FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

***COUR D'APPEL* OF PARIS**
Division 5 – Chamber 1

DECISION OF 05 OCTOBER 2011

(No. 220, 11 pages)

Docket Number: **09/02423**

Decision referred to the *Cour d'Appel*: judgment of 14 January 2009 – *Tribunal de Grande Instance* of PARIS 3rd Chamber 1st Section – Docket No. 97/20725.

APPELLANTS

- WATERS CORPORATION
represented by its legal representatives,
having its registered office at 34 Maple Street, Milford 01757 MASSACHUSSETS (UNITED STATES)
electing address at the office of Mr Dominique OLIVIER, *avoué* before the *Cour d'Appel*

- SAS WATERS
represented by its legal representatives,
having its registered office at 5 rue Jacques Monod – Rond Point des Sangliers 78280 GUYANCOURT,

represented by Mr Dominique OLIVIER, *avoué* before the *Cour d'Appel*
assisted by Mr Arnaud CASALONGA, attorney-at-law, member of the Paris Bar, courthouse box: K177

RESPONDENTS

- HEWLETT-PACKARD GmbH, a company governed by the laws of Germany
represented by its legal representatives,
having its registered office at Herrenberger Strasse, 110-130, 71034 BOBLINGEN (GERMANY),

- AGILENT TECHNOLOGIES DEUTSCHLAND GmbH, a company governed by the laws of Germany
represented by its legal representatives,
having its registered office at Herrenberger Strasse, 110-130, 71034 BOBLINGEN (GERMANY),
electing address at the office of SCP FISSELIER CHILOUX BOULAY, *avoués* before the *Cour d'Appel*,

represented by SCP FISSELIER CHILOUX BOULAY, *avoués* before the *Cour d'Appel*
assisted by Mr Pierre VERON and Mr Thomas BOUVET, attorneys-at-law, members of the Paris Bar, and pleading on behalf of the law firm VERON & Associés, courthouse box: P24

COMPOSITION OF THE COURT:

Under Articles 786 and 910 1st subparagraph of the French Code of Civil Procedure, the case was discussed on 22 June 2011, in public hearing, before Mr Didier PIMOULLE, Presiding Judge, and Ms Brigitte CHOKRON, Judge, in charge of the report, the attorneys-at-law not being opposed to it.

These judges gave an account of the oral pleadings during the deliberation of the Court, composed of:

Mr Didier PIMOULLE, Presiding Judge
Ms Brigitte CHOKRON, Judge
Ms Anne-Marie GABER, Judge

Court Clerk, during the discussion: Ms Aurélie GESLIN

DECISION: - handed down after due hearing of the parties;

- made available at the Court Clerk's office, the parties having been previously notified in accordance with the conditions laid down in the second subparagraph of Article 450 of the French Code of Civil Procedure;

- signed by Mr Didier PIMOULLE, Presiding Judge, and by Mr TL NGUYEN, Court Clerk, to whom the original copy of this decision was handed by the signatory Judge.

*****

Having regard to the appeal lodged by WATERS CORPORATION and WATERS (SAS) against the judgment handed down by the *Tribunal de Grande Instance* of Paris on 14 January 2009 after due hearing of the parties in the dispute opposing the latter to HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH;

Having regard to the latest pleading served on 31 May 2011 by WATERS CORPORATION and WATERS (SAS), the appellants;

Having regard to the latest pleading served on 17 May 2011 by HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH, the respondents;

Having regard to the closing order pronounced on 7 June 2011;

WHEREUPON:

Express reference is made to the appealed judgment and to the parties' pleadings for a thorough presentation of the facts of the case and of the proceedings; suffice it to recall the following.

Under an assignment contract dated 29 October 1999, registered in the French Patent Register on 21 August 2000, AGILENT TECHNOLOGIES DEUTSCHLAND GmbH became the holder of the French designation

of European patent EP 0 309 596, entitled "*pumping apparatus for delivering liquid at high pressure*" (hereinafter referred to as "the patent"), granted on 31 March 1993 on the basis of a patent application filed by HEWLETT-PACKARD GmbH on 26 September 1987.

The patent was the subject-matter of a dispute with WATERS CORPORATION, a company governed by the laws of the United States of America, and its French subsidiary, WATERS (SAS), which HEWLETT PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH accused of infringement acts.

