



Düsseldorf local division
UPC_CFI_457/2023

procedural order
of the Court of First Instance of the Unified Patent Court local division
Düsseldorf
issued on 22 July 2024
concerning EP 3 490 258 B1

Guiding principle:

Unless otherwise ordered by the court, the intervener is treated as a party in accordance with R. 315.4 RoP. R. 262A.6 RoP therefore also applies to him. He is therefore entitled to have the group of persons authorised to access information classified as confidential include at least one natural person in addition to his legal representatives.

Keywords:

Protection of secrets; parties; interveners; access restriction; circle of persons authorised to access; tiered secrecy protection regime

Plaintiff:

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Access Advance LLC, represented by its CEO Peter Moller, 100 Cambridge Street Suite 21400,
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represented by: Attorney Dr Volkmar Henke, Attorney Dr Tilman Müller,
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defendant :

1. **HP Deutschland GmbH**, represented by its managing directors, Mr Adrian Müller and Mr Peter Kleiner, Herrenberger Straße 140, 71034 Böblingen, Germany,
2. **HP Inc.**, represented by its managing directors, 1501 Page Mill Road, Palo Alto, California 94304, U.S.A,
3. **HP International SARL**, represented by its managing directors, Route du Nant-d'Avril 150, 1217 Meyrin, Switzerland,
4. **HP Austria GmbH**, represented by its managing directors, Technologiestrassen 5, 1120 Vienna, Austria,
5. **HP France SAS**, represented by its Managing Directors, Meudon Campus Bât. 1, 14 Rue de la Verrerie, 92190 Meudon, France,
6. **HP Belgium SPRL**, represented by its Managing Directors, Hermeslaan 1a, B-1831 Diegem (H.P. Inc.), Belgium,

7. **HP Inc Danmark ApS**, represented by its managing directors, Engholm Parkvej 8, 3433 Allerød, Denmark,
8. **HP Finland Oy**, represented by its managing directors, Piispankalliontie, 02200, Espoo, Finland,
9. **HP Italy S.r.l.**, represented by its Managing Directors, Via Carlo Donat Cattin, 5 - 20063 Cernusco sul Naviglio (MI),
10. **Hewlett-Packard Nederland BV**, represented by its managing directors, Startbaan 16, 1187 XR Amstelveen, The Netherlands,
11. **HP PPS Sverige AB**, represented by its managing directors, Gustav III:s Boulevard 30, 169 73 Solna, Sweden,
12. **HPCP - Computing and Printing Portugal, Unipessoal, Lda**, represented by its directors, Building D. Sancho I, Quinta da Fonte, Porto Salvo, 2770-071 Paço de Arcos, Lisbon, Oeiras, Portugal,
13. **Hewlett-Packard d.o.o.**, represented by its managing directors, Tivolska cesta 48, 1000 Ljub- ljana, Slovenia,
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15. **HP Inc Bulgaria EOOD**, represented by its Managing Directors, Mladost Region, Business Park Sofia, Building 10, Sofia 1766, Bulgaria,

Defendants 1) to 15) represented by: Dr Frank-Erich Hufnagel, lawyer

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European Patent No. EP 3 490 258 B1

ADJUDICATING BODY/CHAMBER:

Judges of the Düsseldorf local division:

This Order was issued by presiding judge Thomas as judge-rapporteur. LANGUAGE OF THE PROCEEDINGS:

German

SUBJECT: R. 262A RoP - Protection of confidential information

BRIEF DESCRIPTION OF THE FACTS:

The plaintiff is suing the defendants for infringement of the European bundle patent EP 3 490 258. It has contributed its HEVC-essential patent portfolio, including the patent in dispute, to a patent pool managed by Access Advance LLC (hereinafter: Access Advance).

At the same time as filing the statement of defence, the defendants filed an application for the protection of confidential information (R. 262A RoP). In an Order dated 6 May 2024, the Düsseldorf local division granted the plaintiff's legal representatives named in the proceedings to date access to the unredacted version of the document and attachments classified by the defendants as confidential, obliged them to maintain confidentiality and gave them the opportunity to comment on the application for protection of confidential information.

The plaintiff did not fundamentally oppose the defendant's request for protection of secrets. However, it has stated that it can only be granted insofar as Access Advance, as pool administrator, is also included in the group of authorised and obligated recipients, insofar as the correspondence between the defendants and Access Advance and the discussion of the respective (pool) offers is concerned.

