – on the one hand, the advantage of the holder’s right to such an exercise, and on the other hand, the damage sustained by third parties,. A *third* criterion relates to the interest of the right holder. Abuse will take place when a right holder exercises his right without legitimate or reasonable interest. A *fourth* criterion relates to the different ways of exercising a right. Abuse will occur when amongst the options equally beneficial to the right holder, he/she chooses the option that is the most disadvantageous to third parties or disregards the
- 10 Belgian courts have expressly recognised that the theory of the prohibition of abuse of rights has to be considered as a general principle of law. See notably *Cass.* 6 janvier 2011, *Pas.* 2011, I, p. 44. *Cass.* 22 septembre 2008, *Pas.* 2008, p. 1999. *Cass.* 24 septembre 1992, *Pas.* 1992, I, p. 1049. *Cass.* 19 octobre 1989, *Pas.* 1990, I, p. 392. *Cass.* 5 mars 1984, *Pas.* 1984, I, p. 768.
- 11 *Cass.*, 10 septembre 1971, *Pas.*, 1972, I, p. 28. T. Leonard (n.3). S. Stijns (n.6). P. Bazier, “Abus de droit, rechtsverwerking et sanctions de l’abus de droit”, *T.B.B.R.*, 2012/8, pp. 393-403 (2012). J. Van Zuylen, “Fautes, bonne foi et abus de droit: Convergences et Divergences”, *Annales de Droit de Louvain*, Vol. 71, No.3, (2011).
- 12 T. Leonard (n.3).

general interest. *Finally*, there will be an abuse whenever the exercise of a right goes against the purpose of this right (the right-function criterion). According to this criterion, it cannot be accepted that a right is exercised for a purpose other than the one which animated the legislature, and the notion of abuse is intrinsically linked to the idea of the existence of a *social function* of subjective rights.¹³

3. France

- 9 Under French case law¹⁴, there is no generic criterion as in Belgium. However, an abuse has to be *characterised* (“*un abus caractérisé*”). It is recognised that there will be a characterised abuse when a right holder does not act as a normally prudent and reasonable person would act in the same circumstances¹⁵, which is fairly similar to the Belgian generic criterion.
- 10 Three – *specific* – criteria¹⁶ are generally used by courts to assess if a right has been abused, *i.e.* the intention to harm criterion¹⁷, the proportionality criterion, and the right-function criterion.¹⁸ These criteria can be defined in the same manner as under Belgian case law. In the French doctrine, much ink has been spilled on the right-function criterion. According to this standard, and as explained above, the legislator has conferred rights upon individuals with specific social aims in mind and these aims should be respected by the right holder.¹⁹ All

13 P. Van Ommeslaghe, “Abus de droit, fraude aux droits de tiers et fraude à la loi” note sous Cass., 10 sept. 1971, *R.C.J.B.* pp. 303 et seq. (1976).

14 P. Ancel & C. Didry, “L’abus de droit: Une notion sans histoire? L’apparition de la notion d’abus de droit en droit français au début du XXe siècle” in *L’abus de droit: comparaisons franco-suisse*, Publications de l’Université de Saint-Etienne (2001).

15 J. Flour, J. Aubert & E. Savaux, *Les obligations - 2. Le fait juridique*. Paris, Dalloz, 123 (2007). J. Ghestin & G. Goubeau, *Traité de droit civil - Introduction générale*, Paris, Librairie Générale de Droit et de Jurisprudence, 736 (1994).

16 L. Eck, “Controverses constitutionnelles et abus de droit”, *intervention au Congrès de l’association française de droit constitutionnel (A.F.D.C.), atelier sur « les controverses constitutionnelles »*, Montpellier, Publication numérique des actes du Congrès sur www.droitconstitutionnel.org, Juin 2005.

17 It is argued that the intention to harm criteria also covers the use of a right in the most damaging way to third parties with equal benefit to the right holder. M. Temmerman, “The Legal Notion of Abuse of Patent Rights”, nccr trade regulation working paper No 2011/23, p. 8 (2011).

18 C. Jallamion, “La fortune de Josserand”, *Fonction(s) des droits de propriété intellectuelle*, Propriété Industrielle n.10, dossier 2 (2010). L. Josserand, *De l’esprit des droits et de leur relativité*, 2^e ed., Paris, Dalloz (1939). L. Josserand, *De l’abus des droits*, Paris, Rousseau (1905).

19 S. Herman, “Classical social theories and the doctrine of ‘abuse of rights’”, 37 *La. L. Rev.* 747 (1977).

rights conferred by law are relative; they are only the means to achieve certain social objectives. It is necessary that the enforcement and exercise of rights stay compatible with such social functions. If they are exercised for other objectives or diverted from their legitimate functions, they can no longer be protected.²⁰

4. The Sanction of Abuse

- 11 In both jurisdictions, the sanction of an abuse is not the forfeiture of the right which has been abused. Rather, it is only the exercise of this right which is limited to a proper use. The prohibition of AoR is rather considered as a “shield than a sword”²¹; the sanction is there to remove the ability from the right holder to assert his right in a manner considered improper by a judge. The objective of the sanction is to re-establish the victim of abuse in a state *as if* the abuse did not occur. The sanction includes the possibility for allocation of damages²². To obtain compensation for the harm suffered, a victim of the abuse must show that the conditions of Art. 1382 of the civil codes are met.²³ Accordingly, he/she must demonstrate that the right holder was at fault (he/she abused his/her right), that he/she suffered harm, and that there exists a causal link between the fault and the harm suffered. To quantify such harm is generally difficult for the victim of abuse, therefore, courts frequently rely on an evaluation *ex aequo et bono* and grant a lump sum to compensate the harm suffered.²⁴

II. Abuse of Rights in the Course of Litigation

1. Introduction

- 12 It is indisputable that exercising the right of access to justice²⁵, the right of defence, the right to sue, the right to appeal a decision, or the right to request protective measures from a court is not abusive *per*

20 J. Cuerto-Rua, “Abuse of rights”, 35 *La. L. Rev.* 965 (1977).

21 D. Anderson QC, “Abuse of rights”, 11 *Jud. Rev.* 348 (2006). Inspired by: E. Teller, *Better a Shield Than a Sword: Perspectives on Defense and Technology*, Free Press (1987).

22 A. Lenaerts (n.4). S. Stijns (n.6). P. Bazier (n.11).

23 See *supra* 6.

24 G. Eloy, “La procédure téméraire et vexatoire”, in X., *Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34, p. 28 (2015).

25 A. Mayrand, “Abuse of rights: France, Quebec”, 34 *La. L. Rev.* 993, 999 (1974). The right of access to justice and the right of defense being notably protected via the article 6 European Convention on Human Rights (ECHR).

se.²⁶ To take legal action does not, in itself, engage the liability of the litigant.²⁷ Nonetheless, legal remedies are powerful means and they *must* be handled with care and in good faith.²⁸ In that regard, litigants *must* avoid unnecessary expenses and ought to act in a diligent way, namely by taking into consideration the legitimate procedural interests of the other parties involved²⁹ as well as the interests of the court itself.³⁰ As any other right, procedural rights are not absolute and can be the object of legitimate limitations.³¹ Therefore, when litigants institute legal procedures – or persevere in a legal action – with the sole purpose of harming the defendant (the intention to harm criterion), in a disproportionate manner (the proportionality criterion) or with a particular objective not intended by the legislator (the right-function criterion)³², it can become abusive.

- 13 Even though the assessment criteria are based on the general principle of the prohibition of AoR, the terminology adopted in the course of litigation to qualify an unacceptable procedural behaviour as an abuse varies. Courts refer to concepts such as “unfair procedural behaviour”³³ or “using the procedure to manifestly slow down the litigation process”³⁴ or “for unlawful purposes”³⁵. However, the prohibition of AoR is essentially referred to via the concepts of “frivolous/reckless and vexatious” litigation³⁶.

26 H. Boularbah & J-F. van Drooghenbroeck, “L’abus du droit de conclure”, dans *Mélanges – Philippe Gérard*, Bruxelles, Bruyant, pp. 465-466 (2002).

27 N. Cayrol, “Dommages-intérêts et abus du droit d’agir”, HAL (2013) <hal-01017593>.

28 L. Josserand, “Relativité et abus de droit”, *Evolutions et Actualités – conférences de droit civil*, Sirey, Paris (1936).

29 G. Eloy (n.24) p. 8. P. Knaepen, “La loyauté procédurale, un principe en plein essor”, Note sous Justice de paix d’Ixelles, 25 Février 2014, *J.L.M.B.*, 2014/31, pp. 1496-1500. M. Storme, “L’obligation de procéder de manière diligente et raisonnable : une obligation indépendante du fond de l’affaire”, note sous Bruxelles, 25 janvier 1990, *J.L.M.B.*, p. 458 (1991).

30 B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten & A. Van Oevelen (eds.), *Rechtsmisbruik*, Intersentia (2015) p. 123.

31 G. Eloy (n.24) p. 9.

32 A. Boucquey, “La défense”, in X., *Droit judiciaire. Commentaire pratique*, II.2-1-II.2-36, p. 5 (2015).

33 With reference to the application of the concepts of good faith, integrity and diligence in the course of litigation.

34 E.g.: Cass., 16 mars 2012, C.08.0323.F et C.09.0590.F, available on: www.juridat.be, p. 26: *Les défendeurs ont, en conclusions, «[dénoncé] l’attitude procédurière des demandeurs, ceux-ci cherchant, par tous moyens, à retarder au maximum la solution judiciaire du litige» [...] Les demandeurs avaient « manifestement pour objectif de [les] décourager » et que l’action n’avait « été engagée que dans le but de leur être désagréable et de leur causer frais et ennuis ».*

35 G. Eloy (n.24) p. 11. E.g.: When a litigant introduces a claim for another purpose than succeeding in the dispute.

36 N. Cayrol (n.24). B. Vanlerberghe (n.30) p. 116. J-F. van Drooghenbroeck, “L’abus procédural: Une étape décisive”

Frivolous and reckless litigation means irresponsible or thoughtless litigation, or situations where a litigant institutes legal proceedings without worrying about the consequences or the risks involved for him- or herself or incurred to third parties.³⁷ It can also be considered reckless for a litigant to introduce a claim which manifestly lacks sound reasoning.³⁸ An action is considered *vexatious* when a litigant uses the procedure to (intentionally/maliciously) hinder or harm third parties.³⁹ In short, there will be an AoR in the course of litigation when the right holder exercises his/her rights with either, the intention to harm or when he/she is inexcusably negligent, frivolous or indifferent to the consequences of this exercise.⁴⁰

2. Belgium

- 14 According to Belgian case law, procedural abuse is entirely modelled on the general principle of the prohibition of AoR. Therefore, the generic and the specific criteria developed *supra* have to be assessed in the same manner in order to establish a procedural abuse.⁴¹ There will be a procedural abuse if the court is of the opinion that a party litigates in a manner that clearly goes beyond the limits of the normal exercise of his right by a cautious and careful litigant.⁴² It is worth noting that prior to 2003, the intention to harm criterion played a predominant role in the evaluation of AoR in the course of litigation. However, in a landmark decision regarding procedural abuses, the Belgian *Cour de cassation/Hof van cassatie* clarified that this criterion was not unique, and that manifest excesses in the exercise of a right can turn a procedure into a vexatious litigation.⁴³

note sous Cass., 31 oct. 2003, J.T., 2004, pp. 135-136. ‘*Action téméraire et vexatoire*’ or ‘*tergend en roekeloos geding*’.

37 B. Vanlerberghe (n.30).

38 G. Eloy (n.24) p. 24. A claim that will request from the other plaintiff thorough investigations, production of documents or appointment of an expert, although the claimant knew or should have known that its argument will necessarily be rejected.

39 B. Vanlerberghe (n.30) p. 126. To maliciously sustain a claim that has no reasonable chance of success or to maliciously holding back pieces of evidence.

