NOTE

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Re. : LAEP INVESTMENTS LTD/SETNET (20110047)

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This note constitutes a critical analysis of the merits and the chances of success of the court claims of Setnet Corporation (hereinafter "Setnet") against SFR and Hewlett Packard France (hereinafter "HP").

1. Summary of the dispute

We understand from reading the substantial briefs of Setnet, SFR and HP, that the dispute concerns alleged faults committed both by SFR and by HP as part of the performance of their contractual relationship with Setnet and that these faults include infringements of intellectual property rights consisting of the unauthorised overrun of the Setnet licenses.

The presentation of the contractual relationship between the parties discloses a progressive variation in accordance with the following chronology:

- From 1999 to 2002, SFR ordered major IT projects (6) from an integrator (Axians) and from Setnet to develop its e-mail access services. SFR would inform the integrator and Setnet of its requirements. They would then respond with separate quotes stating in particular the price and the terms of sale of the licenses. SFR would then send a letter of intent to the integrator, following which the integrator would issue an order form to Setnet.

- From 2002 to 2005, HP became the integrator. On 19 March 2002 a partnership was struck between HP and Setnet. Under this agreement, Setnet gave HP, under certain conditions, the right to distribute and to grant sublicenses over its Cellcentric software as part of the solution sold to SFR.

- From 2004 to 2006, the relationship continued but the license agreement was revised on 11 May 2004. Setnet accepted this agreement which was imposed upon it by SFR (via HP) but which changed the method of calculating the licenses.

2. Summary and analysis of the procedural aspects of Setnet's claim

On 13 February 2007, Setnet sued HP and SFR before the Commercial Court of Paris.

2.1 As to the admissibility of the action

SFR and HP first sought to challenge the admissibility of Setnet's action before the Commercial Court of Paris.

- In its briefs dated 12/12/07 and 29/09/10, HP asserts that Setnet did not demonstrate that Mr. Fodor had conceded to it the non-exclusive rights over the Cellcentric software suite, and above all, that Setnet, as a non-exclusive licensee, was not entitled to bring a lawsuit for infringement of intellectual property rights under French law.

HP asserts moreover that the issue of the ownership of the rights over the Cellcentric software suite (as opposed to the protection of said rights) is governed by US law in accordance with the Berne Convention of 9/09/1886, and that Setnet cannot therefore avail itself of the presumption of ownership of these rights, said presumption having evolved under French case law. HP challenges Setnet's right to request that French law be applied to the case.

- In its briefs dated 12/12/07 and 27/10/10, SFR claims, just like HP, that Setnet has not demonstrated, in its capacity as exclusive distributor of the Cellcentric software application, that it has a contractual right to take action for infringements of intellectual property rights. Just like HP, SFR invokes article 5.2 of the Berne Convention which distinguishes between the issue of protection of the rights and that of ownership, and it concludes that the law of the country of origin of the work applies, i.e. in the present case, US law. SFR thus founds its argument on a precedent of France's Supreme Court which ruled that the presumption of ownership of rights did not apply to a company claiming rights over a foreign work. According to SFR, which reiterates the arguments of HP in this respect, Setnet must demonstrate its capacity to take action under US law rather than French law.

Finally, SFR asserts that even if one were to assume that that French law was applicable, Setnet has not shown that the Cellcentric software application is a collective work nor the existence of such presumption of ownership of rights that would enable a company marketing a work under its name to be presumed to be the holder of the intangible property rights over that work. SFR considers that the degree of possession which Setnet needs to invoke in order to claim the presumption of ownership of the rights implies that it should behave as the owner of the work, something which Setnet has not done by presenting itself in its brief as merely the non-exclusive distributor of the software application.

- In its brief dated 11/02/11, Setnet answers the arguments of both HP and SFR. Setnet refutes the argument of HP and of SFR according to which it depicted itself merely as the non-exclusive distributor of the software application. Setnet claims, in a way which we find rather effective, that SFR and HP have for many years used a technology the rights to which they knew were held by Setnet. The contracts and documents exchanged by the parties clearly indicate this (in particular the contract with HP dated 19 March 2002).

Setnet thus argues that its presentation of itself as non-exclusive distributor did not imply a lack of rights the Cellecentric software application, but was merely the outcome of an internal compartmentalisation of the marketing of Cellecentric within and outside the mobile telephony sector.

Setnet then demonstrates that Mr. Fodor did indeed grant to Setnet, formerly named Datawave Corporation, all of his intellectual property rights over Comsurfer, which was later renamed Cellcentric.