The defendants have objected to such inclusion of Access Advance in the group of authorised parties on the grounds that the prerequisite for granting such access is the participation of the person concerned in the proceedings. On this basis, there should only be no fundamental objections to access by persons belonging to Access Advance if Access Advance is involved in the proceedings, for example as an intervener or party.

After the defendants raised no objections to granting certain employees named by the plaintiff access to the information classified by the defendants as confidential, the Düsseldorf local division provisionally extended the group of employees entitled to access to these employees in an Order dated 19 June 2024. Following a corresponding application by the plaintiff, the Düsseldorf Local Chamber initially postponed the decision on access authorisation for employees of Access Advance.

Access Advance then intervened in the proceedings in a document dated 20 June 2024.

By Order of 26 June 2024, the Düsseldorf local division allowed Access Advance LLC to intervene on the plaintiff's side.

The defendants then took advantage of the opportunity granted to them to comment on the application for secrecy protection and now invoked for the first time that the content of the bilateral licence negotiations between the parties was subject to a strict confidentiality agreement. In view of the fact that the intervener's legal representatives had not even requested access to this strictly confidential information, the defendants saw no need to grant the intervener access in this respect. In any event, access should be limited to one person.

APPLICATIONS BY THE PARTIES:

In relation to the plaintiff, the defendants request

that the court rule as follows.

In relation to the intervener, the defendants claim that the court should,

- I. to classify as confidential the information listed in the table below and contained in the unredacted version of the statement of defence of 3 May 2024 (Part II) and the redacted version thereof intended for the intervener, including the annexes listed:

	Aufzufinden in	Bezeichnung
1.	Klageerwiderung Teil II Rz. 4-5, 157-191, 315-343, Anlage FBD-K 31, Anlage FBD-K 32, Anlage FBD-K 33, Anlage FBD-K 34, Anlage FBD-K 35, Anlage FBD-K 36, Anlage FBD-K 37, Anlage FBD-K 38, Anlage FBD-K 39	Informationen bezüglich der Lizenzverhandlungen der Parteien, einschließlich der Bedingungen der gegenseitigen Lizenzangebote (Informationen der Parteien, die CDA mit der Klägerin unterliegen)
2.	Klageerwiderung Teil II, Rz. 4, 6, 41-57	Informationen bezüglich der Lizenzverhandlungen der Beklagten mit Dritten, einschließlich der Bedingungen der Lizenzverträge (Informationen der Beklagten, die NDA mit Dritten unterliegen)
3.	Klageerwiderung Teil II Rz. 408, 413, 418-426 Anlage FBD-K 44	Informationen zu Geschäftszahlen der Beklagten

- II. to order that the information subject to confidentiality under Section I. is subject to an appropriate duty of confidentiality, i.e. by anyone who becomes aware of it as a result of their involvement in the present proceedings (as a party, representative, witness, expert, court employee or in any other way),

The information must be treated confidentially and may not be used or disclosed outside of these court proceedings, unless he has gained knowledge of this outside of the proceedings;

on the part of the intervener the access

1. to the information classified as confidential under I. 2. and I. 3:
 - a. to the legal representatives of the intervener,
 - b. to the following employees of the intervener:

- [...]

2. to the information classified as confidential under Section I.1;

in the alternative to 2:

3. on the information classified as confidential under point I. 1. on the part of the intervener:
 - a. to the legal representatives of the intervener;
 - b. to a reliable employee of the intervener to be named in advance by the intervener to the court and the defendants;

III. to point this out,

1. that the obligation to maintain confidentiality pursuant to Section II. shall continue to apply after the conclusion of the court proceedings, unless the disputed information becomes known or readily accessible to persons from the circles that normally have access to such information;
2. that the information to be treated confidentially pursuant to section II. confidential information shall be treated as confidential by all persons who become aware of it as a result of their participation in these proceedings (as a party, representative, witness, expert or otherwise) and shall not be used or disclosed outside these proceedings unless they have become aware of it outside these proceedings, if provided to the receiving party on a non-confidential basis by a source other than the defendants or their affiliates, provided that such source is not bound by a confidentiality agreement or other duty of confidentiality to the defendants or their affiliates;
3. that in the event of a culpable infringement, the court may impose a recurring penalty payment on the obligated party for each infringement and enforce this immediately.

With regard to the other applications concerning the protection of confidential information during the oral hearing and the pronouncement of judgment, reference is made to the document dated 15 July 2024.

REASONS FOR THE ORDER:

The application for the protection of trade secrets and other confidential information is admissible and is successful to the extent tenorised.

I.

There are no objections to the admissibility of the application.

1.