40 G. Helin, “L’abus de droit dans la jurisprudence”, *Orientations* n.7, Sept. 2010 pp. 19-22. This covers the different criteria (both in Belgium and France) developed above.

41 G. Eloy (n.24). N. Cayrol (n.27). B. Vanlerberghe (n.30) p. 120, 126. J-F. van Drooghenbroeck (n.36). G. Helin (n.40).

42 See e.g.: Cass., 31 octobre 2003, J.T., 2004, p. 134; Cass., 12 mai 2005, C.04.0275.F; Cass., 28 septembre 2011, P.11.0711.F; Cass., 16 mars 2012, C.08.0323.F-C.09.0590.F, available on: www.juridat.be.

43 Cass., 31 octobre 2003, J.T., 2004, p. 134: “*Une procédure peut revêtir un caractère vexatoire non seulement lorsqu’une partie est animée de l’intention de nuire à une autre mais aussi lorsqu’elle*

3. France

- 15 Similarly to the 2003 decision of the Belgian *Cour de cassation/Hof van cassatie*, the French *Cour de cassation* has also declared that procedural abuse does not require an intentional element. Specifically, it was deemed sufficient to demonstrate that the right had been used for another purpose than its social goal⁴⁴ or that the right holder acted with frivolousness⁴⁵.

4. The Sanction – Particularity: The Disruption of the Judicial Process

- 16 There are essentially two types of sanctions for an abuse in the course of litigation: damages to the injured party⁴⁶ and a civil fine⁴⁷. These two sanctions remedy two different effects of the abuse. The first compensates the injury caused to the litigant victim of the abuse, while the second corrects the harm caused to the judicial system. Specific provisions to remedy to this second effect of abuse exist in Belgian and French procedural codes (*Code judiciaire/Gerechtigd Wetboek* and *Code de procédure civile* respectively). Art. 780bis of the Belgian judicial code and Art. 32-1 of the French code of civil procedure clearly stipulate that the party who uses judicial proceedings to clearly delay the procedure or for unlawful purposes (i.e. in a dilatory or abusive manner), shall be sentenced to a civil fine, without prejudice to other damages which could be claimed.⁴⁸ The civil fine aims at compensating the fact that procedural abuse twists the judicial process and disrupts the good functioning of justice.⁴⁹ The

imposition of such a fine is part of the discretionary powers of the court⁵⁰ and is limited to the amount provided by law.

- 17 As for the procedural costs involved in litigation, Belgium and France provide for a “loser-pay” rule⁵¹, meaning that the losing party has to bear the procedural costs (i.e. judicial expenses and costs of the winning party). In addition, specific provisions exist for attorney’s fees. Art. 1022 of the Belgian judicial code provides for the allocation of a (fixed) recoverability of attorney’s fees⁵², while Art. 700 of the new French code of civil procedure (CCP) allows for the recovery of costs not covered by the exhaustive list⁵³ provided by Art. 695 CCP (*les dépens*). This covers expenses incurred during litigation such as attorney’s fees, expert opinions or other irrecoverable costs (*les frais irrépétibles*).⁵⁴ In the assessment of these costs, judges can take into consideration all the circumstances of the case in order to grant an appropriate compensation (including the behaviour of the litigants).⁵⁵ If under French law judges can decide in equity⁵⁶, under

exerce son droit d’agir en justice d’une manière qui excède manifestement les limites de l’exercice normal de ce droit par une personne prudente et diligente”.

- 44 N. Cayrol (n.27). The plaintiff does not act to restore justice, but merely to pressure the defendant.
- 45 Cass. 2e civ., 10 janv. 1985, *Gaz. Pal.* 1985, I, *Panor.*, p. 113.
- 46 G. Eloy (n.24) p. 3. *Supra* 9.
- 47 G. Closset-Marchal, “L’appel abusif, note sous Cass., 5 mai 2008”, *R.G.D.C.*, p. 385 (2009).
- 48 Art 780bis al. 1-2 Belgian judicial code: “*La partie qui utilise la procédure a des fins manifestement dilatoires ou abusives peut être condamnée à une amende de 15 euros à 2.500 euros sans préjudice des dommages-intérêts qui seraient réclamés. En ce cas, il y sera statué par la même décision dans la mesure où il est fait droit à une demande de dommages et intérêts pour procès téméraire et vexatoire []*”. References to reckless and vexatious proceedings can also be found in Art.563 al 3 and 620 Belgian judicial code. Art. 32-1 French Code de procédure civile: “*Celui qui agit en justice de manière dilatoire ou abusive peut être condamné à une amende civile d’un maximum de 3000€, sans préjudice des dommages-intérêts qui seraient réclamés*”. Rem: The same provision is applicable for the right to appeal (Arts. 559; 581) and cassation (Art. 628).
- 49 For Belgium see G. Eloy (n.24) p. 30,32. B. Vanlerberghe (n.31) p. 125. A. Boucquoy (n.32) p. 6. G. Closset-Marchal (n.47) p. 385. For France see N. Cayrol (n.27).

- 50 E.g.: Cass., 28 juin 2013 C.12.0502.N, available on: www.juridat.be.
- 51 Arts. 1017-1021 Belgian judicial code and Arts. 695-696 French new code of civil procedure. C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The costs and funding of civil litigation: A comparative perspective*, Hart Publishing (2010).
- 52 See in particular; Arts. 2 and 3 *Arrêté royal fixant le tarif des indemnités de procédure visées à l’article 1022 du Code judiciaire et fixant la date d’entrée en vigueur des articles 1er à 13 de la loi du 21 avril 2007 relative à la répétibilité des honoraires et des frais d’avocat* (Mon., 09 Nov. 2007).
- 53 Contrary to Art. 1018 Belgian judicial code which does not provide for an exhaustive list of judicial expenses and costs. I. Samoy & V. Sagaert, “‘Everything Costs Its Own Cost, and One of Our Best Virtues Is a Just Desire To Pay It’ An Analysis of Belgian Law” in M. Reimann (ed.), *Cost and Fee Allocation in Civil Procedure*, Ius Gentium: Comparative Perspectives on Law and Justice 11, Springer Science+Business Media B.V. p. 81 (2012).
- 54 Art. 700 New CCP: “In all proceedings, the judge will order the party obliged to pay for legal costs or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlaid but not included in the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may, even sua sponte, for reasons based on the same considerations, decide that there is no need for such order”.
- 55 Art. 1022 Belgian judicial code stipulates that the judge has to take into consideration the financial ability of the losing party, the complexity of the case, any contractually agreed compensation between the parties and the manifestly unreasonable character of the situation, to either increase or decrease the amount granted.
- 56 According to Art. 700 CCP, the judge can also take into consideration the economic situation of the losing party. N. Cayrol, “La répartition des frais en procédure civile française” in M. Reimann (ed.) *Cost and Fee Allocation in Civil Procedure*, Ius Gentium: Comparative Perspectives on Law and Justice 11, Springer Science+Business Media B.V. p.137, pp. 144-150 (2012). S. Gjidara-Decaix, “Les règles de

Belgian law the allocation cannot exceed the fixed minimum and maximum amounts⁵⁷.

C. Abuse of Rights in Patent Litigation: Quid in Practice?

- 18 Having presented the theoretical framework concerning the prohibition of AoR, the paper will now turn to the case law analysis in order to fully comprehend how Belgian and French judges interpret the principle of AoR in the framework of patent litigation.
- 19 Patent litigation typically revolves around two questions, i.e. validity and infringement.⁵⁸ The question of validity focuses on the qualities of the patent itself, not on the way the patent holder is exercising the rights attributed to him/her by his/her patent. The same applies to the establishment of infringement: the main focus is on the alleged infringer's behaviour, and not on the patent holder's conduct. The analysis of the application of the prohibition of AoR in patent litigation allows one to take a different perspective on patent litigation, and to shed some light on the behaviour of the right holder. Infringement claims, seizure measures, as well as (preliminary) injunctions represent the most fertile ground of analysis for this paper. It is particularly regarding the way in which a patent holder enforces the exclusive rights conferred to them by their patent(s), that they are likely to be held liable for an abuse of rights. If Art. 3(2) of the European Directive 2004/48/EC on the enforcement of IPRs (the Enforcement Directive)⁵⁹ explicitly mentions the possibility of "abuse"⁶⁰, the transposition of the Enforcement Directive in national legislations leaves room for interpretation. This paper aims at understanding what actions undertaken by right-holders can be considered as abusive, which could, in turn, contribute to provide more information on the rather evasive notion of "abuse".

répartition des frais en procédure civile", *Revue Internationale de droit comparé*, 2010, Vol. 62, No. 2, pp. 325-360.

- 57 Art. 1022 Belgian judicial code.
- 58 J. Straus, "Patent litigation in Europe – A Glimmer of Hope? Present Status and Future Perspectives", 2 *Wash. U. J.L. & Pol'y* 403, pp. 406-407 (2000).
- 59 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (JO L 157 du 30.4.2004, p. 45-86).
- 60 A. Metzger, "Abuse of Law in EU Private Law: A (Re-) Construction from Fragments" in R. de la Feria & S. Vogenauer (eds.) *Prohibition of Abuse of Law, A New General Principle of EU Law?*, Hart Publishing, 16 (2011). S. Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU law" in R. de la Feria & S. Vogenauer (eds.) *Prohibition of Abuse of Law, A New General Principle of EU Law?*, Hart Publishing, 35 (2011).

- 20 Cases have been compiled in Belgian and French patent law jurisprudence over the last 14 years. The collection was generated from a search on the database Darts-IP.⁶¹ A word search was conducted for the terms "abus de droit", "misbruik van recht" and "rechtsmisbruik" ("abuse of right") in order to collect cases in the official languages⁶² of the two jurisdictions covered by this paper. According to this search, between January 1st, 2000 and December 31st, 2014, the principle of the prohibition of AoR has been invoked in the course of patent litigation, in 79 different cases.⁶³
- 21 It is worth noting that, contrary to common law countries, the rule of precedent does not apply in Belgium and France. However, case law constitutes a valuable source of law.⁶⁴ A case law analysis aiming at identifying a certain degree of unity in the application of AoR in patent litigation is therefore highly relevant. Despite the fact that a total of 79 cases may seem fairly limited, a careful reading and a thorough analysis of each case enabled the filtering out of the essential components of the prohibition of AoR applied in Belgian and French patent litigation.
- 22 As mentioned above, there is no specific provision for abuse under Belgian or French patent law and Art. 1382 of the civil codes represents the legal basis for analysis. The following sections are therefore divided according to the tripartite structure of this pivotal provision, i.e. the fault or "abusive" action (C.I.1), the harm suffered (C.I.2) and the causal link (C.I.3) while integrating this analysis in the framework of patent litigation.

I. The Fault or the "Abusive" Action

- 23 There is a wide variety of actions which have been qualified as "abusive" in the case law at hand. In theory, the criteria developed under Belgian and

61 Darts-IP collects cases and court documents from major IP courts including Europe, Hong Kong, China, Brazil, and the United States, see <http://www.darts-ip.com/world/>.

62 German is also an official language in Belgium, however, patent cases are not pled in German.

63 These 79 cases include all instances of a particular dispute, i.e. first instance, appeal and cassation level. In the eventuality of a case referring to AoR only at one level of decision, e.g. only on appeal, a more precise search was conducted in order to obtain the other decisions, i.e. the trial judgment and/or cassation judgement. It must be acknowledged that it was not possible to retrieve all the instances since some of them haven't been published. Belgian jurisdictions dealt with 15 of these cases while French jurisdiction decided on the 64 remaining cases.

64 I. Romet, A. Metier & D. Talvard, "Patent Enforcement in France", in C. Heath (ed.), *Patent Enforcement Worldwide: Writings in Honour of Dieter Stauder*. Oxford. Bloomsbury Collection, p. 144 (2015).

French case law⁶⁵ could serve as guidance in order to identify these abusive actions. The analysis revealed that such a categorisation is not as straightforward as expected. An attempt to provide some order in the chaos of the cases has therefore been to categorise the abusive actions according to different phases of the procedure. However, certain actions have effects transcending these phases and are therefore comprised under a more general heading.