It is under these circumstances that, by a judgment dated 29 May 2002, the *Tribunal de Grande Instance* of Paris, among other provisions, dismissed WATERS' claim for invalidity of patent claims 1 to 12, held WATERS liable for infringement of patent claims 1, 2, 10, 11 and 12 for having manufactured, imported, offered for sale and sold in France the 2690 and 2695 chromatography apparatuses and their 2690D and 2690XE variations, pronounced an injunction measure under penalty, before finally ruling on the damage, appointed an expert in the person of Mr GUILGUET and granted interim damages of 150,000 euros to AGILENT TECHNOLOGIES DEUTSCHLAND GmbH.

By a decision dated 7 April 2004, which today is final, the *Cour d'Appel* of Paris affirmed the aforementioned judgment but also held that the WATERS products bearing references 2790 and 2795 were infringing and increased the interim payment on account of the damages to 500,000 euros.

During the proceedings for the calculation of the damage suffered by HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH due to infringement, pending before the *Tribunal de Grande Instance* of Paris, the judge in charge of the case preparation, in light of the aforementioned decision, ordered on 21 March 2005 supplementary expert investigations, which were entrusted to Mr GENDRAUD, following Mr GUILGUET's retirement after the filing of his report on 15 June 2004.

Concurrent to these proceedings, new proceedings opposed the parties, in which HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH argued that the pumping apparatuses marketed by WATERS as of August 2002, allegedly modified in such a way as to exclude them from the scope of the patent, implemented the patent claims; by a decision dated 27 January 2010, now final, the *Cour d'Appel* of Paris dismissed the infringement claims directed at WATERS' modified apparatuses as they were not founded.

Under the appealed judgment, ruling on the claim for compensation due to the damage caused by WATERS' marketing of the infringing 2690, 2695, 2690D, 2690XE, 2790 and 2795 apparatuses until 29 July 2002, in light of the expert reports filed by Mr GUILGUET on 15 June 2004 and Mr GENDRAUD on 30 June 2008 respectively, the *Tribunal*, essentially, and enjoying the benefit of provisional enforcement:

* held this claim admissible with regard to WATERS CORPORATION for the infringement acts committed as of 12 September 1997 and, in the case of WATERS SAS, for those committed as of 28 September 1998;
* ordered WATERS CORPORATION to pay the sum of 306,199 euros to AGILENT TECHNOLOGIES DEUTSCHLAND GmbH as compensation for the damage resulting from the infringement acts committed between 12 September 1997 and 28 September 1998;

* ordered jointly and severally WATERS CORPORATION and WATERS SAS to pay the sum of 3,910,981 euros to AGILENT TECHNOLOGIES DEUTSCHLAND GmbH as compensation for the damage resulting from the infringement acts committed between 29 September 1998 and 29 July 2002;
* held that the amount of the damages should be reduced by the amount of the interim damages paid in enforcement of the decision dated 7 April 2004;
* held that these sums will be converted to the current value at the date of the judgment on the basis of the industrial production index, measurement and control material gross aggregate index, as published by the INSEE (base 100 in 2000);
* ordered jointly and severally WATERS CORPORATION and WATERS SAS to pay the sum of 100,000 euros to AGILENT TECHNOLOGIES DEUTSCHLAND for the "springboard effect";
* dismissed the claim for compensation for financial damage;
* ordered jointly and severally WATERS CORPORATION and WATERS SAS to pay the sum of 15,000 euros to AGILENT TECHNOLOGIES DEUTSCHLAND GmbH under Article 700 of the French Code of Civil Procedure.

WATERS, the appellants, request that the Court reverse the appealed judgment and hold WATERS CORPORATION not liable for the apparatuses sold by WATERS SAS between 12 September 1997 and 28 September 1998, exclude the apparatuses sold by WATERS SAS between 29 October 1999 and 21 August 2000 from the infringing sales, set the damage on the basis of a 3% compensatory royalty, alternatively a 5% compensatory royalty, and consequently set this damage, for all the heads of claim, at 416,669 euros before conversion to the current value, alternatively at 694,448 euros before conversion to the current value, and quite alternatively, on the basis of the loss of profit for 12% of the apparatuses and of a 3% compensatory royalty for 88% of the apparatuses, *i.e.* a sum of 624,780 euros before conversion to the current value, and even more alternatively, on the basis of the loss of profit for 12% of the apparatuses and of a 5% compensatory royalty for 88% of the apparatuses, *i.e.* a sum of 869,316 euros; in any case, the appellants request that the Court reduce the sums requested to fairer proportions with respect to the irrecoverable costs.

HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH, the respondents, seeking the reversal of the appealed judgment for these heads of claim, wish to see the damage set on the basis of the loss of profit, including over the period from September 1997 to October 1999, to see the sales recorded between the patent assignment and the registration of this assignment in the French Patent Register included in the infringing sales, to see the loss of profit set at 7,903,615 euros and at least at 6,253,918 euros, to see the sum granted for the "springboard effect" increased to 460,490 euros, to see the damages increased by the application of a yearly interest rate so as to take into account the financial damage, to see the appellants ordered jointly and severally to pay 500,000 euros to them for the irrecoverable costs.

This being set out, it is important to first specify that AGILENT TECHNOLOGIES DEUTSCHLAND GmbH is entitled, under an agreement entered into with HEWLETT-PACKARD GmbH on 17 January 2000, to keep for itself the damages for the patent infringement for the periods before and after the transfer of the patent ownership; consequently, it is the only claimant for damages, HEWLETT-PACKARD GmbH only being present in the proceedings to confirm the terms of the aforementioned agreement.

On the period of compensation,

AGILENT TECHNOLOGIES DEUTSCHLAND GmbH, replacing HEWLETT-PACKARD GmbH for the period before the assignment of 29 October 1999, wishes to obtain compensation for its damage as of 12 September 1997.

It therefore argues that, as WATERS CORPORATION thought that it had to summon HEWLETT-PACKARD GmbH for invalidity of patent No. 0 309 596 on 8 October 1997 before the *Tribunal de Grande Instance* of Paris, AGILENT TECHNOLOGIES DEUTSCHLAND GmbH voluntarily intervened in the proceedings in its capacity as assignee of the patent and lodged, alongside HEWLETT-PACKARD GmbH, a counterclaim for infringement of the patent by pleading dated 12 September 2000 so that, considering the statute of limitations, its damage for infringement should be assessed as of 12 September 1997.

WATERS recalls that HEWLETT-PACKARD GmbH and AGILENT TECHNOLOGIES DEUTSCHLAND GmbH summoned WATERS SAS to compulsory join in the proceedings on 28 September 2001 in order to see it held liable jointly and severally with WATERS CORPORATION for infringement of the patent; consequently, they maintain that, considering the statute of limitations, AGILENT TECHNOLOGIES DEUTSCHLAND GmbH is not entitled to sue WATERS SAS for infringement facts prior to 28 September 1998.

Furthermore they allege that WATERS CORPORATION, the only one at issue for the period from 12 September 1997 to 28 September 1998, did not exploit the infringing apparatuses in France where they were only introduced by WATERS SAS and that, consequently, the period to be taken into account for the assessment of the damage only begins as of 28 September 1998 for WATERS CORPORATION and WATERS SAS.

It is not disputed that WATERS CORPORATION, a company governed by the laws of the United States of America, manufactured the infringing apparatuses and that WATERS SAS, a company governed by the laws of France, marketed them in France until 29 July 2002, the date upon which they were withdrawn from the market.

It results from the judgment of 29 May 2002 that WATERS CORPORATION and WATERS SAS committed infringement acts with respect to patent claims 1, 2, 10, 11 and 12 by importing, offering for sale and selling in France the 2690 and 2695 apparatuses and their 2690D and 2690XE variations and ordered them jointly and severally to pay interim damages of 150,000 euros on account of the damage suffered from these infringement acts.

According to the final decision dated 7 April 2004 affirming the first-instance judgment, the *Cour d'Appel* of Paris held, to dismiss the claim lodged by WATERS CORPORATION for it to be held non liable for infringement, which maintained that it did not take part in the importation of the allegedly infringing apparatuses on the French territory, that it was immaterial that the apparatuses transited through the Netherlands before being delivered in France to WATERS SAS' customers, as WATERS CORPORATION took part in the act of importing goods into France by supplying its French subsidiary, and concluded that these facts characterised the offer for sale and the importation of the apparatuses in dispute on the French market by WATERS CORPORATION.

It follows that, as the respondents rightly point out, WATERS CORPORATION's argument, which is contrary to *res judicata* and according to which it did not import the infringing products into France and, accordingly, did not commit infringement acts to the detriment of AGILENT TECHNOLOGIES DEUTSCHLAND, is not admissible.

Consequently, WATERS CORPORATION is required to compensate for the damage suffered by AGILENT TECHNOLOGIES DEUTSCHLAND from the infringement acts committed after 12 September 1997.

The claims for infringement lodged on 12 September 2000 against WATERS CORPORATION could not have had an interruptive effect on the statute of limitations with regard to WATERS SAS, which was only summoned on 28 September 2001.

