TRIBUNAL DE GRANDE INSTANCE DE PARIS

[redacted]

3rd chamber
3rd section

Docket №: **10/05487**

Original copy: 1

Summons of:
1 April 2010

JUDGMENT
handed down on 10 June 2016

CLAIMANTS

TIME SPORT INTERNATIONAL SAS
Rue Blaise Pascal - Bâtiment B
38090 VAULX MILIEU

Mr Damien REGNIER, attorney-at-law, member of the PARIS Bar, courthouse box #D0451, Ms Françoise FAURIE, attorney-at-law, member of the BORDEAUX Bar

Mr Jean-Michel BILLIOUD, Voluntary intervener
Plan performance administrator,
1, Rue du Musée 38200 VIENNE

represented by Mr Damien REGNIER, attorney-at-law, member of the PARIS Bar, courthouse box #D0451, Ms Françoise FAURIE, attorney-at-law, member of the BORDEAUX Bar

DEFENDANTS

DECATHLON SAS
4 boulevard de Mons
59650 VILLENEUVE D'ASCQ

represented by Ms Sophie HAVARD DUCLOS, attorney-at-law, member of the PARIS Bar, courthouse box #R144

D-H-G KNAUER GmbH
Strasse Kleines Wegle 8
71691 FREIBERG (GERMANY)

represented by Ms Laetitia MARCHAND, attorney-at-law, member of the PARIS Bar, courthouse box #D1427, Ms Vanina VEDEL, attorney-at-law, member of the STRASBOURG Bar,

Enforceable copies issued on: 10/06/2016

COMPOSITION OF THE *TRIBUNAL*

Arnaud DESGRANGES, Vice-Presiding Judge
Carine GILLET, Vice-Presiding Judge
Florence BUTIN, Vice-Presiding Judge

assisted by Marie-Aline PIGNOLET, Court Clerk,

DISCUSSION

At the hearing of 5 April 2016 held publicly

JUDGMENT

Pronounced publicly by making the decision available at the Court Clerk's office
In the presence of all the parties
in first instance

PRESENTATION OF THE DISPUTE

TIME SPORT INTERNATIONAL SAS, created in 1986, is a manufacturer of sporting goods, more specifically in the field of cycling, including helmets. It has two production sites in France and a factory situated in Slovakia, which employ altogether 160 staff, approximately. It is was the object of safeguard proceedings by a decision dated 19 October 2010, closed on 26 December 2013, and of a plan for continued operation approved on 19 October 2012. Mr BILLIOUD initially named as judicial representative, was appointed as administrator to execute the plan, the implementation of which is ongoing.

D-H-G KNAUER GmbH is a German company specialised in the manufacturing and distribution of equipment goods in the field of cycling and in particular bike helmets, under the trade name "KED".

DECATHLON is specialised in the design, manufacture and distribution of sporting goods and exploiting 249 stores with specialised departments for each discipline, including cycling, which represents 12% of its turnover.

On 1 April 2010, TIME SPORT INTERNATIONAL brought proceedings against DECLATHLON FRANCE SAS and D-H-G KNAUER GmbH (hereinafter referred to as KNAUER) for the infringement of claim 1 of its European patent EP 0 682 885, relating to a device for the occipital fixing of a bike helmet. Were concerned by the infringement action, first, helmets of the brand “B'TWIN” and, second, helmets of the brand “KED”, manufactured and supplied by KNAUER.

By a judgment dated 7 September 2012, the *tribunal de grande instance de Paris* in particular:

RECORDED the intervention of Mr BILLIOUD, plan performance administrator for TIME SPORT INTERNATIONAL;

DISMISSED DECATHLON's requests for the revocation of claim 1 of European patent № 0 682 885 of which TIME SPORT INTERNATIONAL is the holder;

HELD that by manufacturing, supplying and marketing the KED JOKER and KED MEGGY helmets reproducing the essential features of claim 1 of European patent № 0 682 885 of which TIME SPORT INTERNATIONAL is the holder, KNAUER and DECLATHLON committed acts of infringement against it;

HELD that by marketing the helmet models "B'TWIN MIX and B'TWIN URBAN HELMET" reproducing the essential features of claim 1 of European patent № 0 682 885, of which TIME SPORT INTERNATIONAL is the holder, DECLATHLON committed acts of infringement against it;

ORDERED DECATHLON and KNAUER jointly and severally to pay to TIME SPORT INTERNATIONAL the sum of €300,000 on account of damages in compensation for the final damage suffered by them by reason of the acts of infringement resulting from the marketing of the KED helmets;

ORDERED DECATHLON to pay to TIME SPORT INTERNATIONAL the sum of €300,000 on account of damages in compensation for the final damage suffered by it by reason of the acts of infringement resulting from the marketing of the B'TWIN helmets;

ENJOINED DECATHLON, under a €150 penalty per recorded infraction, from marketing any KED or B'TWIN helmet equipped with an infringing device;

PRIOR TO ANY RULING

ORDERS that expert proceedings be carried out by Ms Martine CARIOU, consisting in:

* defining the number of KED MEGGY, KED JOKER, B'TWIN MIX and B'TWIN URBAN HELMET infringing helmets sold by DECATHLON as of 1 April 2007 until the day of this judgment;

* ascertaining the turnover respectively achieved by KNAUER and DECATHLON by manufacturing, supplying and selling the infringing goods commercialised in the DECATHLON stores in France, the extent and value of the stock, and in determining the profits that they made,

* giving advice on the extent of the damage caused to the development of TIME SPORT INTERNATIONAL in terms of customers, turnover and profits, and the losses suffered in terms of investment and commercial positioning,

* reporting all the other findings useful for reviewing the parties' claims;

These provisions were confirmed by the *cour d'appel de Paris* on 16 December 2014.