1. General Misconduct

24 Knowledge – The knowledge of a patent holder (or the fact that he/she should have known) regarding the invalidity⁶⁶ of a patent and/or the lack of infringement⁶⁷, or even regarding other pieces of information considered crucial for a court, is a key element in the assessment of abuse. If it can be established that a patent holder had such knowledge but did not act in good faith, the patent holder can be held liable.

25 This type of abusive action is particularly well illustrated by a decision from the Paris District Court.⁶⁸ In this case, the American electronic company TYCO argued that the French company TTK infringed two of its European patents regarding a method for detecting and obtaining information about changes in variables.⁶⁹ Back in 1996, TYCO suspected that TTK violated its patents and engaged into various procedures for infringement. TTK claimed that the lawsuit had only been introduced to fuel a long-lasting dispute between competitors and that TYCO *knew* of the existence of a US patent application back in 1993, that would constitute prior art and invalidate its patent⁷⁰. Despite that knowledge, TYCO decided to advance with multiple proceedings and used all of the available mechanisms in order to delay these proceedings. TYCO did not show any willingness to reach a solution in this case, and adopted a procedural behaviour which slowed down the judicial process to the detriment

of TTK. According to TTK, the combination of these actions demonstrated that TYCO was manifestly abusing its right to claim infringement. The Court invalidated both patents and rejected the claims for infringement. It also deemed it to be abusive to introduce this lawsuit, and to pursue this litigation by unfair means, since it was clear that TYCO's actions had been driven by bad faith. The *knowledge* of the patent holder regarding the highly potential *invalidity* of its patent, and the bad faith adopted during litigation in order to unnecessarily prolong the procedure were deemed sufficient for the Court to hold the patent owner liable for abuse of the right to claim infringement.

26 Despite the fact that the knowledge of the patent holder represents a key element in the assessment of abuse, patent holders have also been excused in many cases.⁷¹ The difficulty in interpreting the scope of a patent led courts to rule that the patent holder could have misjudged or misinterpreted the scope of its rights and therefore could not be held liable for abuse. Moreover, courts also found that alleged infringers often failed to prove that the patent holder had such knowledge, either when introducing an infringement claim or during the litigation process. The burden of proof of such knowledge is particularly heavy on claimants of abuse.

27 In a controversial Belgian case⁷², the Ghent District Court for Commercial Matters even dismissed the argument of abuse although the patent holder himself once claimed the invalidity of its own title. In this case, the Belgian company Lotus Bakeries (owner of a Belgian patent on a Speculoos spread⁷³) was opposed to one of its competitors (the company

⁶⁵ Supra 7, 8.

⁶⁶ TGI Paris (3^e ch. 1^e sct.) 14 Nov. 2013, *M. Serge G. c. SAS Lise Charmel Industrie* (RG 12/09624); TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918); Cour d'appel de Paris (4^e ch. Sct. A) 05 Fév. 2003, *SA Colas c. STE T.S.S. (Eurovia Beton)* (RG 2001/08866); Cour d'appel de Paris (4^e ch. Sct. A) 25 Avril 2001, *Société DIAM Diffusion Internationale d'Articles Manufactures SA c. Société RLB SA* (RG 1999/06310).

⁶⁷ Cour de cassation (comm.) 03 Juin 2003, *SA Neptune et Société Cuisiner Cuisine de la mer c. Société Fleury Michon* (E 01-15.740).

⁶⁸ TGI Paris (3^e ch. 3^e sct.) 28 Jan. 2003, *Société TYCO Electronics Corp. et TYCO Electronics France SAS c. SA TTK*, (RG 02/02889).

⁶⁹ EP0133748B1 and EP0250776B1.

⁷⁰ Examiners from the USPTO requested to modify the application on the basis of the said prior art (p. 10).

⁷¹ In France, TGI Paris (3^e ch. 3^e sct.) 22 Juin 2012, *Watts Industries France (anciennement GRIPP SAS) c. Rehau SA* (RG 10/02331); TGI Paris (3^e ch. 2^e sct.) 02 Avril 2010, *Société Levo AG Wohlen c. SAS Invacare Poirier* (RG 08/06015); TGI Paris (3^e ch. 3^e sct.) 28 Oct. 2009, *SARL AMD c. SARL Power System* (RG 08/08271); Cour d'appel de Paris (4^e ch. Sct. A) 04 Juin 2008, *SAS Alcan packaging food France, SA Paul Boye Technologies c. L'Etat Français, SA Matériels Industriels de Sécurité (MATISEC), SA Rovitex et SARL Safitex* (RG 06/17059); Cour d'appel de Paris (4^e ch. sct. B) 16 Sept. 2005, *M. Marcel M. et SA Matière c. SARL Prefa 31 et al.* (RG 03/06456); Cour d'appel de Toulouse (2^e ch. sct. 2) 12 Juin 2007, *Technilum c. Valmont* (RG 06/04256); Cour d'appel de Douai (Ch 1, Sct 2) 14 Sept. 2005, *SA Glaverbel, Société Fosbel Intellectual AG, Fosbel Europe BV et Fosbel Intellectual Ltd. c. SAS Compagnie Technique des Pétroles (CTP) et SA FIB Services* (RG 02/06916); Cour d'appel de Paris (4^e ch. Sct. B) 16 Mai 2003, *SA Saitec c. SARL Isolum* (RG 2001/14523); Cour d'appel de Paris (4^e ch. Sct A) 27 Nov. 2002, *Stratus SARL, Arome SARL et M. P. Blanc-Beauregard c. Société Athem* (RG 2000/07234). In Belgium, Hof van Beroep te Brussel (8^{ste} kamer), 01 April 2014, *Luc Doolaeghe v. N.V. Atos Worldline* (AR 2009/AR/3204); Hof van Beroep te Brussel (8^{ste} kamer) 04 Mei 2010, *De Wijngaert Achille v. V.Z.W. Royal Sporting Club Anderlecht* (AR 2008/AR/2267).

⁷² Kh. Gent (Zesde kamer) 20 Jan. 2011, *BVBA Willems Biscuiterie v. NV Lotus Bakeries* (A/09/02830).

⁷³ BE 1016009A3.

Willems). Back in 2006, two individuals applied and obtained a Belgian patent on the Speculoos spread. Two years later, Lotus approached the patent owners and alleged that the patent was invalid. However, the claim of invalidity was withdrawn and Lotus obtained the exclusive rights on the Speculoos spread. After having obtained and enforced a seizure measure at the premises of two Belgian supermarkets, the patent holder filed an infringement action against its competitor. Willems considered this opportunistic from Lotus to now enforce the patent with panache and verve, as Lotus had once claimed its invalidity. The Court dismissed the argument of abuse and held that in light of the principle of freedom of trade, Lotus could decide to change its strategy. The Court ruled that it was the defendant's decision not to commercialise its own Speculoos spread and that this decision had not been influenced by any allegedly aggressive scheme on the part of Lotus.

28 Intention to Harm – Although Belgian and French supreme courts declared that the “intention to harm” criterion was not unique⁷⁴, and that an abuse could be based on other criteria, it is clear from the cases analysed that the “intention to harm” still has a meaningful role to play in the assessment of abuse in the framework of patent litigation.

29 In 2014, the Paris Court of Appeal had to decide on a landmark case regarding the possibility of sanctioning a pharmaceutical company for abuse of rights. It all started in 2008 when Biogaran, a French pharmaceutical company specialised in generic drugs, obtained three marketing authorizations (MAs) for an anti-arthritic medicine. The German multinational Madaus Pharma was the holder of a European patent⁷⁵ (EP414) on an anti-arthritic medicine. Laboratoire Medidom and Laboratoire Negma being its licensees. Madaus' licensees, convinced that the generic drug was infringing EP414, put Biogaran on notice so that they would prevent the commercialisation of the generic by all means deemed necessary. Soon thereafter, Biogaran introduced an action for invalidity of claim 14 of EP414. In parallel, it started the commercialisation of its generic products. In light of this commercialisation, the licensees filed a request for preliminary injunctions. They obtained and enforced the preliminary injunctions (i.e. a ban on the commercialisation and distribution of the generic drugs and a call-back of the allegedly infringing products), but soon after, claim 14 of EP414 was declared invalid for lack of novelty and therefore the preliminary injunctions were withdrawn. In light of these decisions, Biogaran introduced a new action before the Paris District Court and notably claimed that the licensees should be liable on the basis of Art.

1382 of the civil code for dilatory manoeuvres and intention to harm. Biogaran argued that Laboratoire Medidom and Laboratoire Negma fraudulently and intentionally created a monopoly on the medicine at the expense of their competitors. Biogaran based its argumentation on various actions undertaken by two laboratories, such as, but not exclusively limited to; dilatory manoeuvres, blocking strategy for the commercialisation of generic medicines, manoeuvres against the grant of MAs by pressuring the administrative body in charge of the grant, unfair communication to pharmacists, multiplicity of litigation and delaying tactics. In first instance⁷⁶, the Court rejected the claim, and held that the licensees merely used all the legal procedural tools at their disposal and did not adopt an unfair behaviour.

30 The Paris Court of Appeal⁷⁷ adopted a very different position concerning the abuse argument. The Court identified the fact that the licensees intervened before the French agency delivering marketing authorization in order to delay the grant of MAs as essential to the assessment of abuse. Although Laboratoire Negma's claim as an exclusive licensee was doubtful, Laboratoire Medidom nonetheless proceeded with multiple administrative actions in order to delay the resolution of this dispute. More than twenty judicial decisions were handed down between the claimants. False or inaccurate notice letters were sent to pharmacists in order to discredit Biogaran's products. According to the Court, it was the combination of these actions and the manipulation of the legal process, which amounted to an abuse of rights and caused patrimonial and reputational damages to Biogaran. The Court held that the licensees were liable under Art. 1382 of the civil code and had to compensate Biogaran for commercial harm of EUR 3.500.000 as well as for reputational harm of EUR 150.000.

31 As with the difficulty to prove the knowledge of the patent holder, it is quite clear from the cases analysed that, for the argument of abuse to succeed, it is necessary to demonstrate a *manifest* intention to harm or to clearly objectify this intention by relying on the particular circumstances of the case.

32 Unfair Competition Practices – In many cases, the arguments of abuse and unfair competition were intertwined.⁷⁸ Although courts appeared to be

⁷⁴ Supra 12, 13.

⁷⁵ EP0520414B1.

⁷⁶ TGI Paris (3^e ch. 2^e sct.) 27 Jan. 2012, *Biogaran SAS c. Laboratoire Medidom & Laboratoires Negma* (RG 09/17355).

⁷⁷ Cour d'appel de Paris (Pole 5 Ch.2) 31 Jan. 2014, *SAS Laboratoires Negma c. SAS Biogaran* (RG 12/05485).

⁷⁸ In Belgium, Voorz. Kh. Antwerpen, 3 April 2012, *United Video Properties Inc. (UVP) v. NV Telenet* (A/11/05443); Kh. Gent (Zesde kamer) 20 Jan. 2011, *BVBA Willems Biscuiterie v. NV Lotus Bakeries* (A/09/02830). In France, Cour d'appel de Paris (Pole 5 Ch.2) 02 Déc. 2011, *M. Antonio Ochoa Marin & Valgraf SL c. SAS Alpem* (RG 10/09788); TGI Paris (3^e ch. 3^e sct.) 23 Mars

more comfortable with sanctioning a patent holder on grounds of unfair competition practices than on grounds of abuse of rights, actions considered as unfair competition practices have occasionally been subsumed under the umbrella of the prohibition of AoR and essentially covered three types of potentially harmful actions.