Since this is considered applicable law, Setnet delves into the conflict of laws between US law and French law. Setnet demonstrates that the dominant case law and doctrine in the matter invoked by SFR and HP, according to which the capacity of author must be determined by the law of the country of origin and the law exerted by the country where the protection is claimed, is not in fact backed by the majority of sources.

Setnet requests the application of French law, given that the infringements of intellectual property rights were committed in France, and demonstrates that it is the holder of the rights under US law.

Setnet bases its reckoning on the presumption of ownership of the rights over Cellcentric in accordance with French case law and asserts moreover that the Cellcentric software suite is a collective work.

2.2 As to the court-ordered expert survey

• In its brief dated 23 October 2009, Setnet requested the appointment of a court expert, a petition which was opposed by SFR and HP. In its preliminary ruling on 27 May 2010, the commercial court of Paris held that the parties to the dispute had differing interpretations of technical facts with a direct bearing on the assessment of the causal events, i.e. the wrongs committed, and therefore appointed an expert to look into the matter.

The court stated that the parties were all referring to the 2004 agreement (MOU) and to the notion of “registered users” but that neither a definition of this term nor any means of measuring it could be determined.

The expert who was appointed by the court (Mr. Znaty) was instructed:

- to give his opinion on the possible interpretations of the term “users” as defined in article 2a of the MOU,
- to assess the relevance of the “Tool” used to count the number of “users” as stipulated by article 2b of the MOU,
- to estimate the number of “users” for each possible interpretation of that term.

But this mission does not cover all the aspects that Setnet was petitioning for in its brief, and in particular:

- to find out whether SFR used other technologies for its e-mail services from 1999 to 2006,
- to issue an opinion regarding the successive methods used to count the licenses of Cellcentric, and to determine whether the changes made in 2004 were inevitable for technical reasons,
- to state whether the agreement to count the licenses based on concurrent sessions was defined precisely enough and whether the parties did in fact reach an agreement over this notion and the counting algorithm,
- to state whether the Oneadmin tool enables the counting of the number of concurrent sessions,
- to state whether the Licence Manager module could be used to monitor the licenses,
- to state whether the 19 elements of the Cellcentric software suite were used in keeping with the licensing agreements (in particular with regard to Vodafone Live),
- to analyse and assess the loss or damage incurred by Setnet as a result of performing its obligations under its relationships with SFR and HP (loss of earnings on unpaid royalties, loss of opportunity for Setnet to develop its business, loss of value of the Cellcentric software application).

The ambit of the expert's assignment, as set by the court, is therefore less extensive than that which was requested by Setnet and less favourable to its position, for it appears to limit the debate to the mere performance of the MOU and to exclude the allegations of improper performance of the agreement of 2002. However, it must be said that some of the tasks sought by Setnet transcended the scope of an expert's duties, since an expert may rule on a technical definition but not on the proper or improper application of a contract or the intention of the parties, such tasks falling within the remit of the court which has to settle the dispute.

Moreover, Setnet has the possibility to seek an extension of the expert's assignment.

3. Analysis of the heads of claims and the various alleged loss headings

3.1 The breaches of contract committed by SFR et HP separately from the infringements of intellectual property rights

3.1.1 <u>The wrongs alleged by Setnet</u>

Setnet invokes two types of wrongful behaviour.

The first involves the breach of the limited license agreement, expressed in terms of concurrent sessions (a); the second involves the wrongful conditions under which the agreement on the licenses per registered user was renegotiated in 2004 (b).

a) the breach of the limited license agreement expressed in terms of concurrent sessions

Setnet invokes two wrongs:

The first wrong results from the impossibility for Setnet to access the logs, which constitutes a barrier to the application of the license agreement. The second wrong arises from the blockage of the tools used to measure and monitor the use of Setnet's technologies.

With regard to the impossibility for Setnet to access the logs to find out the number of concurrent sessions and determine the rights over the licenses, the allegation does appear to be demonstrated, but only against SFR, since Setnet merely accuses HP of indirect wrongful reticence in this respect.

This alleged wrongdoing on the part of SFR does indeed appear to have been committed but should doubtless be clarified by precise references to the provisions of the contract (and where applicable by issuing the expert with additional instructions).

Regarding the blocking of the tools used to measure and monitor the use of Setnet's technologies, it would seem that this obstruction is characterised by SFR's refusal to install the Oneadmin software application enabling the counting of concurrent sessions. On the other hand, HP's improper installation of the Licence Manager software application enabling the counting of the licenses is a little less obvious and should be developed further.