The latter will be required to compensate for the damage suffered by AGILENT TECHNOLOGIES DEUTSCHLAND as of 28 September 1998.

The appealed judgment will be affirmed on this issue.

WATERS CORPORATION and WATERS SAS, relying on the provisions of Article L. 613-9 of the French Intellectual Property Code, maintain as a new argument on appeal that AGILENT TECHNOLOGIES DEUTSCHLAND cannot claim compensation for damage for the period from 29 October 1999 (date of the patent assignment, from which HEWLETT-PACKARD GmbH is no longer the patent holder) to 21 August 2000 (date of the assignment registration, from which the assignee's rights can be asserted against third parties).

Consequently, they maintain that only two periods can be taken into account in the assessment of the damage:

- from 28 September 1998 to 29 October 1999,
- from 21 August 2000 to 29 July 2002.

But it was previously held that WATERS CORPORATION will be required to compensate for the damage caused by the infringement as of 12 September 1997 and not as of 28 September 1998 as it requested.

In addition, the rule of enforceability provided in the aforementioned article cannot have the effect of allowing an infringer to infringe a patent with impunity as long as the assignment has not been registered; in any case, WATERS is not justified in relying on the application of this rule to circumvent the obligation of damage compensation for the period from 29 October 1999 to 21 August 2000 whereas they do not dispute their obligation of damage compensation for the prior period, from 28 September 1998 to 29 October 1999; finally, it is established that the assignee AGILENT TECHNOLOGIES DEUTSCHLAND replaces the assignor HEWLETT-PACKARD GmbH for the period prior to the assignment.

It follows that WATERS' claim is irrelevant.

On the infringing sales

According to the undisputed conclusions of the expert Mr GUILGUET, the infringing sales, constituted by the 2690, 2690D, 2690XE and 2695 apparatuses, are composed of:

* 116 units amounting to 2,539,740 euros for the period from 19 September 1997 to 27 September 1998,

* 642 units amounting to 14,826,453 euros for the period from 28 September 1998 to 29 July 2002,

i.e. a total of 758 apparatuses for global revenue of 17,366,193 euros.

According to the expert Mr GENDRAUD, who is not challenged on this issue, the infringing sales, constituted by the 2790 and 2795 apparatuses for the years 1998 to 2002, are composed of 51 apparatuses, including 1 sold in 1998, amounting to a revenue of 506,313 euros.

It results from this information and from the grounds decided above that WATERS CORPORATION alone will be required to compensate for the damage suffered from the importation and the offer for sale of 117 infringing apparatuses in France between 12 September 1997 and 28 September 1998 and that WATERS CORPORATION and WATERS SAS will be required jointly and severally to compensate for the damage suffered from the importation, the offer for sale and the sale of 692 infringing apparatuses in France between 28 September 1998 and 29 July 2002.

On the mode of assessment of the damage

In this respect, the parties maintain their respective positions such as developed in the appealed judgment to which reference is made. AGILENT TECHNOLOGIES DEUTSCHLAND essentially bases the assessment of damage on its loss of profit and WATERS, on the contrary, maintains that this assessment should be made on the basis of compensatory royalty since AGILENT TECHNOLOGIES DEUTSCHLAND does not directly exploit its patent in France.

This being so, the parties agree on the principle under which the damage caused by the infringement should be assessed in terms of the loss of profit on the lost sales when the patentee exploits the invention and consequently was in the position to make the sales that the infringer made, and that, on the contrary, it should be assessed in terms of lost royalties when the patentee does not itself exploit the protected invention.

As the respondents recall, the fact remains that the damage compensation should be intended to re-establish the patentee in the situation in which it would have been but for the infringement and that, in the present case, the fact that the patentee manufactures the apparatuses implementing the invention abroad should not prevent its damage from being assessed on the basis of the loss of profit, provided that it demonstrates that the products, whose sale was lost for its distributors in France, would have been purchased from it.

If it is established that AGILENT TECHNOLOGIES DEUTSCHLAND manufactures the apparatuses equipped with the patented device in Germany, which are then sold in France by AGILENT TECHNOLOGIES FRANCE, it is also established, as the *Cour d'Appel* of Paris pointed out in its decision of 7 April 2004, in light of the invoices produced in court, that AGILENT TECHNOLOGIES DEUTSCHLAND, at least since the beginning of the year 2001, sold the patented products that it manufactured in Germany directly to its French subsidiary AGILENT TECHNOLOGIES FRANCE; this is

a circumstance from which the *Cour d'Appel* inferred that AGILENT TECHNOLOGIES DEUTSCHLAND was justified in seeing its damage compensated on the basis of the loss of profit in France.