- 33 Denigration Campaign** – First, a patent holder has to be careful when providing information related to an infringement claim to third parties (e.g. customers of the alleged infringer or public officials),⁷⁹ and must avoid entering into a denigration campaign. The terms of the notice must be objective, prudent and carefully weighed and the patent holder must comply with the general duty of good conduct vis-à-vis its competitors.⁸⁰ The notice can be considered abusive when delivered with a clear intention to harm the suppliers or customers of an alleged infringer,⁸¹ or in cases where an immoderate notice negatively affects a commercial relationship established between an alleged infringer and third parties.⁸²
- 34 Disorganisation of the Market or Internal Disorganisation of a Competitor** – Second, the impact of a patent holder's misconduct on the market has been scrutinised and taken into consideration for the assessment of abuse, in particular where the

misconduct led to the disorganisation of the market or the internal disorganisation of a competitor business.⁸³

- 35** This can be illustrated by the following case. The English biomedical research charity Wellcome Foundation was the holder of a supplementary protection certificate (SPC) on the molecule acyclovir. It developed and commercialised its product VALTREX on the basis of this molecule. In 1997, it requested from Flamel, a French specialty pharmaceutical company, to stop its on-going clinical trials on the GENVIR, an allegedly infringing product. Wellcome introduced an infringement action. Flamel claimed that Wellcome adopted a malicious strategy, including fictitious negotiations, abusive seizures and procedures, and unfair competition practices. The overall scheme aimed at preventing Flamel from entering the market with its competitive product. The Paris District Court⁸⁴ argued that the introduction of an infringement action could not be abusive in *itself*. However, if the goal of the right holder in introducing such action is not to safeguard its rights but to eliminate or block a competitor from the market, it could be considered abusive. The Court analysed all the circumstances of the case⁸⁵ and concluded that Wellcome had a malicious intent and adopted an abusive behaviour. The Court concluded that since Wellcome knew these rights were not infringed upon, the seizure measures and the infringement action did not aim at safeguarding the rights derived from the SPC, but only intended to delay the entry on the market of a competitive product. As for the fictitious negotiations, the Court held that Wellcome relied on Flamel's belief that it was the best possible partner to develop the GENVIR to enter into such negotiations and unfairly obtain information about the development of the said product. Therefore, the Court held that Wellcome was liable, not only because it entered into fictitious negotiations with a potential competitor, but also because it developed an abusive scheme in order to delay the entry in the market of a competitive product.

2005, *Société AMDP et Société Service de Machines et Outillage Technique (SMOT) c. Société Exrod* (RG 02/16042); Cour d'appel de Paris (4^e ch. Sct. A) 05 Fév. 2003, *SA Colas c. STE T.S.S. (Eurovia Beton)* (RG 2001/08866); Cour d'appel de Paris (4^e ch. Sct. B) 18 Mai 2001, *STE Sponeta GMBH c. SA Cornilleau* (RG 1999/14452); Cour d'appel de Paris (4^e ch. Sct. A) 25 Avril 2001, *Société DIAM Diffusion Internationale d'Articles Manufactures SA c. Société RLB SA* (RG 1999/06310); TGI Paris (3^e ch. 2^e sct.) 20 Fév. 2001, *Wellcome Foundation Ltd c. SA Flamel Technologies (SARL Parexel Intl., SA Creapharm)* (RG 98/11548).

- 79 TGI Paris (3^e ch. 2^e sct.) 30 Mars 2012, *Actavis Group, Actavis Group PTC EHf Société, Actavis France SAS, et Mylan c. Novartis AG et Novartis Pharma SAS* (RG 08/03802); Cour d'appel de Douai (ch. 2 sct.1) 13 Mars 2013, *SARL Adage & SAS Pocheo c. SAS Mail Inside* (RG 12/03535). TGI Paris (3^e ch. 1^e sct.) 23 Nov. 2005, *Société Alcan Packaging Capsules c. SA Sparflex* (RG 03/08711).
- 80 TGI Paris (3^e ch. 3^e sct.) 16 Mai 2000, *SA Societe KIS c. Société Française Automatique (SFA) (ex- Société Games Diffusion International (G.D.I.) et SARL Société Gevin Corporation SRI* (RG 98/10315).
- 81 TGI Paris (3^e ch. 1^e sct.) 4 Mars 1998, *Societe Athem c. Societe Stratus, Societe Arome et M. Philippe Blanc-Beauregard* (RG 95/9984) p. 11. See also, TGI Toulouse (1^e ch.) 26 Aout 2006, *Société Technilum c. Société Valmont France RCS Cusset et Société Amie Spie Sud Ouest* (RG 04/03366). The patent holder informed different parties – which could be potential contractors for the defendant – of the existence of its intellectual property rights and the potential risks of being considered as contributory infringers if they were to contract with the alleged infringer.
- 82 TGI Paris (3^e ch. 3^e sct.) 28 Jan. 2003, *Société TYCO Electronics Corp. et TYCO Electronics France SAS c. SA TTK*, (RG 02/02889). TGI Paris (3^e ch. 1^e sct.) 26 Sept. 2007 [*Sir D. et al.*] c. *Société Biomet Merck France* (RG 06/01414).

83 TGI Paris (3^e ch. 1^e sct.) 15 Nov. 2011, *J.C. Bamford Excavators Ltd. et JCB SAS c. S.A. CNH France et SA Manitou BF* (RG 10/15560); TGI Paris (3^e ch. 2^e sct.) 20 Fév. 2001, *Wellcome Foundation Ltd c. SA Flamel Technologies (SARL Parexel Intl., SA Creapharm)* (RG 98/11548). Contra: TGI Paris, (3^e ch. 3^e sct.) 04 Mai 2012, *Sealed AIR SAS c. Doux Frais SAS* (RG 10/12618).

84 TGI Paris (3^e ch. 2^e sct.) 20 Fév. 2001, *Wellcome Foundation Ltd c. SA Flamel Technologies (SARL Parexel Intl., SA Creapharm)* (RG 98/11548).

85 Since early negotiations (in 1995 and 1996) Wellcome knew that the development of GENVIR by Flamel could harm its business. It also knew that GENVIR was a competitive product of the VALTREX. It knew that Flamel wanted to launch the clinical trials for the GENVIR. Moreover, and in light of the judicial past of Wellcome, it could not have ignored the case law related to clinical trial.

36 In most instances involving such market oriented analysis, courts focused on the aim pursued by the patent holder when initiating an infringement action. If the objective of the right holder was not to safeguard its rights but to eliminate or block a potential competitor from entering (or expanding in) the market, courts held that the patent holder abused its rights and/or was liable for unfair competition practices. By focusing on the distortion of the objective of an infringement action, courts seem to be particularly attentive to the general “right-function” criterion of the principle of the prohibition of AoR.⁸⁶

37 **Threats and Pressure** – Thirdly, occasionally, patent holders have used their exclusive rights to intimidate and pressure not only the alleged infringer but also third parties.⁸⁷ For example, in 2007, the Brussels Court of Appeal compensated an alleged infringer for the abusive exercise of its rights by a patent holder not only because of its bad faith, and the denigration campaign it undertook, but also because of the threats and pressures it inflicted on the alleged infringer and its resellers. In parallel to the infringement action, the patent holder reached out to resellers and potential clients of the alleged infringer, affirming patent infringement, spreading rumours and threatening these third parties with potential complicity in patent infringement. These actions led to a significant drop in the alleged infringer’s sales although the lawsuit was only in an initial phase. The Court⁸⁸ decided to hold the patent holder liable for its misconduct in light of the bad faith, the “free wickedness”, and the relentlessness of the patent holder.

38 In the majority of cases, the knowledge and/or intention of the patent holder and unfair competition practices have not been analysed independently. As pointed out earlier, the proof of a specific knowledge and/or an intention to harm is cumbersome. Evidence of unfair competition practices introduces a more tangible or objective element to the assessment of the case. It provides more room to manoeuvre for judges seeking to sanction a patent holder for abuse of rights.

39 This combination was at the heart of a 2003 French

86 Supra 7, 8.

87 TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918); TGI Toulouse (1^e ch.) 26 Aout 2006, *Société Technilum c. Société Valmont France RCS Cusset et Société Amie Spie Sud Ouest* (RG 02/06916); TGI Paris (3^e ch. 3^e sct.) 16 Mai 2000, *SA Societe KIS c. Société Française Automatique (SFA) (ex- Société Games Diffusion International (G.D.I.) et SARL Société Gevin Corporation SRI* (RG 98/10315).

88 Cour d’appel de Bruxelles (9^e ch.) 8 Juin 2007, *Alnaco S.A. c. [Sir de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696.

Supreme Court case.⁸⁹ The company Neptune (and its manufacturer and reseller Cuisimer) held a French patent on a process for the manufacturing of surimi.⁹⁰ Suspicious of patent infringement and unfair competition practices by its competitor (Fleury Michon) Neptune and Cuisimer brought an action before the Paris District Court. At first instance, the Court rejected the claim of infringement and awarded damages to Fleury Michon for abuse of rights.⁹¹ On appeal, the Paris Court of Appeal⁹² confirmed that Neptune and Cuisimer were liable for abuse of their right to introduce an infringement action, as well as their right to introduce an unfair competition claim. In last resort, the French Supreme Court confirmed the decision of the Court of Appeal which held that, in light of the state of the art and the specific market in which the parties were involved as competitors, it was manifestly abusive for a patent holder to enforce a patent for which he/she could not have misunderstood, in good faith, the extent of its scope (i.e. the knowledge of the patent holder). Therefore, a patent holder could not have initiated an infringement action when he/she knew, or should have known, that its patent was actually not infringed upon. To do so could only have been explained by the intention to intimidate a competitor and to drive them out of the market (i.e. unfair competition practices).

40 **Disproportionate Damages** – A particular case falling within the scope of general misconduct focuses on the adequate compensation in case of established infringement. In principle, a patent holder has the right to obtain compensation for the harm suffered, however, this compensation must be proportionate.

41 This type of misconduct has been recognised in 2013 by the Mons Court of Appeal. In 2009, a patent holder (the plaintiff) entered into license negotiations with a competitor (the defendant) for the commercialisation of a gardening tool, the “Rigolet”. Together, they presented the invention to the press and during trade fairs. The defendant even created a company for the manufacture, production, and commercialization of the patented product, and made important investments regarding the development of the product. However, a conflict arose between the parties. The plaintiff requested and obtained a descriptive seizure as well as a preliminary injunction to stop the commercialisation of the

89 Cour de cassation (comm.) 03 Juin 2003, *SA Neptune et Société Cuisimer Cuisine de la mer c. Société Fleury Michon* (E 01-15.740).

90 FR2692111B1.

91 TGI Paris (3^e ch. 1^e sct) *SA Neptune et c. Société Cuisimer Cuisine de la mer c. Société Fleury Michon*, 12 Mai 1999 (RG 96/4541).

92 Cour d’appel de Paris (4^e ch, sct. A) *SA Neptune et c. Société Cuisimer Cuisine de la mer c. Société Fleury Michon*, 27 Juin 2001 (RG 1999/19537).

"Rigolet". The defendant immediately complied with this order. During the procedure on the merits, the plaintiff claimed damages for infringement. The Court⁹³ declared that the plaintiff's claim for damages was disproportionate to the harm caused to the defendant, considering the investments made to produce and commercialise the patented product. In light of the history of the parties (i.e. presentation to the press and trade fairs, negotiation phase) and the immediate stop on commercialisation, it was considered that the plaintiff acted without legitimate motive and did not exercise its right as a prudent and diligent right holder. The Court decided that it was abusive for the patent holder to seek such a disproportionate amount of damages, notably because during negotiations the patent holder had encouraged the commercialisation of the infringed goods, but also because the infringement actions had only led to a minimal benefit for the alleged infringer.

- 42 In this case, the criterion of proportionality played a crucial role in the establishment of abuse. The court balanced the interests of the parties in light of all the circumstances of the case and considered that it would have been abusive to allocate a disproportionate amount of damages to the patent holder. In the majority of cases, the criterion of proportionality is less clearly distinguishable. This could be explained by the fact that patent litigation traditionally focuses on two essential questions, i.e. the validity of the title and infringement.⁹⁴ During the evaluation of infringement, patent holders are in a stronger position due to their exclusive right and the presumption of validity of their title. However, once the question of infringement is answered in the following phase, which consists in the evaluation of damages, parties are more or less reinstated in a situation of equality. This situation requires judges to weigh the interests of the parties involved in the process and to reach an outcome considered as proportionate. Considering the harm suffered by the patent holder but also the benefits made by the infringer, a patent holder claiming a disproportionate amount of damages can be held liable for abuse of rights.