These wrongs appear to have been demonstrated but their impact in terms of compensation is rather limited, because French rules of civil liability do not merely take into consideration the existence of wrongs, however serious they may be, in order to determine the compensation that is due. The existence of a loss or damage resulting from the wrongdoing must be demonstrated.

b) the wrongful conditions under which the agreement on the licenses per registered user was renegotiated in 2004

Setnet has shown that the modification of the method used to count the licenses did not result from a purported complexity of the initial calculation method but from the impossibility for SFR to pay the corresponding result.

This is very clearly demonstrated and SFR and HP naturally attempted to conceal it in their briefs dated 12/12/07.

Nevertheless, Setnet did agree to enter into a new agreement and information was provided to it prior to the signature of the agreement (see the e-mail dated 2 January 2004). The crux of the matter is therefore going to depend not on the signature of the agreement which was accepted by Setnet but on the suitability of the information which it received from SFR before signing the agreement in 2004.
Doubtless SFR's dominant position could explain Setnet's lack of margin for manoeuvre, but it still could have shown some resistance. One should also bear in mind that Setnet's assessments of its alleged losses are based on calculation methods drawn from the purportedly wrongful agreement of 2004, a fact which SFR will not fail to argue.

Setnet considers that the signature of this agreement was wrongful because its sole purpose is to make it more difficult for SFR to count its users and thus calculate the [number of] licenses [in use].

Finally, Setnet claims that it was deceived and that SFR vitiated its consent in the course of the signature of the agreement of 2004, but does not draw very clear consequences from this, there being a choice between claiming damages or the nullity of the agreement. Given that the latter option is not expressly requested by Setnet in its brief, which does not refer to article 1116 of the Civil Code, one may conclude from this that Setnet is only petitioning the court for damages, but the position of Setnet on the matter of the deceit and of its consequences needs to be clarified.

Similarly, it is difficult to find a clear-cut position on the agreement of 2004 in Setnet's brief since Setnet indicates that this agreement, although it was signed, was vitiated, and then that the MOU has no value, in the absence of precise content and of a signature.

Conclusion as to the justifications put forward by Setnet

The breaches of contract alleged by Setnet separately from the infringement of intellectual property rights seem to us to be real, in principle, but their demonstration must be developed further.

However, it is difficult to link any specific loss or damage to these breaches of contract aside from the loss of earnings on the licenses, a head of claim which, in our opinion, would mainly give rise to compensation for the infringement of intellectual property rights.

These breaches of contract should thus be bunched with the infringements of intellectual property rights because the harm or damage caused is identical and will not be compensated twice. SFR adopts this position in any event in its brief dated 12/12/07.

The outcome would not be without interest, since Setnet has proposed to the Court a minimum amount of compensation for the infringements of intellectual property rights which it wants the court to increase in order to take into consideration the wrongful acts committed against it by SFR and HP. These breaches of contract (committed separately from the infringement of intellectual property rights) could thus be used to underpin this claim for an increase in the compensation, which is currently left to the discretion of the court and will therefore be rejected if no accurate claim is made.

Conversely, as Setnet states, if one considers the damage caused based on these heads of claims, the breaches of contract committed separately from the infringement of intellectual property rights, thus excluding any considerations related to the license, should relate to the maintenance, the training and the integration IT services. If the breach of the terms of the limited license agreement expressed in concurrent sessions has direct consequences on the profit generated by these non-license activities, this breach must be presented differently in order to differentiate oneself further from the issue of the infringement of intellectual property rights.

3.1.2 The alleged loss or damage

Setnet successively presents the breaches of contract committed by SFR then those committed by HP and finally those committed by the two of them together, but it then goes on to petition the Court for a joint and several award of 10,000,000 euros against SFR and HP.

Such a joint and several award might be understandable as far as the breaches committed jointly by SFR and HP are concerned, but not in respect of those distinct breaches committed by each of these parties which may have led to different damage, and are indeed presented as such by Setnet; the claims of Setnet must be broken down.

With regard to the breaches committed by SFR, Setnet considers that the obstruction of its right to obtain information about the use of the software and the supply of partial logs is the root cause of the damage or loss that it has incurred. As far as we can see, however, this loss cannot be distinguished from that caused by the infringement of intellectual property rights.