Following the judgment of 22 May 2015, D-H-G KNAUER GmbH was:

-required to guarantee the payment of the sums borne and paid by DECATHLON FRANCE SAS in application of the enforceable decisions handed down in the proceedings for infringement of patent EP 0 682 885 brought by TIME SPORT INTERNATIONAL against D-H-G KNAUER GmbH and DECATHLON FRANCE SAS, in relation to the sales of the helmets of the "KED" brand;
-ordered to pay to DECATHLON FRANCE SAS the sum of €155,000 left to be borne by it in accordance with the 7 September 2012 judgment of the *tribunal de grande instance de Paris*, as a result of the marketing of the helmets of the "KED" brand;
-ordered to pay to DECATHLON FRANCE SAS the sum of €100,000 corresponding to half of the sums paid by DECATHLON FRANCE SAS to the law firm Laude Esquier Champey representing it in the action initiated against it by TIME SPORT INTERNATIONAL.

Besides, the *tribunal* ordered the stay of the proceedings pending the final decision on the damages and expenses that DECATHLON FRANCE SAS will have to pay as a result of the patent infringement action initiated against it by TIME SPORT INTERNATIONAL, in that it relates to the helmets of the "KED" brand.

The expert report was filed on 7 November 2014.

SELARL AJ PARTENAIRES, named as judicial administrator of TIME SPORT INTERNATIONAL by order dated 23 October 2014 of the *tribunal de commerce de Vienne* following the death of its director, voluntarily intervened in the action.

In its last pleading filed electronically on 9 February 2016, TIME SPORT INTERNATIONAL (hereinafter referred to as TSI) and M. BILLIOUD submit the following requests:

HAVING REGARD to the 7 September 2012 judgment,

HAVING REGARD to the 16 December 2014 decision,

HAVING REGARD to the expert report,

HAVING REGARD to the provisions of Article L. 615-7 of the French Intellectual Property Code,

HAVING REGARD to Article 1382 of the French Civil Code,

TO ORDER DECATHLON FRANCE SAS to pay to TIME SPORT INTERNATIONAL, in compensation for its damage, the sum of €4,992,290 representing the overall profit which it made by selling the infringing KED and B'TWIN helmets between 1 November 2007 and 8 September 2012,

TO ORDER DECATHLON FRANCE SAS to pay to it: the sum of €751,299 for the loss of the chance to make a profit margin on the sales of the KED helmets for the period from 2 April 2007 to 30 October 2007 or, at the very least, and in the alternative, the sum of €333,910.6 on the basis of a 20% compensatory royalty rate,

TO ORDER KNAUER and DECATHLON FRANCE SAS jointly and severally to pay to TIME SPORT INTERNATIONAL, in compensation for the damage suffered by it, the sum of €1,754,483 representing the overall profit made by KNAUER by selling the infringing KED helmets between 1 November 2007 and 8 September 2012,

TO ORDER KNAUER and DECATHLON FRANCE SAS jointly and severally to pay to TIME SPORT INTERNATIONAL: the sum of €363,833 for the loss of the chance to make a profit margin on the sales of the KED helmets for the period from 2 April 2007 to 30 October 2007 or, at the very least, and in the alternative, the sum of €161,703.6 on the basis of a 20% compensatory royalty rate,

TO ORDER DECATHLON to pay to TIME SPORT INTERNATIONAL, the sum of €1,324,500 in respect of the penalty ordered by the *tribunal*,

TO ORDER DECATHLON FRANCE SAS and KNAUER jointly and severally to pay to TIME SPORT INTERNATIONAL a sum of €150,000 for the moral prejudice caused,

TO ORDER the said companies, jointly and severally, to pay to it the sum of €100,000 under Article 700 of the French Civil Procedure Code.

TO ORDER DECATHLON FRANCE SAS and KNAUER, jointly and severally, to pay the entire legal costs,

TO ORDER the provisional enforcement of the decision to be handed down, notwithstanding any appeal and without the obligation to provide security.