2. Procedural Misconduct

- 43 **Initiating the Procedure** – The exercise of the right to exclude third parties, i.e. the right to claim infringement, represents a fundamental mechanism of protection for patent holders.⁹⁵ An infringement

action can only be brought by (a) a plaintiff with appropriate grounds to sue (b) derived from the patent in suit and (c) against the proper defendant who is alleged to have infringed such patent.⁹⁶ To initiate an infringement procedure while knowing that one or more of these prerequisites are not met, led courts to conclude that a patent holder abused his/her rights. The "knowledge" of the patent holder⁹⁷ on one or more of these three prerequisites was particularly decisive when enquiring potential abuses in the introduction of an instance.

- 44 **Plaintiff with Proper Standing** – For instance, the Paris Court of Appeal⁹⁸, found that it was abusive for an (ex) exclusive licensee to, not only initiate a claim for infringement, but also to have seizure measures performed at the premises of one of the alleged violators, when the exclusive licensee knew he/she did not benefit from this value any longer.⁹⁹
- 45 **Patent(s) in Suit** – For example, it has been considered abusive for a patent holder to claim infringement of titles known to be part of the public domain,¹⁰⁰ or to introduce a claim for infringement when the patent holder relied on different patents (or different patent claims) during different proceedings but against the same alleged infringer and for the same claim of infringement.¹⁰¹ The latter can also be considered a judicial harassment technique.
- 46 The role played by the patent(s) in suit on the appreciation of abuse was notably at the heart of the 2012 *UVP v. Telenet*¹⁰² case. In this case, the

Heath & L. Petit (eds.) *Patent Enforcement Worldwide: A Survey of 15 Countries: Writings in Honour of Dieter Stauder*, Hart Publishing, pp. 139-170 (2005). In France over 80% of patent cases concern infringement litigation.

96 L. Petit (n.95) p. 146.

97 *Supra* 21.

98 Cour d'appel de Paris (4^e ch. Sct. B) 15 Fév. 2008, *SA Eurofog et Société SAGEM (intimée provoquée) c. Société Photonetics, Société Sofresud, Société Fibersense Technology Corp., et SAS IXSEA* (RG 06/06627).

99 *A contrario*: Cour d'appel d'Aix en Provence (2^e ch.), 02 Fév. 2011, *SARL GS Environnement & [M. S.] c. [M. L & M. A] (mandataire judiciaire de la société Prodis SAS)* (Rôle n.09/07185); TGI Paris (3^e ch., 2^e sct.) 16 Fév. 2001, *SA Saitec c. SARL Isolum*, 16 Fév. 2001 (RG 99/13164), confirmed by Cour d'appel de Paris (4^e ch. Sct. B) 16 Mai 2003, *SA Saitec c. SARL Isolum* (RG 2001/14523).

100 TGI Paris (3^e Ch. 4^e sct.) 10 Oct. 2013, *Société Carpenter c. Société France Biotex* (RG12/06748). *Contra*: TGI Paris (3^e ch. 1^e sct) 24 Oct. 2007, *SA Secatol et SAS Secatol c. SA Haemmerlin, SARL Morena, M. and Mme. Morena and Florian Eichinger GMBH* (RG 01/18185).

101 TGI Paris (3^e ch. 3^e sct) 23 Mai 2007, *SA Tami Industries c. Applexion et SA Céramiques Techniques et Industrielles (CTI)* (RG 05/15960); TGI Paris (3^e ch. 3^e sct) 11 Juin 2008, *SARL Générale d'abris et accessoires pour piscines (GAAP) c. Société Abrisud* (RG 06/17811) p. 10.

102 Voorz. Kh. Antwerpen, 3 April 2012, *United Video Properties Inc. (UVP) v. NV Telenet* (A/11/05443).

93 Cour d'appel de Mons (1^e ch.) 02 Déc. 2013, *X c. SPRL Green & Company* (2012/RG/1003).

94 *Supra* 17.

95 L. Petit, "The Enforcement of Patent Rights in France", in C.

Belgian cable broadband provider Telenet developed a multimedia platform (Yelo) which allows digital TV users to watch programs on TV and mobile devices. The American company United Video Properties Inc. (UVP) and its affiliated companies (jointly called ROVI) alleged that Yelo was infringing upon its European patent regarding an interactive television program guide system having multiple devices within a household.¹⁰³ Despite multiple requests from Telenet to obtain more information on the potentially infringed patents, ROVI constantly refused to provide such information. It also refused to provide information regarding the actual acts of infringement. It only provided a list of more than 100 patents and patent applications and argued that it was for Telenet to identify the relevant patents for its defence in court. Telenet repeatedly asked for more information and indicated to ROVI its intention to advance the matter amicably. ROVI only responded that it would be more expensive for Telenet to contract individual licenses for the infringed patents than to opt for a general license on ROVI's portfolio. In light of these circumstances, the President of the Antwerp District Court for Commercial Matters held that ROVI abused its rights in serving a summons for infringement to Telenet without specifying the relevant patents infringed upon. The President highlighted the importance of the determination of the scope of the invoked patent by its holder in the event of an infringement action. It stressed that if the patent holder decided to serve a notice letter to an alleged infringer, it had to specify which patents were actually infringed upon. The lack of precision regarding the identification of the claims infringed on, although repeatedly requested by the alleged infringer, played a decisive role in the qualification of abuse.

- 47 This case also illustrates why “unfair competition practices” have been included in the general misconduct section.¹⁰⁴ Although the actions taken by the patent holder related to the mandatory procedural requirements of properly introducing an infringement claim, the President of the District Court took the view that the argument based on AoR was actually merged with the argument of unfair market practice and the general standard of good faith in the market.¹⁰⁵ The President concluded that if ROVI had an exclusive right to exclude third parties, this right came with responsibilities and had to be exercised with caution. To merely refer to various patents without specifying which patents were actually infringed upon and which actions were constitutive of patent infringement, especially when

the alleged infringer sought clarification on this point, amounted to an AoR and therefore an act of unfair competition.¹⁰⁶

- 48 **Proper Defendant/Alleged Infringer**¹⁰⁷ – For instance in 2008, the Paris District Court¹⁰⁸ held that since the patent holder knew (or at least should have known) that the alleged infringer had no commercial activity in the French market, the latter could not be considered as an importer and therefore could not be considered an alleged infringer¹⁰⁹. The patent holder knew (or at least should have known) that its claim for infringement could not succeed. To lock the alleged infringer in a procedure, despite such knowledge, was manifestly an abuse of rights.
- 49 **Judicial Harassment and (Unnecessarily) Lengthy Procedure** – Initiating redundant and unnecessary procedures or unduly prolonging the procedures against the same defendants for the same infringement claim and on the basis of the same patent (or the same patent claims) can constitute a fault leading to the liability of the patent holder on the basis of the prohibition of AoR.¹¹⁰
- 50 **Right to Appeal** – If the exercise of the right to initiate an infringement claim can turn into an abuse, the exercise of the right to appeal a decision

106 In its notice letter, ROVI referred to patents which had been either invalidated in a foreign jurisdiction (i.e. in the UK), revoked at the EPO, or not even in force in Belgium and which were irrelevant for the case at hand. It also relied on patents which were subsequently not invoked in the infringement action.

107 In Belgium, see Tribunal de Commerce de Mons, 28 Juin 2012, *Prefarails SA & Feronia SA c. CDM SA & ALM Industry* (A/10/01456) where the Court found manifestly abusive to drag in the procedure a defendant against whom the patent holders had only frivolous grievance and for which they had very little chance of success (pp. 14-15). Part of the assessment of abuse also focused on the ‘forum-shopping’ technique adopted by the patent holders. The latter sued the alleged contributory infringer in an attempt to have the entire infringement case decided by an incompetent court.

108 TGI Paris (3^e ch. 1^{er} sct.) 18 Mars 2008, *Schneider Electric Industries c. Chint Europe* (RG 06/03701). See also: TGI Paris (3^e ch. 3^e sct) 27 Juin 2007, *Société Calvasoft BV c. [Sir L. et al.] et Société Valor Consultants* (RG 05/08487), p. 18 where the TGI Paris found abusive to drag in the procedure defendants against whom the patent holder had no specific grievance.

109 Chint did not fulfil the two necessary requirements to be considered as an importer responsible for infringement, i.e. to have an activity in France and to be actively involved in the introduction of infringing products in the French market.

110 TGI Paris (3^e ch. 1^{er} sct.) 15 Nov. 2011, *J.C. Bamford Excavators Ltd. et JCB SAS c. S.A. CNH France et SA Manitou BF* (RG 10/15560); Cour d’appel de Douai (Ch 1, Sct 2) 14 Sept. 2005, *SA Glaverbel, Société Fosbel Intellectual AG, Fosbel Europe BV et Fosbel Intellectual Ltd. c. SAS Compagnie Technique des Pétroles (CTP) et SA FIB Services* (RG 02/06916); TGI Paris (3^e ch. 3^e sct.) 28 Jan. 2003 *Société TYCO Electronics Corp. et TYCO Electronics France SAS c. SA TTK*, (RG 02/02889).

103 EP1213919B1.

104 Supra 28.

105 Reference is made to Art. 95 de la *Loi du 6 AVRIL 2010. - Loi relative aux pratiques du marché et à la protection du consommateur* (Mon., 12 Avril 2010).

may as well be considered abusive. Occasionally, courts considered it abusive to appeal a decision which was particularly well substantiated and sufficiently clear for the patent holder. A reasonable and prudent litigant must evaluate its chances of success properly before appealing a decision.¹¹¹ Rushing to an appeal procedure without thoroughly evaluating the circumstances of the case or in order to unduly prolong a dispute can turn result in an abuse. However, and more frequently, courts concluded that even if a patent had been invalidated in first instance, to appeal this decision could not be considered an abuse since the invalidity decision was detrimental to the holder and therefore justified its interest in appealing this particular case.¹¹²

3. Misconduct Related to Seizure Measures

51 Belgian¹¹³ and French law¹¹⁴ provide efficient mechanisms for patent holders to fully enforce their right to exclude third parties. The provisions related to seizure measures are perceived – beyond national boundaries – as being particularly useful.¹¹⁵ Even before the adoption of the Enforcement Directive, Belgium and France were known for their provisions on *saisie-description* or *saisie-contrefaçon*.¹¹⁶ Certain conditions must be met in order for a patent holder to obtain seizure rights. However and despite these conditions governing the grant of the measures, abuses remain possible. In particular regarding the way in which patent holders actually enforce the seizure once obtained.

52 **Diverted Purpose** – With regard to the grant or the enforcement of seizure measures, it is worth

mentioning that the “right-function” criterion¹¹⁷ played an essential role in the assessment of claims of abuse. The aim of seizure measures is evidentiary;¹¹⁸ it is to obtain elements to prove the existence, origin, destination and scope of the alleged infringement. Seizures can not aim at being “fishing expeditions” or performing industrial espionage.¹¹⁹ To enforce such measures as a way to obtain confidential information, or to unduly exploit such information from a competitor has sometimes been declared abusive.¹²⁰ In addition, to divert the evidentiary purpose of these measures and to use these enforcement mechanisms to throw public discredit on the reputation of an alleged infringer has also been considered abusive.