With regard to the breaches committed by HP, Setnet considers that HP never backed up its position and never took any steps against SFR, thus violating an obligation of cooperation in accordance with the partnership agreement of 2002, which has not been disclosed to us. In any event, the obligation of cooperation which was supposedly violated by HP is not sufficiently demonstrated. Finally, Setnet asserts that HP's late payments for the maintenance and the licenses caused it to suffer a loss. This too is not sufficiently demonstrated. Even if it were, the cost of the delay would consist of interest charged on the moneys due, as opposed to the sum of money being sought as compensation.

With regard to the breaches committed by both SFR and HP, Setnet reiterates the grievances alleged against SFR and HP separately in a bid to expand upon them, but without really adducing evidence that these breaches are in any way distinct from the ones already mentioned.

3.1.3 The defences raised by HP and SFR

a) The position of HP

According to HP's brief dated 12 December 2007 (page 5), Setnet did not clearly identify in its brief the contractual obligations which HP purportedly committed to and then breached. HP seeks to draw a distinction between the two contracts between Setnet and HP, to wit the cooperation agreement dated 19 March 2002 and the maintenance contract. With regard to the cooperation agreement, which supposedly applies in respect of the licenses, HP appears to be claiming (page 10 of the brief dated 12/12/07) that this agreement did not introduce any express obligation for HP to count the licenses used by SFR or to monitor the effective use of the software application by SFR.

The provisions of the agreement do not contain any obligation of this kind and the agreement remains very vague as to the parties' obligations in general. HP then puts forward an argument which makes sense, stating that it was not in its interest to downplay the number of licenses used by SFR since its remuneration was calculated based on the number of these licenses.

With respect to the monitoring of the licenses, HP asserts that the monitoring software such as Licence manager could not be implemented owing to shortcomings on the part of Setnet and claims that Setnet agreed to deliver the M3S project without this tool. Even though it does appear that there was an issue with the counting of the licences, HP's responsibility for this does not seem obvious unless one can show that HP had an obligation to activate and above all to re-activate Licence Manager but refrained from doing so.

Finally, with regard to the renegotiation of the contract in 2004, HP points out, like SFR, that Setnet agreed to redefine the terms governing the counting and was informed (see the e-mail dated 2 January 2004) of the number of users prior to the signature of the agreement in April and May 2004. HP sensibly asserts (on pages 17-18 of the brief dated 12/12/07) that the counting and declaration obligation was incumbent upon SFR in accordance with the agreement signed in 2004 but not upon HP, which only played an intermediary role, relaying to Setnet the information that was provided by SFR without HP having an obligation to check the veracity of the data. SFR indicates in this respect in its brief that the first agreement was only based on estimates and that it was only the second agreement of 2004 which imposed monitoring in hindsight by SFR.

b) <u>The position of SFR</u>

SFR asserts that the claims brought by Setnet on the basis of the contract have the same goal as the claims of infringement of intellectual property rights (page 18 of the brief dated 12/12/07), a position which appears to be at least partly in keeping with our assessment.

SFR states that it never had a direct contractual relationship with Setnet (with the exception of the maintenance contract dated 19 May 2005), the only existing contracts being between Setnet and HP. This is not completely true since as acknowledged by SFR and HP, each order consisted in a meeting of wills and therefore a contractual relationship, however informal, and the agreement of 2004 was signed and performed by the parties (page 18 of the brief dated 12/12/07).

This inaccuracy does not mean that the position of SFR is flawed.

With regard to the signature of the new agreement in 2004, SFR claims that the latter was accepted by Setnet without any comments until 2006 and that no deceit was involved. Setnet was allegedly informed of the number of users in an e-mail dated 2 January 2004 prior to the signature of the agreement in April-May 2004 (page 22 of the brief dated 12/12/07). SFR moreover asserts that Setnet did not request a higher unit price per license since according to common practice the prices should be set on a sliding scale in accordance with volumes (page 23 of the brief dated 12/12/07).

SFR then asserts that in accordance with the agreement of 2004, it duly sent to Setnet declarations of user numbers that were correct and in keeping with its use of the software suite, and that these were not seriously challenged by Setnet.

Finally, SFR embarks on a technical discussion of the methods of counting the licenses, the concurrent sessions and registered users, backing up its arguments by expert reports which contradict Setnet's own expert.

Conclusion regarding the compensation claimed by Setnet

The very existence of damage other than that involving the infringements of intellectual property rights is debatable. Assuming that it did occur, the sum of 10,000,000 euros does seem rather excessive and is likely to be reduced (or even set aside) by the Court.

Only precise wrongs concerning the maintenance, the training and the IT integration services might justify compensation for any loss or damage other than that involving the infringements of intellectual property rights.