If some elements of the proceedings put forward by WATERS reveal the presence, between AGILENT TECHNOLOGIES DEUTSCHLAND and AGILENT TECHNOLOGIES FRANCE, of a company called AGILENT TECHNOLOGIES EUROPE BV located in Switzerland, the examination of these elements establishes that the latter generates no clientele and plays no role in the marketing of the products that are delivered by the German company directly to the French company and that it is limited to invoicing the sales made between these two companies.

Consequently, AGILENT TECHNOLOGIES EUROPE BV cannot be regarded as exploiting the patent in France, where the patented products are sold by AGILENT TECHNOLOGIES FRANCE after the latter obtained supplies from AGILENT TECHNOLOGIES DEUTSCHLAND that manufactures the products.

Therefore, as the *Tribunal* rightfully held, the latter is justified in claiming compensation for its damage on the basis of the loss of profit since it directly suffers the consequence of the sales lost in France by its French subsidiary AGILENT TECHNOLOGIES FRANCE.

On AGILENT TECHNOLOGIES DEUTSCHLAND's incremental profit margin

In this respect, WATERS points out that the respondents produce no piece of evidence that is sufficiently accurate, dated and indisputable to justify the incremental profit margins recorded for the considered years.

But the expert Mr GENDRAUD, at the end of a detailed analysis of the accounting data provided by AGILENT TECHNOLOGIES DEUTSCHLAND, taking into account the numerous and partially justified criticisms from WATERS' financial expert, concluded that the patented products generated a net margin varying between 5,796 euros and 8,678 euros according to the year and that, with respect to the ancillary products sold either at the same time as the apparatus or during the lifetime of the apparatus, which is approximately 7 years, a margin of 8,903 euros for the year 2000, of 12,347 euros for the year 2001 and of 9,904 euros for the year 2002 could reasonably be decided.

However, one should take into account WATERS' observations according to which the ancillary products are not necessarily purchased from the manufacturer during the lifetime of the apparatus, as the spare parts market is distinct, so that AGILENT TECHNOLOGIES DEUTSCHLAND sells maintenance kits for WATERS apparatuses and, consequently, the purchaser of an infringing apparatus from WATERS could then purchase spare parts from AGILENT.

Consequently, in light of this element, the *Tribunal* rightly concluded that the loss of profit for the spare parts should not be assessed with respect to the number of apparatuses that AGILENT TECHNOLOGIES DEUTSCHLAND could have marketed but for the infringement and should be the subject-matter of a distinct calculation with a distinct drift of sales.

As a consequence of such a conclusion, the *Tribunal* rightly held, in light of the information gathered by the expert, that the incremental profit margin per unit is of 7,876 euros, 12,202 euros and 9,828 euros for the years 1999, 2000 and 2001 respectively for the chromatography apparatuses and the ancillary products sold concomitantly and that, for the spare parts sold over the lifetime of the apparatuses, the margins are of 217 euros, 145 euros and 76 euros.

Considering that, for the period before October 1999, the respondents admit that they are not in a position to produce the cost prices of the patented products, which were borne at that time by HEWLETT-PACKARD GmbH, the patent holder; this circumstance led the expert Mr GENDRAUD to dismiss the calculation of the damage on the basis of the incremental profit margin and to use the system of compensatory royalty for the concerned period.

Like the *Tribunal*, the *Cour d'Appel* notes that, in the present case, the application of the compensatory royalty is more rigorous than the reduction of the incremental profit margin proposed by AGILENT TECHNOLOGIES DEUTSCHLAND to compensate for the uncertainty raised by the insufficiency of data and will follow the expert Mr GENDRAUD in that he calculated the damage suffered before the assignment of October 1999 on the basis of the compensatory royalty.

On the drift of sales

To determine the drift of sales, the experts rightly performed an analysis of the specificities of the top-of-the-range chromatography market and exactly recorded that AGILENT and WATERS share the market more or less equally.

Nevertheless, the *Tribunal* rightfully pointed out that even if the opposed companies share the top-of-the-range chromatography market, numerous elements intervene in the choice of an apparatus coming within this category and in particular the faithfulness to a manufacturer, so that the 100% drift of sales proposed by the respondents cannot be decided.