53 In a landmark case, the French Supreme Court heavily sanctioned a patent holder who used the seizure procedure to conduct a fishing expedition rather than to gather evidence of infringement in a fair manner. In this case, the Swiss company Vetrotech Saint Gobain was the holder of a European patent¹²¹ on a light-transparent heat-protection element. In 2006, it suspected that its French competitor Interfer was infringing its patent by making and selling glazing in France. Vetrotech obtained and enforced various seizure measures followed by the introduction of an infringement action regarding the French tier of its European patent. In first instance, the Paris District Court¹²² found that Vetrotech had enforced the seizures under very unusual circumstances. Three patent attorneys were present during the seizure and the bailiff had a list of 24 specific questions to address to the alleged infringer. In light of these facts, the Court partially offset the minute of the seizures since the latter was closer to a fishing expedition than a proper means to obtain evidence of infringement. After an assessment of the allegedly infringing products via the minute of the seizure, it was clear for the Court that Vetrotech had the necessary and sufficient elements to recognise that Interfer’s technology was actually not infringing the patent invoked. The non-

111 Cour d’appel de Bruxelles (9^e ch.) 8 juin 2007, *Alnaco S.A. c. [Sir de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696.

112 In France, Cour d’appel de Paris (4^e ch. Sct. B) 16 Mai 2003, *SA Saitec c. SARL Isolum* (RG 2001/14523). In Belgium, Hof van Beroep te Brussel (8ste kamer) 04 mei 2010, *De Wijngaert Achille v. V.Z.W.Royal Sporting Club Anderlecht* (AR 2008/AR/2267).

113 Arts. 1369bis/1§3, 1369bis/1§5 Belgian judicial code.

114 Arts. L.613 and L.615 French IP code.

115 T. Bouvet, “Pre-trial measures: ex-parte searches and discoveries in IP cases”, Presentation at MIPLC Alumni Conference, Nov. 2007. T. Bouvet & M. Jelf, “Seizure, inspection and disclosure in Europe”, Presentation at Management forum – Successful patent litigation in Europe, Dec. 2009. P. Véron (dir.) *Saisie-contrefaçon*, Dalloz, 2^e ed., p. 34 (2005). In France, *saisie-contrefaçon* measures are used in 80% of infringement actions, it is considered as the most efficient way to gather evidence of infringement.

116 P. Véron (n.115). D. Keasmacher, “La saisie en matière de contrefaçon: Le code judiciaire à la rencontre des droits intellectuels”, *J.T.*, 2004, pp. 57-71.

117 *Supra* 7, 8.

118 D. Keasmacher (n.116). P. Véron (n.66) p. 6,51, 242.

119 D. Keasmacher (n.116) p. 71. F. de Visscher, “La preuve des atteintes – Réforme de la saisie-description”, in F. Brison (ed.), *Sanctions et procédures en droits intellectuels/Sancties en procedures in intellectuele rechten*, Larcier, p. 157 (2008).

120 In Belgium, TPI Bruxelles (7^e ch.) 20 Juin 2007, *SA GlaxoSmith-Kline Biologicals v. SA Sanofi Pasteur* (RG2006/6577/A). In France, TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918). Contra: In Belgium, Voorz. Kh. Antwerpen (kort geding) 21 Juin 2011, *Visys v. Best* (C/11/00067). In France, TGI Paris (3^e ch. 1^e sct.) 23 Nov. 2005, *Société Alcan Packaging Capsules c. SA Sparflex* (RG 03/08711).

121 EP0620781B1.

122 TGI Paris (3^e ch. 3^e sct.) 25 Mars 2009, *Vetrotech Saint Gobain (International) AG c. Interfer Sécurité SA* (RG 07/12696).

infringement also stemmed from Vetrotech's own analysis and reports. This set of facts led Intervet to claim that the patent holder abused its rights. In first instance, the Court ruled that both the seizure measures and the actual infringement action were abusive and that the commercial harm inflicted upon Intervet should be repaired. Vetrotech appealed this decision but the Paris Court of Appeal¹²³ confirmed the judgement of first instance. Vetrotech lodged an appeal in cassation. The French Supreme Court¹²⁴ held that the decisions on abuse were legally justified by the fact that Vetrotech obtained undue information on the manufacturing process of a direct competitor and that the seizure had served as an excuse to conduct illegal investigations. This was considered sufficient to characterise a fault on the part of Vetrotech and to sustain that the lower courts did not err in law.

54 (Unnecessary) Multiplication of Seizures and Place of Enforcement – Next to the diversion of the evidentiary objective of seizure measures, the unnecessary multiplication of seizures as well as the place of enforcement of such invasive enforcement mechanisms have also played a significant role in the assessment of abuse in patent litigation.¹²⁵

55 With regard to the *number* of seizures, the Paris District Court¹²⁶ held a patent holder liable for abuse when, following a first seizure at the premises of the alleged infringer which provided him with sufficient elements to prove infringement, it multiplied the number of seizures, in particular at the place of business of a subsidiary of the alleged infringer as well as at the premises of one of the alleged infringer clients. The patent holder should have proceeded with more caution when enforcing these measures and should have refrained from multiplying the number of such unnecessary seizures.

123 Cour d'appel de Paris (Pole 5 1^e ch.) 22 Juin 2011, *Vetrotech Saint Gobain (International) AG c. Intervet Sécurité SA* (RG 09/24271).

124 Cour de cassation (comm.) 12 Fév. 2013, *Vetrotech Saint Gobain (International) AG c. Intervet Sécurité SA* (F 11-26.361).

125 TGI Paris (3^e Ch. 4^e sct.) 10 Oct. 2013, *Société Carpenter c. Société France Biotex* (RG12/06748); TGI Paris (3^e ch. 3^e sct.) 23 Mars 2005, *Société AMDP et Société Service de Machines et Outillage Technique (SMOT) c. Société Exrod* (RG 02/16042). Contra: TGI Paris, (3^e ch. 3^e sct.) 04 Mai 2012, *Sealed AIR SAS c. Doux Frais SAS* (RG 10/12618) and TGI Paris (3^e ch. 3^e sct.) 27 Mars 2002, *Aventis Pharma c. Bristol Myers Squibb* (RG 96/25285). In the latter case, it has been considered insufficient to simply point at the number of seizures (seven in total) without specifying which actions undertaken by the patent holder during the enforcement of the seizures were actually abusive.

126 TGI Paris (3^e ch. 1^e sct.) 15 Nov. 2011, *J.C. Bamford Excavators Ltd. et JCB SAS c. S.A. CNH France et SA Manitou BF* (RG 10/15560).

56 As for the *place* of enforcement, a patent holder has the right to have a seizure enforced at any place deemed necessary to prove infringement.¹²⁷ The measure allows for a surprise inspection at the domicile or business premises of a competitor¹²⁸, but also at the show booth during a public trade fair. However, it appears from the cases¹²⁹ analysed that the place chosen by the patent holder for the enforcement of a seizure led courts to consider this exercise abusive. For example, if the patent holder already identified the alleged infringer but decided to have seizures conducted at different premises (e.g. that of customers); if the patent holder already had seizure measures conducted at different premises and were sufficient to gather elements of proof; or if the place of enforcement had been chosen to publicly “humiliate” the alleged infringer.

57 It should be noted that unfair competition practices and the knowledge or the intention to harm on the behalf of the patent holder have played a crucial role in the final determination of an “abusive scheme” including misconduct in the enforcement of seizure measures. To enforce seizure measures can amount to unfair competition practices either with the intention of pressuring a competitor's client or seeking to harm the reputation of the alleged infringer. They can also lead to the disorganisation of a group of competitors. However, courts have regularly excused patent holders on the grounds of a legitimate mistake.

4. Misconduct Related to Injunctions

58 The right to obtain and enforce (preliminary) injunctions can be of inestimable value for a patent holder.¹³⁰ Similar to the wrongful enforcement of seizure measures, harm arising from wrongful enforcement of (preliminary) injunctions has occasionally been remedied via the application of the

127 P. Véron (n.115) p. 152.

128 L. Petit (n.95) p. 152.

129 TGI Paris (3^e ch. 1^e sct.) 25 Jan. 2006, [*M. G.*] et *SA Jean Miguel Marthens c. SA Dupont de Nemours France, SA Dupont de Nemours Suisse International et Société EI Dupont de Nemours and Company* (RG 05/06294). Contra: Cour d'appel de Paris (Pole 5 Ch.2) 02 Déc. 2011, [*Sir. O.M.*] & *Valgraf SL c. SAS Alperm* (RG 10/09788); TGI Paris (3^e ch. 3^e sct.) 14 Juin 2006, *SA Jeulin c. M. F. Hervouet (agent liquidator of SARL Euroma)* (RG 04/09028); Cour d'appel de Douai (Ch 1, Sct 2) 14 Sept. 2005, *SA Glaverbel, Société Fosbel Intellectual AG, Fosbel Europe BV et Fosbel Intellectual Ltd. c. SAS Compagnie Technique des Pétroles (CTP) et SA FIB Services* (RG 02/06916); TGI Paris (3^e ch. 1^e sct.) 19 Déc. 2001, *STE Agritubel c. STE Guerletub et ST Jourdain* (RG 98/19637).

130 Arts. 9 and 11 Enforcement Directive. European Observatory on Counterfeiting and Piracy report on *Injunctions in Intellectual Property Rights* (2009), available at: http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf.

prohibition of AoR. Noticeably, it is in the framework of patent litigation in the pharmaceutical sector that the argument of abusive (preliminary) injunctions has been predominantly raised.

- 59 This was the case during one dispute between the Israeli company Medinol Ltd., and the American group Johnson & Johnson, before the President of the Brussels District Court for Commercial Matters¹³¹. Medinol was the holder of a divisional European patent¹³² (EP450) which was split off from another European patent¹³³ (EP856) which had been revoked at the EPO in March 2004. Before the revocation of EP856, Medinol already entered into numerous litigations across Europe¹³⁴. However, given the invalidity of EP856, Medinol started to launch proceedings on the basis of EP450.¹³⁵ In this case, Medinol attempted to obtain a preliminary (cross-border) injunction against Johnson & Johnson. The President held that Medinol's behaviour was inconsistent with the requirement of urgency and the multiple legal actions did not reflect the general principles of patent law. EP450 did not add anything to EP856 and it was considered that the multiple patents were confusing.¹³⁶ Medinol essentially attempted to keep its competitors "on the hook" as long as possible by initiating various legal proceedings across Europe on the basis of a divisional patent,¹³⁷ although the parent patent had been revoked at the EPO. In light of these circumstances, the President declared that the patent holder abused its rights to exclude third parties through the grant of a preliminary (cross-border) injunction in a summary proceeding.
- 60 In a second Belgian pharmaceutical case, the German company Merck was opposed to the English company GSK. GSK held a European patent

on the anti-depressant "Paxil". At the time of the procedure, this patent had lapsed in most countries where it was validated, including Belgium. GSK obtained a new term of protection due to the grant of another European patent (EP403).¹³⁸ In 2002, Merck announced it would start commercialising its own anti-depressant. In light of this up-coming commercialisation, GSK initiated an infringement action and requested an injunction. Merck petitioned that the principle of "reasonableness and fairness" should be taken into consideration when assessing the necessity of an injunction, in particular considering the public interest. The Brussels judge¹³⁹ recognised that the injunction would have profound repercussions on the company's business and that, although judges deciding on the grant of an injunction have wide discretion when deciding upon such measures, they nonetheless have to take into consideration the interests of the various parties involved. On the one hand, the company, which will have to suffer the consequences of the injunction will not be able to sell its product for the duration of the preliminary order. On the other hand, in case of infringing products, to deny the injunction could cause significant harm to the patent holder. In the particular case of "generic-originator" pharmaceutical dispute, the court must take into account the benefits for the public interest of cheaper generic drugs, and the financial cost of R&D suffered by the patent holder. In first instance, the Brussels judge granted the preliminary injunction, and argued that it would be more harmful to the patent holder to deny such a measure than it would be harmful for the defendant not to be able to sell its product for a certain period. However, the Brussels Court of Appeal reversed this decision.¹⁴⁰ It held that there was a strong implication that the second patent (EP403) provided for a second period of protection on the original product and did not protect a new product. The Court declared that the interest of the patent holder, who attempted to obtain an extended period of protection beyond the one intended by the legislator, could not prevail over the interest of the defendant who invoked the expiry of the legal period of protection. The injunctions were therefore revoked.