TIME SPORT INTERNATIONAL SAS and Mr JM BILLIOUD mainly set out that:

-the compensation for the infringement of a patent right does not meet the principles laid down in Article 1382 of the French Civil Code but is granted under Article L. 615-7 of the French Intellectual Property Code, which leads to take into account the economic situation of the infringer,
-the legislator wanted to dissociate three items of damage or at the very least three distinct parameters that the *tribunal* must take into consideration to determine the nature and quantum of the damage suffered by the right-holder, namely the negative economic consequences, the infringer's profit and the moral prejudice, which was confirmed and specified by the new version of the text deriving from the 11 March 2014 French Act,
-the damage is not subject to a potential exploitation of the invention, and in any case, TSI had already exploited its patent,

-for the period before 29 October 2007 the principles established by case law permit, on the basis of the appraisal of the judge alone, to go beyond the full compensation,

-over the period from 1 November 2007 to 7 September 2012:

-for the B'TWIN helmets marketed as of 2008 and until 7 September 2012, 317,965 infringing helmets were sold representing a turnover of €3,124,756 excluding taxes,
-for the KED helmets, during the reference period from April 2007 to 7 September 2012, KNAUER sold 630,790 units and achieved a turnover of €4,942,549 excluding taxes, and DECATHLON FRANCE SAS achieved a turnover of €10,184,992 excluding taxes, during the same period and for the same quantities,
-KNAUER's profits from 1 November 2007 to 7 September 2012 (pages 28/29 of the report) are of €1,754,483,
-DECATHLON's profits amounted to €1,477,326 for the B'TWIN helmets, and €3,514,964 excluding taxes for the sales of the KED helmets limited to the period from 1 November 2007 to 7 September 2012, that is, an overall profit, generated by the sales of infringing helmets, amounting to €4,992,290 excluding taxes,
-DECATHLON's arguments consisting in considering its net margin to assess the damage are not relevant in this particular case as the infringing sales merely constitute a hardly significant part of the turnover which it generates annually, and only the direct costs related to the exploitation of the litigious items can be deducted from the gross profit,
-it is immaterial to know whether or not the injured party could have generated the same profits, and in any case those made by the infringer are fully representative of the damage suffered by TSI, for being an industrial company of a size comparable to that of KNAEUR, it could have supplied DECATHLON with the same quantities of helmets,
-in no case the damage could be reduced to a mere compensatory royalty as this alternative is possible at the injured party's request only,
-TSI did not limit itself to a judicial exploitation of the right, of which it became the holder in January 2000,
-the damages cannot be limited to the profits generated by the fixing device the subject-matter of the patent only; on the basis of the entire market value rule what is necessarily sold together with the patented object must be included in the infringing sales,

-for the period between 31 April and 31 October 2007:
- the victim of an infringement may claim in respect of the loss of earnings the amount of the loss of chance suffered by being deprived of the possibility of marketing the products covered by its patent; TSI was technically able to exploit its patent and had to stop when faced with DECATHLON's competition; it demonstrates its industrial capacity and commercial strategy at the time of the facts; it is thus necessary for this period to determine the turnover achieved by KNAUER and DECATHLON FRANCE SAS by selling the KED helmets alone, and to apply to it the margin that TIME SPORT INTERNATIONAL would have been able to make and which it has lost every chance of making,

-the causal relationship between the infringement and the stop to the favourable process in view of the resuming by TIME SPORT INTERNATIONAL of the marketing of the helmets equipped with the patented device is sufficiently established,
-by claiming compensation for the loss of chance calculated proportionally to the act of exploitation of each of the infringers in the different proceedings that it has commenced, the claimant does not contravene the principle under which it cannot be compensated beyond the damage that it has sustained,
-if for this period the causal relationship was not accepted, compensation should be determined on the basis of a compensatory royalty rate, which, in principle, must be increased by reference to the contractual rate; and the 4% rate suggested by DECATHLON cannot be adopted, it relies on examples of brand licences instead of patent licences, and on comparisons that are not relevant,
-the circumstances of the case justify that a 20% rate be applied to KNAUER's and DECATHLON's turnover during that period; admittedly, the helmets are the same but the acts of exploitation are distinct,
-the expert notes on pages 25 and following of the report that the examination of the documents provided reveals the existence of a stock of 5,070 B'TWIN helmets, and 2,148 KED helmets; this stock was marketed,
-the request in respect of the moral prejudice is founded.

DECATHLON FRANCE presents, in its last pleading filed electronically on 10 March 2016, the following requests:
Having regard to the expert report filed by Martine Cariou on 17 November 2014,
Having regard to the exhibits submitted to the judge,
TO FIND that TIME SPORT INTERNATIONAL did not exploit its patent at the time of the acts for which it claims compensation,
TO HOLD that for the period from 1 April to 31 October 2007, TIME SPORT INTERNATIONAL's loss of earnings can be assessed only by applying a compensatory royalty, the amount of which should be comprised between €50,000 and €67,000 at the most,
TO HOLD that for the period from 1 November to 8 September 2012, TIME SPORT INTERNATIONAL's damage can be assessed only by applying a compensatory royalty, the amount of which should be comprised between €250,000 and €466,000 at the most,
TO CONSIDER, in the case in which the *tribunal* would decide to take into account the profits made by DECATHLON FRANCE for the period from 1 November 2007 to 8 September 2012, that DECATHLON FRANCE achieved a net margin ranging between €1,226,000 and €1,282,000,

In any case
TO DISMISS all of TIME SPORT's unfounded claims in respect of the marketing of the stocks and the moral prejudice suffered by it,
TO DISMISS all of TIME SPORT's requests for holding DECATHLON FRANCE and D-H-G KNAUER jointly and severally liable in respect of the damages concerning D-H-G KNAUER only,

TO REDUCE to a more proportionate level the liability for legal costs of DECATHLON FRANCE under Article 700 of the French Civil Procedure Code.

