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FAIRNESS OF EVIDENCE: MORE FLEXIBILITY IN OBTAINING IT... BUT NOT IN PRESENTING IT TO THE JUDGE IN INTELLECTUAL PROPERTY MATTERS



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The issue of fairness in evidence has recently come under the spotlight following two judgements issued on December 22, 2023 by the plenary session of the French Supreme Court (Cour de cassation). After a proportionality check, the Court now authorizes the production of evidence obtained unfairly. However, when it comes to intellectual property, judges are more inclined to reinforce the fairness of debates, which is not necessarily contradictory.

The principle of fair proof is established in article 9 of the Code of Civil Proceedings, which provides that everyone must prove their claims "in accordance with the law".

According to the courts, this article implied a requirement of fairness in obtaining evidence, which should lead to the rejection of evidence obtained unfairly. For example, the recording of a conversation without a person's consent was considered to be an unfair evidence, particularly prejudicial to the right to privacy¹⁰.

In two particularly well-grounded rulings, the Supreme Court now considers that "it is now appropriate to consider that, in civil proceedings, unlawfulness or

*unfairness in obtaining or producing a means of proof does not necessarily lead to its exclusion from the proceedings"*¹¹.

According to the Court, this reversal is intended to avoid "depriving a party of any means of proving its rights" and is based on the principle of equality of arms during the trial.

While disloyalty between the parties in obtaining evidence now seems to be accepted (1.), loyalty is still required in presenting evidence to the Judge, particularly in intellectual property matters (2.).

1. The admission of disloyalty between parties in obtaining evidence

In criminal cases, the courts have for many years recognized the unfairness of evidence in favor of the parties. Persistent and long-standing case law accept all evidence produced by litigants, even if it has been obtained illegally or unfairly¹². In this case, judges give primacy to the rights of the defense in order to ensure that the truth is revealed. However, this right to "disloyalty" applies only to those subject to trial, and

¹⁰ Cass. 2nd civ., Oct. 7, 2004, no. 03-12.653

¹¹ Cass. Ass. Plén., December 22, 2023, 20-20.648 and 21-11.330

¹² Cass. Crim. June 15, 1993, n°92-82.509

not to public officials, who remain subject to an obligation of loyalty¹³.

One direct consequence of this difference in approach between civil and criminal matters in terms of assessing the right to evidence was to lead litigants to prefer the criminal track to the civil track, in order to benefit from a more favorable probatory regime.

In some cases, the same fact can be classified as criminal or civil, so the claimant benefits from an option and may select the one most favorable to, as in the case of "forum shopping". For example, the unlawful reproduction of a trademark may give rise to an action before the judicial court, but also to the filing of a criminal complaint on the basis of article L716-9 of the French Intellectual Property Code, which provides for 4 years' imprisonment and a fine of 400,000 euros.

It was this "*risk that the criminal track could be used to circumvent the more restrictive evidence regime in civil track*" that led the Cour de cassation, at least in part, to its reversal in its two rulings of December 2023.

From now on, evidence considered unfair because of the way it was obtained by one party from the other may be admitted before the judge, provided that its production is "*indispensable to the exercise [of the right to evidence] and that the infringement is strictly proportionate to the aim pursued*".

In one of its two rulings of 2023, the French Supreme Court accepted the production of surreptitious recordings of a person during an interview.

This solution will certainly influence future case law, but it must be balanced with other recent cases which also deal with loyalty.

2. Loyalty to judge in intellectual property matter

The question of fairness in obtaining evidence must be distinguished from the obligation of fairness towards the judge in the presentation of the facts. This fair presentation is particularly debated in the field of intellectual property, where evidence is regularly at the

center of debates, notably because of the existence of specific legal provisions.

In this respect, Article 3 of Directive 2004/48 on the enforcement of intellectual property rights expressly states that "*measures, procedures and remedies must be fair and equitable*".

Judges are therefore particularly vigilant about the presentation of facts made by the claimant, regularly referring in their decisions¹⁴ to Directive 2004/48, as well as Article 10 of the Civil Code, from which they deduce an obligation for the parties to produce the elements in their possession likely to influence their opinion¹⁵.

The Court of Cassation has ruled that "*the applicant for an infringement seizure measure must demonstrate loyalty in the presentation of the facts in support of his request for infringement seizure*"¹⁶. More specifically, this loyalty expressed for example in the obligation to communicate to the judge any intellectual property titles held by the opposing party, as well as relevant decisions handed down by intellectual property offices.

Another area in which loyalty is regularly invoked is when a third party carries out a purchase report. In a decision dated January 25, 2017, the Cour de cassation put an end to the usual practice of having a purchase recorded in a store in the presence of a bailiff, using a student lawyer who worked in the plaintiff's law firm¹⁷. This was based on article 9 of the French Civil Code and on the principle of fair proof. Some recent rulings still seek to determine whether there is a "*stratagem or unfair procedure*" to assess the validity of the report, and to verify the identity of the third party performing the purchase to ensure his independence¹⁸.

In this respect, it is questionable whether the two rulings handed down by the plenary assembly in 2023 do not challenge the requirement for a finding to be made by an independent third party since the requirement of fairness of the evidence, which in this case concerns the obtention of evidence and not its presentation to the judge, is no longer required. That said, given the particular requirements of loyalty in the

¹³ Cass. ass. plen., Dec. 9, 2019, no. 18-86.767

¹⁴ E.g. TJ Paris, 3e ch. 2e sect., Feb. 9, 2024, no. 23/10348; Cass. Com. December 6, 2023, no. 22-11.071

¹⁵ Cass. Com. December 6, 2023, no. 22-11.071,

¹⁶ TJ Paris, 3rd Ch. 2nd Section, Feb. 2, 2024, no. 23/12720

¹⁷ Civ. 1. January 25, 2017, 15-25.210

¹⁸ CA Paris, Pôle 5 Ch. 1, March 8, 2023, no. 21/09769.

field of intellectual property, it is likely that this practice will continue as a precautionary measure.

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