- 61 These cases present two similarities. First, judges in charge of granting a (preliminary) injunction did take the interest of the parties into account before granting such a measure. In the pharmaceutical sector, and specifically in litigation between an originator and a generic company, judges held that

131 Rb. Brussel (kort geding) 26 Oct. 2004, *Medinol Ltd. c. Janssen Pharmaceutica, Johnson & Johnson Medical, Cordis Holding Belgium (Johnson & Johnson Group)* (04/607/C).

132 EP846450B1.

133 EP762856B1.

134 In 2000 and 2003, Medinol brought proceedings in the Netherlands and Belgium, notably to obtain cross-border injunctions against the defendants.

135 In Germany, the Netherlands and Belgium. The Dutch court rejected Medinol's claim for infringement in light of the fact that EP450 was actually identical to EP856 and therefore constituted a 'double patenting' activity. In a summary proceeding, the Court of The Hague also rejected Medinol's claim and ruled that considering the revocation of EP856 and the 'double patenting' activity of Medinol, there was no reason to grant a preliminary injunction against the defendants. The judge also granted an 'anti-suit' injunction to the defendants.

136 The question of a potential 'double patenting' or 'ever-greening' situation.

137 P. De Jong, O. Vriens & C. Ronse, "Evoluties in het octrooirecht. Overzicht van rechtspraak 2003-2006", *R.D.C./T.B.H.* 2007/5, Mai/Mei 2007, pp. 423-480.

138 EP0223403B1.

139 Rb. (beslag kamer) Brussel, 13 Jun 2003, *N.V. Merck v. SmithKline Beecham Plc* (2003/AR/1606), *I.R.D.I.*, 2003, pp. 275-282.

140 Hof van beroep te Brussel (17 kamer) 29 Jun 2004, *N.V. Merck v. SmithKline Beecham Plc*, (2003/AR/1606), *I.R.D.I.*, 2004, pp. 402-407.

the impact of the measure on the public interest contributed greatly to the proportionality exercise.¹⁴¹ This balancing test could have been considered as an illustration of the “proportionality criterion”¹⁴² used to determine if a right holder abuses its rights. However, in the framework of a (preliminary) injunction, the balance is performed *ex ante* and is statutory. In the cases at hand, the prohibition of AoR only arose once the injunctive measures were granted, i.e. *ex post*. It served as a mitigating mechanism for the over-enforcement of injunctions by patent holders. Second, the decisions of abuse were based on the fact that patent holders aimed at illegitimately extending the scope of their patents beyond what had been conceived by the legislator. Patent holders obtained a patent on a product which had already been patented and for which the term of protection had expired. By focusing on the aim of the patent holder, which was in contradiction with the general principles of patent law, the “right-function” criterion was directly involved. Moreover, the intention to harm potential or actual competitors in the market by relying on such a title was highly influential in recognising an abuse. These cases demonstrate once again how to substantiate a claim of abuse by relying on multiple misconducts; the “intention to harm”, potential “unfair competition practices” and to base a claim on an “irregular patent”.

5. Misconduct Before Administrative Bodies

- 62 The prohibition of AoR requires judges to analyse all the circumstances of the case. Therefore, the conduct of a patent holder before administrative bodies such as patent offices (national¹⁴³ or the EPO) or authorities granting marketing authorisation (in the pharmaceutical sector) has also been taken into account in the assessment of abuse in patent litigation.
- 63 For example, in one of the cases analysed, the Paris District Court¹⁴⁴ scrutinised the attitude of the patent holder during the EPO opposition procedure. In particular, the knowledge of the patent holder regarding the exact extent of its rights. The Court held that if the plaintiff amended its claims during

141 See also TPI Bruxelles (ch. des saisies) 01 Jan. 2003, *S.A. Euro-generics v. Smith Kline Beecham Plc.* (RG/02/11.997/A).

142 *Supra* 7, 8.

143 TGI Toulouse (1^{er} ch.) 26 Aout 2006, *Société Technilum c. Société Valmont France RCS Cusset et Société Amie Spie Sud Ouest* (RG 04/03366). Reversed by Cour d’appel de Toulouse (2^e ch. sct. 2) 12 Juin 2007, *Technilum c. Valmont* (RG 06/04256).

144 TGI Paris (3^e ch. 1^{er} sct.) 15 Nov. 2011, *J.C. Bamford Excavators Ltd. et JCB SAS c. S.A. CNH France et SA Manitou BF* (RG 10/15560).

the opposition procedure, it was solely to have the defendant’s product fall within the scope of its patent. It was manifest that the patent application and its amendments aimed to obtain a monopoly detrimental to the activities of a competitor and did not aim to develop the patent holder’s own activity. In light of these elements, the Court ruled that the patent holder was liable on the basis of Art. 1382 of the French civil code.

- 64 Notably, an interesting aspect of this case lies in the fact that what has been taken into consideration for the establishment of an abusive scheme, was the attempt from the patent holder to obtain a monopoly and block competition instead of developing its own activity. Connections with the “right-function” criterion of abuse can be established considering the goals of patent law. Patents represent incentive to innovate, encompassing the promotion of the development of products and services for consumers. In this case, the patent holder did not use its rights in order to fulfil this particular purpose of the law. This diversion led the Court to conclude an abuse on behalf of the patent holder. Another noteworthy aspect relates to the fact that, once again, importance has been given to unfair competition practices, the specific knowledge of the patent holder, or its intention to harm.

6. Intermediate Conclusion: The Need to Demonstrate an ‘Abusive Scheme’

- 65 At this stage of the paper it is important to emphasize that it is the combination of various misconducts that guide courts towards ruling patent holders liable for abuse. It is the elaboration of an “abusive scheme” encompassing numerous misconducts which lead to a sanction. When taken separately, the misconducts highlighted above are rarely considered sufficient to substantiate a claim of abuse. For instance,¹⁴⁵ it is not solely because a patent holder enforces a seizure at the premises of a client of an alleged infringer rather than at the alleged infringer’s place of business, that a court will rule that the seizure is abusive. However, a court could conclude that a patent holder is liable for abuse of rights if combined with actions such as: introducing an infringement action solely on the basis of the minutes of the bailiff, which are not clear on the question of infringement; not requesting nor enforcing any physical seizure; accessing and obtaining information non-related to the infringement proceeding from a competitor etc. After reviewing the different cases, it can be said that the misconducts identified as “the knowledge”

145 TGI Paris (3^e ch. 3^e sct.) 23 Mars 2005, *Société AMDP et Société Service de Machines et Outillage Technique (SMOT) c. Société Ex-rod* (RG 02/16042).

of the patent holder, its "intention to harm", and objective "unfair competition practices" are the dominant actions leading courts to declare that a patent holder developed an "abusive scheme" and holding them liable on the basis of Art. 1382 of the respective civil codes.

II. The Harm Suffered

- 66 A victim of abuse has to prove the harm suffered. In the cases under scrutiny, this essentially covered three types of harm: commercial harm, reputational harm and (extra) costs of litigation.
- 67 **Commercial Harm** – This can include, loss of customers, delays in delivery, costs for the replacement of the allegedly infringing products, loss of profits and shortfall suffered by the victim of abuse.¹⁴⁶
- 68 **Reputational Harm** – This takes into account the direct impact of the abusive actions on third parties (including customers and/or resellers of the victim of abuse) especially in the case of denigration campaign, threats or pressure, as well as the indirect impact on third parties, such as the repercussion of the litigation process on the relationship between the victim of abuse and third parties. The length of the procedure is also included in the assessment of the reputational harm.¹⁴⁷
- 69 It seems particularly difficult for a victim of abuse to successfully demonstrate the existence and to quantify the commercial and/or reputational harm.¹⁴⁸ Even in cases where a court acknowledged

that the patent holder misbehaved (and therefore was at fault), allocation of damages has often been denied for the lack of proof of a distinct harm¹⁴⁹ directly connected to the misbehaviour. As for the quantification of the harm, in the *Biogaran c. Negma* case¹⁵⁰, the generic drug company victim of abuse substantiated its commercial and reputational harm by providing the Court with extensive commercial and financial records as well as studies from consultancy experts. This case is nonetheless exceptional. In the majority of the cases, courts reduced the amount sought as compensation and awarded a lump sum evaluated *ex aequo et bono* due to the lack of substantive elements to evaluate the actual harm.

- 70 **Costs of Litigation** – Since Belgium and France both adopted a "loser-pay" rule,¹⁵¹ the application of the related provisions has been considered sufficient by courts to repair such harm.¹⁵² It is argued that the rules on judicial expenses do not exclude the application of the rules on extra contractual liability (i.e. Art. 1382 of the civil codes) and that a litigant can be charged to pay the costs not covered by these provisions, if caused by its wrongful act.¹⁵³ The litigant incurring these extra costs must then demonstrate that a particular harm will not be covered by the specific provision on the costs of litigation. In practice, none of the cases have relied on Art. 1382 of the respective civil codes to allocate such additional repair. This is likely explained by a substantive difference existing between the two jurisdictions analysed. In Belgium, the amount

146 TGI Paris (3^e ch. 3^e sct.) 25 Mars 2009, *Vetrotech Saint Gobain AG c. Interfer Sécurité* (RG 07/12696) and Cour de cassation (comm.) 12 Fév. 2013, *Vetrotech Saint Gobain (International) AG c. Interfer Sécurité SA* (F 11-26.361); TGI Paris (3^e ch. 2^e sct) 16 Déc. 2005, *Société Eurofog et Société SAGEM (intervenante forcée) c. Société Photonetics, Société Sofresud et Société Fibersense Technology Corp.* (RG 00/10470) confirmed by Cour d'appel de Paris (4^e ch. Sct. B) 15 Fév. 2008, *SA Eurofog et Société SAGEM (intimée provoquée) c. Société Photonetics, Société Sofresud, Société Fibersense Technology Corp., et SAS IXSEA* (RG 06/06627).

147 TGI Paris (3^e ch. 1^e sct.) 15 Nov. 2011, *J.C. Bamford Excavators Ltd. et JCB SAS c. S.A. CNH France et SA Manitou BF* (RG 10/15560).

148 TGI Paris, (3^e ch. 3^e sct.) 04 Mai 2012, *Sealed AIR SAS c. Doux Frais SAS* (RG 10/12618); TGI Paris (3^e Ch. 3^e sct) 04 Mai 2012, *Ulma CYE S.COOP et Ulma Packaging, SARL c. Doux Frais SAS* (RG 11/00284); Cour d'appel de Paris (Pole 1 Ch.2) 22 Fév. 2012, *SAS Solution Impression (anciennement Octo Communication) c. SA Sevu – société spécialités européennes de vulcanisation* (RG 11/04632); Cour d'appel de Paris (Pole 5, ch.4) 18 Jan. 2012, *[Sir P. et al.] c. SA Metabolic Explorer (09/09895)*; Cour d'appel de Paris (Pole 5 Ch.2) 02 Déc. 2011, *[Sir O.M.] & ValgrafSL c. SAS Alpem* (RG 10/09788); TGI Paris (3^e ch. 1^e sct) 06 Nov. 2007, *Société Agencement Magasins Coordination – AMC c. Société R.G.R.* (RG 04/03229); Cour d'appel de Paris (4^e ch. Sct. A) 05 Fév.

2003, *SA Colas c. STE T.S.S. (Eurovia Beton)* (RG 2001/08866); TGI Rennes (2^e ch. civ) 21 Jan. 2008, *Sonefa SARL et Proteaval SARL c. [Sir K.]* (RG 05/02411). On the other hand, a claim of abuse has been rejected by the Paris Court of Appeal, since, although the defendant clearly substantiated a commercial harm, he failed to demonstrate the fault from the patent holder. Cour d'appel de Paris (4^e ch. Sct. B) 18 Mai 2001, *STE Sponeta GMBH c. SA Cornilleau* (RG 1999/14452).