DECATHLON FRANCE develops mainly the following arguments:

-its conduct is wrongly described as unfair; it has never tried to hide the existence of DECATHLON SA nor the relations between these two companies; the request for a security was founded with regard to the terms of the contract, it did not intend to mislead TSI on the identity of its supplier,

-the damage must be assessed according to the principle of full compensation under which the damages must be calculated in relation to the person who sustains damage which can legally be compensated - here the holder of the infringed rights - and by reference to the object of this right, the exploitation of the holder, its sales and distribution capacities, its economic perspectives, and not in relation to the person who causes damage, as in that case the compensation would be punitive,
-since the period subject to compensation extends from 1 April 2007 to 7 September 2012, it is necessary to identify the applicable rules after the 29 October 2007 Act № 2007-1544, which is accepted by TIME SPORT,

-for the first period until 31 October 2007:
-the loss of earnings and the loss suffered must be assessed, the loss suffered being based on an actual exploitation, on the net margin (and not the gross margin), and on weighting factors; in the absence of exploitation, the claims for compensation must be made on the basis of the lost royalties; such is the case if the patentee could not market the infringing sales, in which case, a mixed calculation method is applied,
-TIME SPORT which has not exploited its patent does not demonstrate a loss of chance caused by the acts of infringement; it had no definite marketing plan; it does not demonstrate its capacity of production and sales, and the competition for this type of product was particularly significant,
-the claims cumulate two losses of earnings in relation to the same helmets marketed by KNAUER and DECATHLON,
-therefore, TIME SPORT should be granted a compensatory royalty for the period from 2 April to 31 October 2007; the amount that it claims in that respect is unrealistic and unjustified; an annual lump sum of €50,000 was fixed by the parties as the royalty to be paid for the future by Bell as a result of the worldwide exploitation of the patent, regardless of the quantities,
-a study by the firm CMS estimates the theoretical remuneration of intangible rights consisting in a technology enabling the manufacturing of sporting goods between 1% and 4%,

-for the period after 31 October 2007:
-contrary to what TIME SPORT contends, French Act № 2007-1544 did not introduce the possibility for the holder of the infringed rights to be simply granted the profits made by the infringer, but only the possibility of taking them into account to assess the

amount of the damages, in relation to the circumstances of the case,
-if TIME SPORT's claims were acceded to, being granted all or part of the profits made by the defendants, despite the fact the legislator did not consider this possibility in 2007, he should take into account the practice of the States that have probably influenced the wording of the Directive and consider this possibility in a restrictive way only,
-in 2001, TIME SPORT stopped manufacturing helmets equipped with the patented device; its intentions to resume the exploitation are not demonstrated,
-the patent relates to the fixing device of the helmets; only part of the selling price of the product comprising the patented device can be taken into account to assess the lost margin, the lost royalties or the profit made,
-in a situation in which it does not exploit its patent, the holder of infringed rights may only claim damages corresponding to its lost royalties,
-since at the time of the facts TIME SPORT had not exploited its patent for many years, the only damage that it is entitled to claim, under the principles and case law, is thus analysed as a compensatory royalty, calculated on the basis of the rate that it would have received if a licence agreement had been concluded with DECATHLON FRANCE,
-failing that, the profits deriving from the infringement of the patent cannot correspond to the profits made from the sale of helmets comprising the patented device, but to the profits corresponding to the added value generated by that device; the entire market value rule can only apply if the patent is not exploited,
-the net margin and not the gross margin should be taken into account, in the absence of cost accounting; DECATHLON FRANCE suggested two distinct methods for calculating its net margin, which are based on the trial balance of its annual accounts certified by its auditors for each of the financial years concerned by the expert proceedings,

-the stocks were never reintroduced into the commercial channel and no claim can be filed in that respect,
-the moral prejudice is not demonstrated.

D-H-G KNAUER GmbH presents, in its last pleading dated 28 September 2015, the following requests:

Having regard to the expert report filed by Martine CARIOU on 17 November 2014,
Having regard to Article L.615-7 of the French Intellectual Property Code,

Mainly,
TO HOLD that since TIME SPORT INTERNATIONAL SAS did not exploit its patent, it can only claim having suffered damage calculated on the basis of a compensatory royalty,
TO HOLD that the amount of this compensatory royalty cannot exceed the sum of €300,000,
TO DISMISS all of TIME SPORT INTERNATIONAL SAS's claims and arguments,

In the alternative,
TO HOLD that the amount of the damage suffered by TIME SPORT INTERNATIONAL SAS and calculated on the loss of earnings cannot exceed the sum of €197,701.96,
TO REDUCE to a more proportionate level the liability for legal costs of D-H-G KNAUER GmbH under Article 700 of the French Civil Procedure Code.