In light of these elements, the *Tribunal* reasonably set the drift of sales for the chromatography apparatuses and the ancillary products sold concomitantly at 50%, as the expert Mr GUILGUET proposed (the expert Mr GENDRAUD having proposed a 33% drift of sales), it being pointed out in this respect that Messrs JARDY's and DALSACE's reports produced by WATERS to claim a reduction of this drift of sales considering the limited scope of the patent, while they may have been relevant in the early phase of the dispute when it was necessary to ascertain whether the infringement acts were proven or not, are no longer relevant since the validity of the asserted patent was finally admitted and the infringement acts finally characterised.

Once more, the *Tribunal*, taking into account the aforementioned particularities of the spare parts market, rightly decided upon a 20% drift of sales for these spare parts.

On the compensatory royalty

As it emerges from the abovementioned, it is reasonable to resort to this royalty to assess the damage suffered during the period from 12 September 1997 to 29 October 1999 and to assess the damage resulting

from the part of the sales of the infringing apparatuses that would not have drifted to AGILENT TECHNOLOGIES DEUTSCHLAND.

For the calculation of this royalty, the *Cour d'Appel* adopts the *Tribunal*'s observations, according to which WATERS, which strongly advertised the very innovative design that the infringing apparatuses implemented and the performances they ensured in matters of chromatographic measurement, cannot today seriously argue the limited and accessory nature of the invention.

Consequently, the *Tribunal* rightly held, on exact and sufficient grounds that the *Cour d'Appel* adopts, that one should take into account the important commercial advantage that resulted from the implementation of the patented device and from the fact that WATERS would have necessarily lost market shares if AGILENT TECHNOLOGIES DEUTSCHLAND alone had implemented the protected device and concluded in light of these elements that the 12% royalty rate proposed by the expert Mr GENDRAUD corresponds to a correct assessment of the damage suffered.

As a consequence of all the elements decided above, the *Cour d'Appel* adopts the calculations made by the *Tribunal* that lead to:

- the sum of 1,653,048 euros as the royalty due for all the infringing apparatuses sold in 1997, 1998, 1999 and for half of the infringing apparatuses sold in 2000, 2001 and 2002;

- the sum of 2,250,700 euros as the incremental profit margin per unit for half of the infringing apparatuses sold in 2000, 2001 and 2002;

- the sum of 7,233 euros as the incremental profit margin per unit for the ancillary products over the lifetime of the apparatuses in 2000, 2001 and 2002;

i.e. a global total sum of 3,910,981 euros, which will be converted to the current value on the basis of the industrial production index in the terms of the judgment.

On the springboard effect

In the compensation for the global damage suffered from the consequences of infringement acts, the "springboard effect" is intended to take into account the circumstance, according to which WATERS would not have sold as many modified products, marketed as of 29 July 2002, if it had not sold the infringing products beforehand,

The *Tribunal* rightly points out in this respect that, in any case, AGILENT would have seen its market share increase considering the technical progress implemented by its apparatuses if WATERS had not committed infringement acts and that, consequently, the stability of the market shares noted in 2002 and 2003, put forward by WATERS, is not likely to exclude "the springboard effect".

Furthermore, the aforementioned clientele's faithfulness to a supplier in matters of chromatography apparatuses is a circumstance that gives credence to the existence of the "springboard effect", from which WATERS could benefit after 29 July 2002 when it replaced the infringing products by modified products, marketed with the same references as those previously withdrawn from the market.

The *Cour d'Appel* will follow the *Tribunal* in that, through a correct appraisal of the elements of the case, it set the damage resulting from the "springboard effect" at 100,000 euros and considered that it was not necessary to convert this sum to the current value.

On the financial damage

The *Cour d'Appel* points out that AGILENT TECHNOLOGIES DEUTSCHLAND did not prove before the first-instance judges, nor does it before the *Cour d'Appel*, a damage distinct from that which is compensated by the grant of the compensatory sums as decided above.

The claim in respect of the allegedly suffered financial damage will consequently be dismissed.

It follows from these elements that the appealed judgment is affirmed in all its provisions.

ON THESE GROUNDS

The *Cour d'Appel*

Affirms the appealed judgment in all its provisions;

Adding thereto;

Orders jointly and severally WATERS CORPORATION and WATERS SAS to pay the costs of the appeal which will be recovered under Article 699 of the French Code of Civil Procedure and to pay 150,000 euros to AGILENT TECHNOLOGIES DEUTSCHLAND as additional compensation for the irrecoverable costs.

The Court Clerk — The Presiding Judge