The other grievances (obstructions, renegotiation of the agreement) should be backed by evidence of wrongs linked to the infringement of intellectual property rights which are liable to worsen the damage caused by the infringement of intellectual property rights alone (compensatory royalties and associated damages).

3.2 The alleged infringements of intellectual property rights

3.2.1 The evidence of the infringements of intellectual property rights

Setnet considers that the combined faults of SFR and HP prevented Setnet from ascertaining the precise extent of the use of its licenses and that they were in fact used beyond the limits set.

It is quite true, and it has been shown that SFR was only granted limited rights by Setnet via HP.

The use of the software application outside the scope of the contract constitutes an infringement of intellectual property rights. SFR's argument that there was no direct contractual link between it and Setnet, the licenses being granted by HP, seems invalid to us.

Setnet has shown that SFR used the licenses beyond the agreed limits (for services and offers that had not been planned) and that the figures put forward by SFR cannot be trusted.

Setnet's allegations regarding the breaches of contract committed separately from any matters pertaining to the licenses (see above) apply here in full and should be used to shore up the allegations of wrongdoing (if not actual fraud) and the damage caused.

Setnet appears to have duly demonstrated SFR's infringement of its intellectual property rights. However, SFR persists in challenging each head of claim, and in particular the issue of the licenses concerning Vodafone Live and Universal Music Mobile, an issue on which it is not possible for us to comment in the absence of all the salient elements.

The expert report ordered by the Court will doubtless settle the matter of the existence of the infringements of intellectual property rights and the damage resulting from same, but its current scope only covers the counting of the licenses by virtue of the agreement of 2004 and does not cover, contrary to what Setnet requested, the use that SFR made of the Cellcentric software suite for all its applications.

HP's role in committing the same acts should on the other hand be expanded upon and presented separately to bring it to the fore.

Indeed, HP claims, in a way which we find rather sensible (page 10 of the brief dated 12/12/07) that the cooperation agreement dated 19 March 2002 did not stipulate any obligation for HP to count the licenses used by SFR or to check SFR's effective use of the software application. The provisions of the agreement do not contain any obligation of this kind and the agreement remains rather vague as to the parties' respective obligations.

Therefore, the infringement of intellectual property rights alleged against HP by Setnet does not seem to be backed by sufficient evidence to justify a joint and several order against both HP and SFR.

3.2.2 The loss or damage incurred owing to the infringement of intellectual property rights

Setnet identifies two categories of losses. The first concerns Setnet's loss of earnings, i.e. the value of the unpaid licenses (a). The second concerns the loss of opportunity for Setnet to develop its business and the damage to its image (b).

a) Setnet's loss of earnings

Setnet bases its reckoning on two elements: the unpaid royalties and the lost earnings relative to the profits made by SFR

- The unpaid royalties

Setnet's demonstration is convincing but it could benefit from a distinction being drawn between the periods marked out by the various agreements: 1999-2004 and 2004-2006. This depends in the end analysis on the interest for Setnet to opt for a given calculation method (per concurrent session or per registered user). Perhaps it may be worthwhile not to invoke the nullity of the agreement of 2004 owing to a flaw affecting Setnet's consent, even if the latter does occasionally refer to the nullity of the agreement, if the calculation method per registered user turns out to be more beneficial at the end of the day.

The claim for compensation brought by Setnet, amounting to 16,350,000 euros, appears to be reasonable and is based on the opinion of an expert. However, SFR also bases its arguments on experts' reports and claims that in the course of performing the agreement of 2004, it duly declared to Setnet the number of users and that no remonstration was made to it at the time. The Court will only be able to rule on this aspect in light of a report drawn up by a court-appointed expert.

On the other hand, Setnet quite rightly indicates that this sum only constitutes a minimum figure since it only corresponds to the amount of unpaid royalties. This compensation must therefore be increased in order for the minimum compensatory payment to match the actual loss.

Yet Setnet is petitioning the Court to increase this sum without proposing a method for doing so. In the absence of such an indication, the Court cannot allow the claim and will not itself proceed to set the amount.

Setnet should therefore do so in its next brief.

Setnet can do this by basing its reckoning on the legal precedent cited in its brief, in which the damages were set at 5 times the value of the licenses granted. It is also at this stage that the breaches of contract that do not involve the licenses themselves (obstruction to Setnet's access to the data, late payment, etc.) must be used to justify such an increase, which must imperatively be proposed to the Court, where need be by alternative solutions.

