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Your trainee's purchase in a store may not be admissible in the French courts: Finding new ways of getting good proof

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Proving infringement in France has become just that wee bit more perilous after the Supreme Court's decision of 25th January 2017.

Saisie-contrefaçon, pioneered in France back in 1991 is still widely used to obtain material evidence of infringement that may be located in premises that are private, such as a company's warehouse or showroom. However, *saisie-contrefaçon* can only be carried out under the aegis of a judge who will want to ensure that what he or she is authorizing is absolutely necessary and proportional. If the judge's authorization is overstepped, then the *saisie-contrefaçon* is deemed null and void and with it, the chance to prove your case.

As a result, to ensure that your client has a solid range of proof that will stand in court, it is always best, where possible, to diversify. Indeed, one should never lose sight of the fact that infringement can be proved by any legally admissible means.

An alternative that is widely used here in France is the *constat d'huissier*: a bailiff is called upon to evidence a purchase made by another person in a store. The key distinction being that a store is publicly accessible, unlike a warehouse. To do this, the bailiff notes that another person enters the store with his or her hands empty before coming out with an item and a receipt which he then consigns as material evidence in his report or *constat d'huissier*.

But the Supreme Court decision of January 2017 has now ruled that using a trainee of a law firm (acting for the plaintiff), in the circumstances described above, to purchase an item in a store that a bailiff will then subsequently consign as evidence, is contrary to article 6 of the Convention for the protection of Human Rights and more generally, to the principle of loyalty in the administration of evidence.

It was by reference to this very principle of loyalty that the Appellate Court, whose decision was overruled, had previously decided that there was no unfair stratagem in using the services of a trainee to purchase the item.

But the Supreme Court went on to say that the person assisting the bailiff must be independent from the plaintiff.

This implies that anyone who is subordinate to the plaintiff may not assist in any such purchases,

neither the lawyer nor a trademark attorney, nor their employees or trainees.

Are we to deduce that this requirement of independence should be interpreted fairly largely?

Will an investigator be deemed sufficiently independent from the plaintiff or will he be deemed subordinate to the plaintiff in such a way that his or her own material conclusions could be put into question?

Clearly, the decision of the Supreme Court raises more questions than it solves.

The immediate consequence of this decision is that it leaves plaintiffs scrambling to reassess their evidence in ongoing cases, with a potential invalidation of all current *constat d'huissier* using the same method.

The short and long term consequences are that we are going to have to take more time and care in gathering good evidence and finding intermediaries, investigators, detectives, and specialized companies over the internet able to offer services that fulfill the criteria of independence set out by the Court.

Gathering proof has always been the nitty gritty of our work but it has never been more true today.

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