D-H-G KNAUER GmbH mainly sets out that:

-before the 29 October 2007 French Act, compensation for damage was based on the loss of earnings and the loss suffered; the courts used to determine whether or not the holder exploited its patent; if it exploited it, the loss of earnings consisted of the profit that it was unable to make as a result of the acts of infringement and, if it did not exploit the patent, the loss of earnings consisted of the lost remuneration in the form of a compensatory royalty; in this instance, TIME SPORT has not exploited itself its patent for 12 years,
-for the calculation of the royalty amount to be paid, the rate charged by the patent holder to its licensees should in principle be referred to; therefore, for the period extending from 2007 to 2012 on the basis of the licence granted to BELL, the damage cannot exceed 6 x €50,000, that is, €300,000,
-TIME SPORT furnishes no element to support its claim in respect of the moral prejudice,
-in her report the expert bases her calculations on D-H-G KNAUER's 45% margin rate, which is excessive for a wholesaler such as DECATHLON; the margin rate applied is very low and compensated by the volume of sales; thus the net margin rate actually used by KNAUER for the sale of its KED Meggy and Joker helmets is 4%, applied to the volume of 630,790 units sold for a turnover of €4,942,549; this margin would give an indemnifiable damage of €197,701.96, that is, an amount lower than the compensatory royalty that would be paid to TIME SPORT.

The closing order was issued on 15 March 2016 and the case was heard on 5 April 2016.

For a full presentation of the parties' arguments, their aforementioned last pleadings are referred to pursuant to Article 455 of the French Civil Procedure Code.

GROUNDS:

1- On the period before 29 October 2007:

Before the entry into force of French Act № 2007-1544 of 29 October 2007 from which Article L. 615-7 of the French Intellectual Property Code is derived, the compensation of the damage resulting from the infringement of the patent was granted in compliance with the rules in the matter of tort liability by applying the principle of full compensation, the damages being determined with regard to the loss of earnings, representing the profits that the patent holder itself would have derived from the infringer's acts of exploitation, and of the loss suffered, corresponding to the infringement of its monopoly.

The sovereign appraisal of these compensatory consequences in the absence of satisfactory evidence does not imply, contrary to what TIME SPORT suggests by relying on theoretical analyses interpreting certain decisions as granting "punitive" compensations with regard to the profits generated by the infringement, that they cannot in principle exceed the full compensation for the damage.

Therefore, regardless of the defendants' situation, and only by reference to that of the right-holder, the claims relating to the acts of infringement recorded between 2 April and 29 October 2007 should be examined.

TIME SPORTS invokes for this period the loss of chance that it sustained by being deprived of the possibility of marketing the products protected by its patent because of the competition resulting from the infringement, setting out that having the experience and technical know-how required, it had contemplated, as of 2007, to resume the manufacturing of cyclist helmets, but had to give up because of the massive sale of B'TWIN and KED helmets in the DECATHLON stores. It adduces in particular a letter of 22 June 2005 to SHINE, in which it indicates considering the relaunch of the helmet activity and being favourable to a collaboration in the form of engineering, of a rental agreement signed on 7 June 2007 concerning 5,867 m^2 of premises and offices, which currently constitute one of the production sites, of a strategy note of 26 October 2007 planning the creation of a new range of TIME helmets, of exchanges of emails confirming the search for partners to that end including talks started with MET, of quotations established in April 2008 for design studies concerning several types of helmet ranges, and finally, of the existence of a "pre-project" in April 2008; this pre-project concerned the production of helmets on the site of VAULX MILIEU requiring investments estimated at €450,000 in addition to €2,000 R&D expenses, the success of which was then considered as depending on a listing by DECATHLON to ensure a significant volume of sales.

The negative economic consequences due to the infringement were considered by the expert on the basis of two hypotheses: that of the payment of the compensatory royalty, and that of a loss of earnings, calculated on the basis of the manufacturing and sales forecasts for the TIME helmets.

It is recalled that as of its creation, TIME SPORT has adopted a strategy based on innovation and positioned itself at the top end of the market segmentation both for the leisure activity and professional and competition cycling. European patent EP 0 682 885 was filed on 9 May 1995 and granted on 25 August 1999 claiming priority from French patent FR 9406014 of 10 May 1994. The claimant started manufacturing helmets equipped with the patented device as of 1995, and manufactured and sold approximately 10,000 cycling helmets in 1995 and 8,000 in 1996. Faced with acts of infringement committed by the US company BELL, the world leader in that sector, it stopped this production in 2000 to focus on the automatic pedals and high-technology bicycle frames. Early in 2010, it noted the offer for sale in the DECATHLON stores of

articles that included the occipital fixing device the subject-matter of its patent which had not been exploited for 10 years. During the first half of 2007, the proceedings brought against BELL resulted in the signature of a settlement agreement awarding $8.1 million compensation to TIME SPORT and the conclusion of a licence agreement, allowing the claimant to generate an operating income of €1,926,000 for the financial year 2006/2007. It is in this context that in April 2008, TIME SPORT assessed the investments necessary to resume the "helmet" activity. At the same time, its financial situation deteriorated - on 30 June 2008, its pre-tax net operating income represents a €3.3 million loss - and in September 2008, it considered that the decision to relaunch the manufacturing of these products, and thus to make the relevant investments, required additional time. It is mentioned in the annexes of the annual accounts for the financial year ending on 30 June 2008 that it started an arbitration procedure before the *tribunal de commerce de Vienne* on 27 August 2008 to obtain the financing required for the financial year to come. It funded the estimated cost of the plan to safeguard jobs in relation to a collective redundancy procedure based on economic grounds during the second half of 2009, and obtained in August 2009 a plan for spreading its social contributions.