- Setnet's lost earnings relative to the profits made by SFR

This particular head of claim does not seem convincing.

Setnet argues that it would be "inequitable" to limit Setnet's lost of earnings merely to the unpaid royalties, even after that amount is raised to take extraneous elements into consideration. However, the basis of the claim must be legally sound. And in law, a loss can only consist of an actual loss or a loss of earnings.

Setnet can only claim compensation based on earnings achieved by SFR thanks to Setnet's technology if these earnings result from the licenses granted or from their overrun. Indeed, the earnings achieved by SFR are only the outcome of the use and the marketing of the licenses, something which Setnet has always agreed to.

Setnet can therefore only claim a loss in respect of the amount of unpaid royalties, to be incremented appropriately to take into consideration the additional wrongs committed, and it is only from that angle that it can invoke the benefit derived by SFR. This is not however a separate head of claim from that of the unpaid royalties.

The competitive advantage of SFR, its ability to attract clients and to hold on to them, are not the outcome of a separate wrong from its overrun of the agreed number of licenses.

Moreover, article L.331-1-3 of Intellectual Property Code states that: "*To fix the damages, the Court considers the negative economic consequences, of which the loss of income, suffered by the injured party, the profits realized by the author of the infringement of rights and the moral wrong caused to the holder of these rights because of the infringement. However, the Court can, as alternative and at request of the injured party, assign as damages a lump sum which cannot be lower than the amount of royalties or rights which would have been owed if the author of the infringement had asked for the authorization to use the violated right."*

This article (not mentioned in Setnet's brief and which applicability could be discussed as regards the enter into force of this legal provision in 2007) states that a choice must be made in order to assess the damage incurred (" *the Court can, as alternative and at request of the injured party").*

In conclusion, Setnet can not ask the Court at the same time to fix the damages by considering the negative economic consequences, (he loss of income) for Setnet, the profits realized by SFR and the moral wrong (amounted to 16.500.000 euros) and claim a lump sum upper than the amount of royalties which would have been paid.

Finally, apart from the fact that the premise of this alleged loss is highly dubious, the very amount of the claim (1.653 million euros) seems disproportionate both in respect of the alleged wrong and in respect of France's rules governing compensation, which does not punish wrongful conduct (as in the English-speaking countries for instance with their "punitive damages") but follows the principle of integral compensation that only covers the actual loss or damage.

b) Setnet's loss of opportunity to develop its business and the damage to its image

Setnet asserts 2 heads of claims under this heading.

The first arises from an alleged loss in the value of Setnet. The second arises from the opportunities allegedly lost by Setnet to develop its business and the loss of value of the Cellcentric software application.

- *The loss of value of Setnet*

Setnet considers that its value as a company is solely based on the fate of its software applications, and that this value depends on their use. Setnet asserts that the use of its software was hindered by SFR and HP and that as a result its valuation fell.

This head of claim seems rather dubious for two reasons.

First of all, any loss of value of a company can only be invoked by its shareholders as opposed to the company itself. And in the absence of a pending purchase of a company, its valuation is merely relative. If a company is not in the process of being sold, there is no loss of the opportunity of having been able to demand a higher transfer price.

Second, SFR and HP did not impede the use of the software applications of Setnet since the latter has already shown the extent to which SFR and HP used them, on a massive scale and indeed beyond the permitted limits. The fact of not having paid for all of these uses seems to us to be a different issue from the actual uses thereof. On the contrary, Setnet's technology was extensively used and Setnet might even have been able to capitalise on the success of SFR for its own benefit, thus enhancing its value.

- *The lost opportunities for Setnet to develop its business and the loss of value of the Cellcentric software application*

First of all, Setnet claims that it was prevented from benefiting from the massive use of its technology by SFR. But it seems to us that without disclosing the precise figures, which it did not have, Setnet could have mentioned its ongoing cooperation with SFR which has become the market leader thanks to Setnet.

Setnet then asserts that it was unable to work on other projects because it was being monopolised by SFR. However this is merely the outcome of Setnet's own choices, and the latter cannot therefore invoke this in Court even if SFR has not been as loyal as it should have been. The fact that SFR did not pay for all of the use it made of the technology does not demonstrate that Setnet would have decided to enter into a contract with another operator, and

Setnet does not adduce any evidence as to the contacts that it may have made in order to form other partnerships.

Finally, Setnet cannot link its loss of income to the loss of its position as leader, which can be explained by the growth of the market for mobile Internet or mobile telephony, the arrival of new competitors and the emergence of new offers.