149 TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918) pp. 21-22.

150 Supra 26.

151 Supra 15.

152 TGI Paris (3^e ch. 3^e sct) *SAS Douaisienne de Basse Tension (DBT) et [Sir B.] c. SAS Technolia France*, 11 Juillet 2014 (RG 10/14022); TGI Paris (3^e ch. 1^e sct) 14 Nov. 2013, *[Sir G.] c. SAS Lise Charmel Industrie* (RG 12/09624); TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918); TGI Paris (3^e ch. 3^e sct.) 22 Juin 2012, *Watts Industries France (anciennement GRIPP SAS) c. Rehau SA* (RG 10/02331); TGI Paris (3^e ch. 1^e sct) 23 Oct. 2007, *SAS Gyrax c. Ets. Gard, SAS Desvoys & Fils, Ets. Grenier Franco et SAS Suire* (RG 05/06184); TGI Paris (3^e ch. 1^e sct.) 31 Oct. 2006, *SAS Alliora c. Société Corjet, Société Automotization Industrial Hamer et SA Ets. Muguet Grizard* (RG 02/16040).

153 I. Samoy & V. Sagaert (n.53) p. 83. V. Sagaert & I. Samoy, "Cost and fee allocation in civil procedure" (Belgium). *International Academy of Comparative Law, 18th World Congress*. July 2010, available at: http://www-personal.umich.edu/~purzel/national_reports/Belgium.pdf, p. 11.

of recoverable attorney's fees is "capped". The actual recovery is therefore very limited. In France however, Art. 700 CCP¹⁵⁴ allows for more room to manoeuvre for judges. This case law analysis conveys the impression that this provision, which provides for an "equity" based assessment of the case, has been relied upon as a substitute to the action for abusive procedure when the constitutive elements of the latter were not sufficiently characterised. In comparison to Belgium, this led to the allocation of greater substantive damages compensating for the harm suffered in terms of costs of litigation.

III. The Causal Link

71 A victim of abuse has to demonstrate that the actual harm suffered stems from the abusive exercise of the rights by a patent holder. It goes without saying that this represents a sometimes insurmountable, hurdle for the victim of abuse. In some cases, the lack of proof of causal link between the fault and the harm has been a great flaw in the argument of AoR.¹⁵⁵ In the cases analysed, courts essentially focused on the fault (2.1) and the harm (2.2), therefore providing only limited insight on the causal link.

IV. The Sanction of Abuse

72 **Damages** – The remedy to an abusive exercise of its patent rights by a patent holder has frequently been to allocate damages to the victim of abuse in order to repair the (commercial and/or reputational) harm suffered. These damages have either been clearly evaluated on the basis of substantive financial records and therefore amounted to a full compensation (only in rare cases), or have been evaluated *ex aequo et bono* and resulted in a lump sum (in most cases). The amount of damages awarded varies greatly between the cases. It goes from a symbolic euro to the exemplary sum of EUR 3.650.000.¹⁵⁶ It should be mentioned that the amount of damages actually granted to the victims of abuse of rights from patent holders was, in most cases, far below the amount of damages claimed.

73 **Publication of the Judgment** – It is clear from the case law that the allocation of damages represents the most traditional remedy. However, in one specific case, the publication of the judgment has been considered as a sufficient sanction for abuse,

and no damages were allocated.¹⁵⁷ Generally, the publication of the judgment holds potential positive repercussions for the victim of abuse. For example, in the event of unfair competition practices from the patent holder and disorganisation in the market, the publication of the judgment may represent an adequate measure to pacify the market in which the parties were involved.¹⁵⁸

74 **Specific Sanction for the Disruption of the Judicial Process** – Occasionally, defendants claimed compensation for abuses on the basis of either Art. 32-1 French CCP or Art. 780bis Belgian Judicial Code.¹⁵⁹ However, these provisions are at the disposal of the judges and do not constitute defensive mechanisms in the hands of litigants. They aim at redressing a disruption in the judicial process and not at compensating the potential harm caused to defendants. Therefore, based on these provisions, courts have generally considered the claims of abuse inadmissible.¹⁶⁰

75 **Sanction for Abusive Seizure or Abusive Injunction** – Isolated claims of abuse of such measures seem to have largely failed in the cases analysed. They were generally part of a broader "abusive scheme" and their sanction was included in an all-encompassing *ex aequo et bono* evaluation. Because of this type of evaluation of the harm suffered, it is difficult to know which part of the lump sum granted was actually aimed at repairing the harm suffered from the abusive seizure or abusive injunction. Moreover, in most cases, the revocation of the measure represented an adequate remedy and was rarely accompanied by damages for a specific harm.¹⁶¹

157 Cour d'appel de Paris (4^e ch. Sct. A) 25 Avril 2001, *Société DIAM Diffusion Internationale d'Articles Manufactures SA c. Société RLB SA* (RG 1999/06310) p. 15.

158 Cour d'appel de Bruxelles (9^e ch.) 8 Juin 2007, *Alnaco S.A. c. [Sir de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696.

159 Supra 14.

160 In France – TGI Paris (3^e ch. 3^e sct) *SAS Douaisienne de Basse Tension (DBT) et [Sir B.] c. SAS Technolia France*, 11 Juillet 2014 (RG 10/14022); Cour d'appel d'Aix en Provence (2^e ch.) 02 Fév. 2011, *SARL GS Environnement et al. c. [Ms. L]* (Rôle n.09/07185); TGI Paris (3^e ch. 1^e sct.) 12 Jan. 2009, *SA METabolic Explorer c. SAS Holditech Heurisko, [Sir M. et al.]* (RG 07/08403); TGI Rennes (2^e ch civ) 21 Jan. 2008, *Sonefa SARL et Proteaval SARL c. [Sir K.]* (RG 05/02411); Cour d'appel de Paris (4^e ch. Sct.B) 27 Mai 2005, *[Sir F.] c. SA Universeal* (RG 03/05266). In Belgium – Kh. Brussel (23^{ste} kamer), 04 Oct. 2011, *N.V. Eurogenerics v. Sanofi-Aventis SA & Sanofi-Aventis Groupe* (AR. A/10/5081).

161 TGI Paris (3^e ch. 1^e sct.) 23 Oct. 2007, *SAS GyraX c. Ets. Gard, SAS Desvoys & Fils, Ets. Grenier Franco et SAS Suire* (RG 05/06184); TGI Paris (3^e ch. 2^e sct) 06 Avril 2007, *SA Railtech International c. GTM Génie civil et services, SA KLK Electro Materiales et Société Electra KLK Europe EKE* (RG 04/15727); Ordonnance du TGI Paris (Ch. des requêtes) 05 Avril 2006, *Citel 2CP et Citel OVP c. Société Soule protection surtensions* (RG 06/04814); Cour d'appel de Paris (4^e ch. Sct.B) 27 Mai 2005, *[Sir F.] c. SA Universeal*

154 Supra 15.

155 TGI Paris (3^e ch. 1^e sct.) 20 Déc. 2012, *SARL Measurix, SARL Measurix France c. SARL Atlog* (RG 11/10918).

156 Supra 26.

D. Conclusion

- 76 Patent holders have the ability and the means to exercise their exclusive patent rights in an abusive manner. However, decisions from Belgian and French courts clearly demonstrate that patent rights must be exercised within the limits of moderation if patent holders do not want to suffer the “wrath” of judges. If a patent holder actively participates in an “abusive scheme”, courts may be less inclined to forgive, and may potentially lean towards a sanction for abuse. The threshold for defendants to win a case on the argument of abuse is nonetheless fairly high. To demonstrate that a patent holder does not act as a normal, prudent and diligent person (the generic criterion for abuse in Belgium), or that an abuse is characterised (the umbrella used in France) is not an easy task. Even confronted with a patent holder’s actions which are somewhat frivolous or irritating, courts may still consider these behaviours insufficient to fully substantiate a claim of abuse.
- 77 The presumption of validity that patents enjoy represents a hurdle for victims of abuse (in Belgium in particular). In various cases, judges held that since a patent had been granted by a patent office, its enforcement could not amount to an abuse. Even when foreign jurisdictions (and administrative bodies) revoked (or refused to grant) the patent, it did not affect its *prima facie* validity. This presumption of validity impacted not only the potential abuse of the right to initiate a claim but also the right to obtain a seizure measure and/or (preliminary) injunction. The value attributed to the presumption is however questionable. This paper argues that the validity, and therefore the legality of a patent, does not necessarily mean that its enforcement is legitimate. It is highly possible to face a situation in which a valid patent is enforced in an abusive manner. Otherwise, it would only be in cases where the patent(s) in suit was/were considered “irregular” that the actions undertaken by patent holders could have been sanctioned via the prohibition of AoR. Yet, the case law analysed demonstrates that this is not the case.
- 78 With regard to seizure measures and (preliminary) injunctions, the prohibition of AoR seems to serve as a last resort mechanism. Conditions to obtain an injunction as well as the legal requirements surrounding the grant of seizure measures give the impression to provide sufficient leeway for judges to sanction illegal requests of such important enforcement mechanisms by patent holders. Once these measures are obtained, over-enforcement is nevertheless open to patent holders. However, it is only in exceptional cases that the prohibition of AoR was able to provide for a remedy to victims of clear misconduct from patent holders. It is suggested
- that the scarcity of these cases relates to the fact that the *ex ante* balancing exercise undertaken by judges before granting such interim measures limits the possibilities of having over-enforcement *ex post*, therefore reducing the need to resort to the prohibition of AoR.
- 79 The leading research question of this paper was to better understand how Belgian and French judges interpret the principle of AoR in the framework of patent litigation, in order to provide more substance to the broad and sometimes vague notion of “abuse” in patent litigation. The prohibition of AoR requires judges to take into consideration all the circumstances of a case before the determination of an abuse and such an all-encompassing analysis has been confirmed in the case law under scrutiny. It was not only the actions taken against the litigant which were part of the assessment, but also the actions having prejudicial consequences for third parties (such as customers of the victim of abuse) and/or actions which took place before administrative bodies (such as patent offices). Regarding the time period covered by the judicial review, the analysis was not limited to the litigation itself, but also included past actions, which sometimes took place years before the litigation.
- 80 From a distant perspective it may seem that the investigation spectrum of judges is rather broad and that a clear identification of abusive actions from patent holders would be lost in the midst of things. However, as mentioned in the hypothesis put forward at the beginning of this paper, with a closer look at the analysis conducted by judges, such specific guidance could be – and actually was – found. After reviewing the cases at hand, it can be concluded that particular attention should be given to the following elements. Firstly, the knowledge of patent holders (or the fact that they should have known) regarding the invalidity and/or the non-infringement of their title. Secondly, the intention of patent holders to either, harm their opponent in litigation, or harm third parties who have particular relationships with their opponent. Thirdly, the involvement of patent holders in unfair competition practices, including denigration campaign, disorganisation of the market and/or internal disorganisation of a competitor, and threat and pressure. Fourthly, the diversion of patent rights, or actions stemming from these rights such as the right to request and enforce seizure measures and/or (preliminary) injunctions, from their legal purposes. These four elements represent the most common building blocks of an “abusive scheme”.

- 81 One commentator¹⁶² has compared the prohibition of AoR to an elephant and argued that you should be able to recognise an abuse when you see one. It is hoped that this paper provides a clearer idea for readers, enabling them to detect and identify these peculiar legal elephants in the savannah of patent litigation.

* Amandine Léonard is a PhD Candidate at the Centre for IT & IP Law of KU Leuven: Agentschap Innoveren en Ondernemen (VLAIO) scholarship. This article is part of the PhD research project of the author. The author is extremely grateful and thankful to her promotor, Prof. Dr. G. Van Overwalle and co-promotor, Prof. Dr. M-C. Janssens. Thank you for your support, comments, unflagging patience and cheerfulness in times of need. The author would also like to thank Valerie Verdoodt, Pieter-Jan Ombelet and Arina Gorbatyuk for their helpful and stimulating discussions.

162 H.L. McCarthy, “Abuse of Rights – Europe’s Legal Elephant”, *GITC Review*, June 2007.