With regard to this chronology and TIME SPORT's proven financial difficulties during the financial year 2007/2008, which according to the expert would have arisen as of the previous financial year had the aforementioned settlement compensation not been paid, the relation between DECATHLON - and the fact that the plan to resume the manufacturing activity of the cycling helmets on the VAULX MILIEU production site was abandoned - does not seem to be established and consequently cannot justify the damages for the loss of chance based on the claimant's sales projections for the period from 2009 to 2012.

Therefore, the compensation for the damage suffered between 2 April and 29 October 2007 must be awarded in the form of a compensatory royalty.

In the alternative, TIME SPORT maintains that the compensatory royalty must be fixed at 20% of the turnover generated by each of the infringers, in particular because of the importance of the invention in the entire market value, the economic significance of the patented device and the choice to limit the number of its distributors. It adds that the compensatory royalty cannot be estimated by reference to that paid by the contractual licensee after a negotiation, as it would constitute an encouragement to infringe.

DECATHLON FRANCE considers that these claims are fully justified in that a transfer contract concluded with SHINE on 11 January 1999 indicated a royalty of €0.46 approximately for each product sold for exploiting the patent on the occipital fixing device, that is, 0.6% of the price of the helmets; that the lump sum royalty paid by BELL for a world licence amounts to €50,000 annually and that a study carried out by the firm CMS Bureau Francis Lefèvre discloses rates of 1% to 4% for similar intellectual property rights, which leads to consider that the remuneration of intangible rights on a technology enabling the manufacturing of sporting goods can be comprised within those limits.

The references to the provisions of a transfer contract concluded ten years before the accused acts, as well as a general licence granted in the context of a settlement agreement ending a dispute, cannot be considered as relevant since the commercial consequences of the exploitation of the right could be evaluated differently on that date and the context of a negotiation implied the existence of other provisions discussed at the same time. Likewise the study carried out by CMS, which has the advantage of presenting a restrictive selection of agreements on technologies considered to be comparable, used in the manufacturing of golf and skateboard equipment, considers, however, only two contracts: one being a licence granted worldwide and the other also relating to trade marks; this is not representative in terms of number and does not constitute an element of comparison useful for the resolution of the dispute. On the other hand, TIME SPORT does not provide comparative elements on the rates applied in the same branch of activity.

The parties are not in disagreement on DECATHLON FRANCE's turnover excluding taxes to be considered for the period from 2 April 2007 to 31 October 2007, which is deducted from the elements found on page 24 of the report, that is, 7/9ths of €2,567,296 including all taxes representing €2,146,568, excluding taxes, being equivalent to €1,669,553.
KNAUER makes no observations on the calculation of its turnover generated during that same period on the basis of the indications provided on page 29 of the report, namely 7/9ths of €1,039,523 representing €808,518.

Although each of the defendants committed acts of exploitation of the patent, these acts concern the same articles supplied by KNAUER and offered for sale by DECATHLON, which, if its supplier had acquired the right to manufacture and market the products implementing the patented device, would have, in that case, included in its purchase price the cost of the royalty paid to the right-holder. Therefore, the damage resulting from the lost royalty must be, for this period which concerns the KED helmets only, calculated by reference to the turnover achieved by KNAUER only.

When it decided to sell its products to large stores specialised in sporting goods and obtained their listing from DECATHLON, TIME SPORT sold 3,250 helmets equipped with the patented device in France and exported 3,180 thereof, and became the victim of acts of infringement as of 1996. These elements are evidence of the relevance of the invention - element to be considered to assess the royalty rate - which persisted in 2008 even if, as DECATHLON claims, other devices of occipital adjustment were used.

These elements justify assessing the damage sustained by TIME SPORT on the basis of a 8% royalty rate applied to the turnover achieved by KNAUER between 1 April and 31 October 2007, that is, €808,518 x 8% = €64,681.44.

Since the defendants contributed together to causing the damage, they will be ordered jointly and severally to pay this sum.

2- On the period from 1 November 2007 to 7 September 2012:

Article L. 615-7 of the French Intellectual Property Code derived from the French transposition of the 29 October 2007 Act, in its version applicable until 13 March 2014, provides that:
"*To set damages, the court takes into account the negative economic consequences, including the loss of profit suffered by the injured party, the benefits made by the infringer and the moral prejudice caused to the right-holder because of the infringement*.

The court may, nevertheless, grant as damages, as an alternative and at the injured party's request, a lump sum that cannot be lower than the amount of royalties or rights that would have been owed if the infringer had requested the authorisation to use the right that it has infringed".

In application of these provisions, the damages must be calculated not only by reference to the damage sustained by the injured party but also by including the profits derived from the infringement, which implies considering first with respect to the assessment criteria, the loss of earnings and the losses suffered on the one hand, and the profit made by the infringer on the other hand; this was confirmed and clarified by the second version of the transposition Act implemented on 13 March 2014 specifying that these parameters must be considered "*distinctly*".

However, considering each party's situation does not mean adopting a solution consisting instead in assessing the damage by reference to the infringer's profits only, which, as relevantly noted by DECATHLON FRANCE, would have the effect of favouring the right-holders voluntarily restricting themselves to a judicial exploitation strategy of their rights.