Similarly, the loss of value of the Cellcentric software application is not sufficiently demonstrated and cannot result from a mere fall in operating income.

3.3 The expenses that Setnet has incurred to defend its rights

This head of claim corresponds in French law to the compensation stipulated by article 700 of France's *Code de procédure civile* [rules governing civil proceedings] for the legal costs incurred by a party as part of the proceedings (i.e. the costs of lawyers, experts, etc.). Provided that Setnet demonstrates that it incurred these costs (such as by disclosing the invoices from its lawyers), it can claim compensation for them should the Court side against SFR and/or HP as to the substance of all or at least part of the claims.

The amount that is generally allocated by the courts is however rarely very high (50,000 euros is already considered a significant award) and in accordance with the text of article 700 of France's *Code de procédure civile*, only corresponds to a partial compensation for the costs incurred as opposed to the entire costs.

4. Overall assessment and estimation of the chances of success:

In general, the statement of the facts provides a satisfactory overview of the dispute. However, it would doubtless be a good idea to identify more clearly the separate contractual relationships between Setnet and SFR on the one hand and between Setnet and HP on the other hand, if need be by basing oneself more directly on the provisions of these contracts.

If this is done, the Court will be better able to identify the contractual obligations that may have been breached by SFR and HP and to determine, for each of the faults committed, whether the joint and several award being sought by Setnet is justified or whether the award must be borne by one or the other defendant. In this respect, the obligations of HP and the wrongs committed by it must be expanded upon and stated precisely, Setnet being sometimes too evasive about the nature of the faults or failing to connect them clearly to a provision of the contract of 2002. Finally, taking a conservative and realistic view, we believe that the amount of losses being claimed by Setnet should be lowered.

4.1 As to the breaches of contract committed by SFR and HP separately from the infringements of intellectual property rights

The breaches of contract committed separately from the infringements of intellectual property rights alleged by Setnet appear to be real but must be stated more precisely and developed. Failing this, the Court may not connect a specific loss or damage to these wrongs that is separate from the loss linked to the loss of earnings on the licenses, a loss which arises from the infringement of intellectual property rights and which cannot be compensated twice over.

The extent of the amount being claimed in this respect (10,000,000 euros) calls for Setnet to be more precise.

If it is not possible to clearly identify the faults committed, the damage and a causal link between the fault and the damage, we believe that these breaches of contract should be used as justification for Setnet's request for the minimum compensation to be raised.

As things stand, it is possible to estimate the chances of success of this specific claim at between 20 and 40%, bearing in mind that the amount eventually allocated by the Court will doubtless be lower than 10,000,000 euros but will take into consideration interest for late payment and the disruption caused to Setnet (obstruction of access to the data), for which substantiation should be provided.

The claim for compensation brought by Setnet amounts 10,000,000 euros against SFR and HP. Regarding this specific claim, it is possible to estimate the amount probably allocated by the Court to Setnet between 30.000 and 100.000 euros.

4.2 As to the unpaid royalties

This head of claim is clearly the soundest of the lot inasmuch as the position of SFR and of HP is weakest or most compromised here.

The demonstration of the fault, of the loss (backed up by an expert) and of the causal link seems likely to convince the Court.

We assess the chances of success of this claim at between 80 and 90% and the amount of money being claimed does not appear to be excessive.

However, Setnet absolutely cannot petition the Court to increment the minimum amount of the unpaid royalties (compensatory royalties) while leaving it up to the Court to determine the extent of this increase. Setnet does not provide any alternative solution to the Court which will not be able to rule due to the lack of a precise claim.

The increase can be expressed in percentage terms (20, 30 or 50% for instance), as a ratio (3 or 5 times the royalties for instance) or as a fixed sum. In this respect, the claim for compensation for the breaches of contract committed separately from matters pertaining to the licenses should be used at this stage as backing with a view to securing an increase. Similarly, the claim brought in connection with the earnings achieved by SFR should be used to emphasise the impact of the failure to pay for the licenses so as to justify the increase sought.

The claim for compensation brought by Setnet amounts 16,350,000 euros. Regarding this specific claim, it is possible to estimate the amount eventually allocated by the Court to Setnet between 15 and 20 millions euros. This minimum amount of the unpaid royalties (compensatory royalties) should be increased (between 25 and 50 millions euros) regarding the claim for compensation for the breaches of contract committed separately from matters pertaining to the licenses.

4.3 As to Setnet's lost of earnings relative to the earnings made by SFR

This claim does not appear to be based on serious merits, not only in light of the amount being claimed (1.653 million euros), which could not be countenanced by the Court, but also and above all owing to the absence of any actual loss incurred by Setnet.