Likewise, the defendants' argument, according to which the holder who himself does not exploit the patented invention could in any case, and in principle, claim only a compensatory royalty, cannot be considered in respect of the "negative economic consequences"; as it would otherwise compromise the objective of the text as mentioned above, and circumvent the rule expressly laid down, under which it is only at the injured party's request that the damages are calculated by reference to the amount of royalties resulting from an authorisation to exploit the right.

With regard to the provisions of the aforementioned Article L. 615-7 in its version then in force, the compensation of the damage suffered must therefore be determined by reference to the profits made by each of the defendants, but without, however, ignoring TIME SPORT's situation on the date of the acts at issue, namely its production capacity, its experience and technical know-how, the investments necessary to the direct exploitation of the patent and the results that it could have expected.

On this first point, the expert indicates that:

-between 2 April 2007 and 8 September 2012, DECATHLON FRANCE SAS sold 317,965 B'TWIN helmets and 630,790 KED helmets manufactured by KNAUER;

-DECATHLON FRANCE's profit for the period from 1 November 2007 to 7 September 2012 amounted to €1,477,326 for the B'TWIN helmets and €3,514,964, excluding taxes, for the sale of the KED helmets, that is, an overall profit for all the helmets equipped with the infringing device of €4,992,290 including all taxes (page 33 of the report);
-the overall profit made by KNAUER can be estimated at €1,754,483 over the period considered, with regard to the turnover by reference of helmets sold between 1 November 2007 and 7 September 2012, and the average margin rate generated by reference by the distributor DECATHLON FRANCE SAS (pages 28 and 29 of the report).

DECALTHLON FRANCE disputes this evaluation first on the grounds that the patent relates only to the means for fixing the helmet, and the entire market value rule can be considered only if the person itself exploiting the rights sustains a loss of margin on all the elements of the product; and, second, on the grounds that the gross margin less the 1.5% royalty paid in respect to the DECATHLON brand was considered without taking account of the expenses relating to the marketing of the infringing product as well as the related fixed costs, while the “infringer's profits” are constituted by its net margin.

Since the overall profits derived from the infringement of the rights should be examined, no relevant reason can justify setting aside the application of the entire market value rule - consisting in including in the infringing sales the elements of the product that are necessarily sold together - if the patent holder does not exploit it directly, the principle based on the fact that since the fixing device is an indissociable component of the helmets, it conditions their marketing.

The expert mentions on the second point that since DECATHLON FRANCE does not use cost accounting by product but by store only, it cannot communicate directly data by product reference except for the commercial margin excluding taxes, or “cash register margin”, (difference between the selling price of the helmet, excluding taxes, to the consumer and its purchase price by DECATHLON FRANCE) and has, consequently, according to two distinct methods proposed during the expert proceedings, determined the full cost by brand of infringing helmet, including the fixed costs or overheads, by using cost allocation or cost drivers. However, it has been noted, on the one hand, that the part of the turnover represented by the infringing sales - between 0.08 and 0.11% - does not lead to consider it as having an impact on DECATHLON FRANCE's fixed costs and, on the other hand, that the costs related to the marketing process cannot be considered as direct costs, since being related to the entire goods, they are distributed according to a method defining a proportionate share, the value of which is not verifiable.

For determining KNAUER's profits, the expert relied on samples of order forms issued by DECATHLON SA from April 2007 to September 2012 to establish an average unit purchase price by reference of infringing KED helmet, to estimate the turnover recorded for these quantities of helmets sold in the DECATHLON stores, and to estimate the profit made by KNAUER between 1 November 2007 and 7 September 2012 by considering that the distributor's average margin rate by reference fluctuated for the

most significant quantities between 30 and 50%. By applying this method of calculation the expert obtains for the period at issue an overall profit of €1,754,483 excluding taxes.

KNAUER argues against this estimate that the 45% margin rate mentioned in the report is totally unrealistic since in the case of a wholesaler such as DECATHLON known for obtaining from its suppliers the lowest prices, this margin remains extremely low and is compensated by the sales volumes. It thus intends to apply a 4% rate, which it justifies in a note dated 25 September 2015, by presenting in the form of a table a simulation of the manufacturing costs and the overheads by helmet type, which, in the absence of a document certified by its auditor, cannot be sufficient to challenge the amount estimated by the expert.

The sums recorded in relation to the profits made respectively by DECATHLON FRANCE and KNAUER, as calculated during the expert proceedings, must therefore be considered.

Given TIME SPORT's particular situation at the time of the litigious acts, in that it had stopped exploiting its patent since 2000 after facing previous acts of infringement, and was experiencing great financial difficulties leading it at the end of 2008 to postpone its plan for resuming the helmet manufacturing activity, its damage can be estimated at 20% of the profits made by each of the infringers - this percentage also takes into account the method of calculation based on the gross margin - that is:
-€4,992,290 excluding taxes x 20% = €998,458 in respect of DECATHLON FRANCE's profits;
-€1,754,483 excluding taxes x 20% = €350,896.6 in respect of KNAUER GmbH's profits.
It is not justified, although these compensatory consequences are assessed by reference to each defendant's profits, that DECATHLON SA be ordered jointly and severally to pay the proportionate part to be borne by KNAUER.