We therefore estimate the chances of success of this claim at between 5 and 15%.

Conversely, although SFR cannot be made to pay for profiting from its cooperation with Setnet and from using its licenses, this head of claim can be used as further justification for the request for an increase in the compensatory royalties (for unpaid licenses) which corresponds to the concept of punishing the person who commits an infringement of intellectual property rights beyond the mere regularisation of the cost of the unpaid licenses.

The claim for compensation brought by Setnet amounts 1.653 millions euros. Regarding this specific claim, it is possible to estimate the amount eventually allocated by the Court to Setnet between 50.000 and 100.000 euros.

4.4 As to the loss of value of Setnet

As we have indicated before, we do not believe that such a purported loss can be invoked by the company itself, but rather by its shareholders. The claim is therefore likely to be declared inadmissible for lack of any interest to take action. Moreover, the loss of opportunity alleged by Setnet is not very clear-cut.

We estimate the chances of success of this claim at around 10%, for an amount lower than 27 millions euros claimed by Setnet.

Regarding this specific claim, it is possible to estimate the amount eventually allocated by the Court to Setnet between 20.000 and 100.000 euros.

4.5 As to the lost opportunities for Setnet to develop its business and the loss of value of the Cellcentric software application

These opportunities are not clearly demonstrated and proven by Setnet. Similarly, the loss of value of the software application, even assuming it were real, might be due to causes other than the acts committed by SFR and HP, and as a result the Court may hold that any causal link was indirect or insufficiently demonstrated.

We estimate the chances of success of this claim at between 15 and 30%, for an amount lower than 200 million euros claimed by Setnet.

Regarding this specific claim, it is possible to estimate the amount eventually allocated by the Court to Setnet between 100.000 and 500.000 euros.

5 Strong points and weak points of Setnet's position:

5.1 Strong points:

- The change of the method of counting the licenses and the corresponding royalties which occurred in 2004 seems to have been dictated, by SFR's own admission, by an impossibility to pay the moneys that were due to Setnet rather than by technical problems.

- The significant growth of SFR's services using the Cellcentric software suite and the growing number of SFR clients contradict the declarations of SFR concerning the use of the licenses.

- The overrun of the authorised number of licenses and the use of the software application for other services not originally included (Vodafone Live et al) will be deemed to amount to infringements of intellectual property, provided that these faults are ascertained in a way which cannot be challenged (expert survey).

5.2 Weak points:

- The eventual faults committed by HP, whether they be breaches of contract not involving the license or infringements of intellectual property rights, are not sufficiently demonstrated inasmuch as neither the cooperation agreement of 2002 nor the agreement of 2004 stipulate any specific obligation for HP in its role as integrator to count the licenses prior to 2004, then to monitor the counting by SFR after 2004, even if the principle of good faith and its capacity as a licensee might implicitly impose such an obligation upon it.

- The breaches of contract not involving the licenses do not seem to be truly distinct from the allegations of infringement of intellectual property rights put forward by Setnet and should rather be used as persuasive evidence to back the claims for compensation for the damage or loss incurred as a result of the infringements of intellectual property rights.

- The loss of value of Setnet does not appear to be sufficiently demonstrated and the company's capacity to take action for this is doubtful.

- The loss of value of the Cellcentric software application should be highlighted more clearly as it does not seem to be sufficiently demonstrated as is.

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List of the documents analysed:

Legal briefs:

- Setnet's writ of summons dated 13 February 2007
- SFR's response brief and counterclaim as to the substance of the case dated 12 December 2007
- HP's response brief and counterclaim as to the substance of the case dated 12 December 2007
- Setnet's brief dealing with the substance of the case dated 10 December 2008
- HP's additional brief dated 28 October 2009
- HP's brief dated 20 January 2010 (re. expert survey)
- SFR's brief dated 20 January 2010 (re. expert survey)
- HP's brief dated 29 September 2010 (non-admissibility)
- SFR's brief dated 27 October 2010 (non-admissibility)
- Setnet's brief dated 11 February 2011 (non-admissibility)

Exhibits disclosed:

- Draft MOU (Setnet exhibit no. 40)
- Cooperation agreement between Setnet and HP dated 19 March 2002
- Ruling of the Court on the issue of the expert survey, dated 27 May 2010
- SFR brief dated 20 January 2010 re. the expert survey
- HP brief dated 20 January 2010 re. the expert survey