3- On the claims related to the stock:

It is noted (on page 25 of the report) that the quantities of helmets held infringing on 7 September 2012 and recorded in the perpetual inventory by store represent 5,070 B'TWIN helmets and 2,148 KED helmets.

TIME SPORT claims that DECATHLON FRANCE SAS, unable to provide evidence of the actual existence of these articles, the destruction of which had been ordered, contended having returned them to its supplier and that this operation gave rise to the issuance of credit notes, which were not communicate, revealing the existence of marketing acts contravening the aforementioned judicial prohibition.

On 6 and 7 January 2016, DECATHLON FRANCE instructed a bailiff to record the amount of helmets in stock held by the storage company FANDI EMBALLAGES, indicating an overall volume of 8,830 units including the B'TWIN and KED helmets (DECATHLON 9 exhibit).

TIME SPORT does not dispute the actual existence of this stock nor its content but argues that theses goods, which transited through a distinct legal entity - DECATHLON SA - before being stored, were marketed. Although the defendant's contention according to which it "*was unable to find the corresponding accounting documents owing to the particular large amount of information to be examined"* does not seem surprising, the operation described, even if recorded as credit notes, cannot, however, be analysed as having been in breach of the injunction issued against DECATHLON *"under a €150 penalty per recorded infraction, from marketing any KED or B'TWIN helmet equipped with an infringing device"* since it is not demonstrate that DECATHLON FRANCE gained an economic advantage from this transfer.

Therefore, the request for payment of the €1,324,500 penalty presented on this basis should not be acceded to.

4- On the moral prejudice:

The request for compensation presented in that respect by reference to "*the exhibits of the file and the expert report"* and in consideration of the fact that TIME SPORT, which had great expectations as to the marketing of a product resulting from a particularly innovative invention likely to place it as leader in the field of cycling helmets, had to give up its ambitions and witness the financial success of competitors whose sales force led to its being excluded.
As rightly emphasised by DECATHLON FRANCE, TIME SPORT's prospects of exploiting the patent were compromised by acts of infringement to which it was confronted as of 1996, committed by BELL which, like the claimant, had obtained the listing of its products with DECATHLON SA.

The obstacles to the development strategy which TIME SPORT hoped to adopt are therefore not entirely attributable to DECATHLON FRANCE.
However, it cannot be disputed that the claimant, which has always focused its activity on the manufacturing of innovative technical products and invested heavily for acquiring industrial property rights, either by making inventions, or by buying patents, has, by reason of the acts of infringement committed less than three years after the previous dispute ended, suffered harm to its image which is largely based on this economic model.

With regard to the contributive part of the facts of the case in TIME SPORT's loss of image in the overall context described above, this prejudice must be evaluated at a sum of €50,000 which DECATHLON FRANCE and KNAUER will be jointly and severally ordered to pay.

5- Other claims:

DECATHLON FRANCE and KNAUER, the losing parties, will be ordered jointly and severally to pay the legal costs as well as to pay to TIME SPORT INTERNATIONAL, which had to incur costs other than those above to assert its rights, compensation

under Article 700 of the French Civil Procedure Code which it is fair to set at €60,000.

Since the provisional enforcement is justified in this case and compatible with the nature of the dispute, it will be ordered for an amount not exceeding the sums to be paid.

ON THESE GROUNDS

The *tribunal*, ruling publicly, after having heard all the parties, in first instance, and making the decision available at the Court Clerk's office,

ORDERS DECATHLON FRANCE SAS to pay to TIME SPORT INTERNATIONAL, as compensation for the acts of infringement committed to its detriment and resulting from the marketing of the B'TWIN and KED helmets, the sum of €998,458 for the period from 1 November 2007 to 8 September 2012;

ORDERS D-H-G KNAUER to pay to TIME SPORT INTERNATIONAL, as compensation for the acts of infringement committed to its detriment and resulting from the marketing of the KED helmets, the sum of €350,896.6 for the period from 1 November 2007 to 8 September 2012;

ORDERS D-H-G KNAUER and DECATHLON FRANCE SAS jointly and severally to pay to TIME SPORT INTERNATIONAL, as compensation for the acts of infringement committed to its detriment and resulting from the marketing of the KED helmets, the sum of €64,681.44 for the period from 2 April to 30 October 2007;

DISMISSES the claim submitted by TIME SPORT INTERNATIONAL in respect of the payment of the penalty;

ORDERS DECATHLON FRANCE SAS and KNAUER jointly and severally to pay to TIME SPORT INTERNATIONAL a sum of €50,000 in respect of the moral prejudice resulting from the acts of infringement committed against it;

ORDERS DECATHLON FRANCE SAS and KNAUER jointly and severally to pay to TIME SPORT INTERNATIONAL a sum of €60,000 under the provisions of Article 700 of the French Civil Procedure Code,

ORDERS DECATHLON FRANCE SAS and KNAUER, jointly and severally, to pay the costs,

ORDERS the provisional enforcement of this judgment for an amount not exceeding half of the sums to be paid.

Done and judged in Paris on 10 June 2016

Le Greffier

Le Président