Article 9(1) and (2)(a) of Directive (EU) 2016/943 provides that, in judicial proceedings, access to documents containing trade secrets or alleged trade secrets submitted by the parties or third parties may, on application, be restricted in whole or in part to a limited number of persons. The protection of confidential information is provided for in Article 58 of the UPCA and implemented in Rule 262A of the Rules of Procedure of the Unified Patent Court (see UPC_CFI_54/2023 (LK Hamburg), order of 3 November 2023, OR. 03 November 2023, ORD_577703/2023 - Avago Technologies International v. Tesla Germany; UPC_CFI_463/2023 (LK Düsseldorf), Order of 11 March 2024, ORD_8550/2024 - 10x Genomics v. Curio Bioscience).

2.

The formal requirements standardised by R. 262A.2 and .3 RoP have been complied with. The representatives of the plaintiff and the intervener were also heard before the protective order was issued, as required by R. 262A.4 RoP. They made use of the opportunity granted to them to comment.

II.

Neither the plaintiff nor the intervener has denied in detail that the information classified as confidential by the defendants constitutes trade secrets or at least other confidential information. It can therefore be assumed that the information in question requires protection.

If the passages of the statement of defence (Part II) classified by the defendants as confidential contain references to annexes that are not expressly mentioned in the application for secrecy protection itself, these are not covered by secrecy protection. This applies in particular to Annexes FBD-K 12 and FBD-K 13 in relation to the intervener.

The information to be found in paragraph 4 of the statement of defence (Part II) concerns the defendant's licence negotiations with third parties. In relation to the intervener, they are therefore to be allocated exclusively to point 2 of the table. Their further mention in point 1. is to be regarded as irrelevant.

III.

According to R. 262A.6 RoP, the number of persons authorised to access information classified as confidential may not be greater than is necessary to ensure compliance with the right of the parties to the proceedings to an effective remedy and a fair trial. However, the group of authorised persons must include at least one natural person from each party in addition to the respective lawyers (UPC_CFI_359/2023 (LK Mannheim), Order of 21 March 2024; UPC_CFI_355/2023 (LK Düsseldorf), Order of 27 March 2024, ORD_7096/2024 - Fujifilm v. Kodak). This applies in any case if the parties have not agreed on a further restriction of the group of authorised users.

1.

There is no dispute between the parties with regard to the group of authorised parties on the plaintiff's side, which is why no further explanation is required in this respect.

2.

Insofar as the defendants want to restrict access to the information classified as confidential on the part of the intervener in part to the litigation representatives and accordingly exclude all employees from such access, such a complete exclusion cannot be reconciled with the intervener's role in the proceedings. In accordance with the auxiliary request, a limited group of persons on the intervener's side was therefore to be granted access to the information classified as confidential.

a)

Unlike before the intervention provoked by the defendants themselves, the present case no longer concerns the question of the extent to which parties on the plaintiff's side are given the opportunity to share certain information with Access Advance employees. Rather, Access Advance now has its own procedural role as an intervener. Pursuant to R. 315.4 RoP, the intervener is treated as a party, unless - as here - otherwise ordered by the court. The principle of equal treatment of intervener and party means that the intervener must be involved in the proceedings as a party (Tilman/Plassmann/Dorn, Unified Patent Court, R. 315 RoP, para. 17). R. 262A.6 RoP therefore also applies to him. He therefore has a right to extend the group of persons entitled to access to at least one natural person. Access Advance did not waive this right in the present case, for example in the form of a corresponding agreement with the defendants (cf: UPC_CFI_239/2024 (LD The Hague), Order of 4 March 2024, ORD_590350/2023, para. 13 - Plant-e Knowledge v. Arkyne Technologies). The exclusion of all employees of the intervener from access to the persons classified as confidential in the main application therefore lacks a basis.

b)

On this basis, the defendant's auxiliary request was to be granted, which neither the intervener nor the plaintiff opposed. In addition to the legal representatives of the intervener, employees of the intervener must therefore also be granted access to the information classified as confidential vis-à-vis the intervener to the extent shown in the operative part.

IV.

Insofar as the defendants request Orders to protect confidential information during the oral hearing and the grounds for the judgement, no decision is required at this time. If necessary, such orders will be issued close in time to or during the oral hearing or the grounds for the judgement.

ORDER:

- A. The following Order is made against the **applicant**:
- I. The information in the statement of claim dated 3 May 2024 (Part II), including the following annexes, listed in the table below is classified as confidential:

	Aufzufinden in	Bezeichnung
1.	<p>Klageerwiderung Teil II</p> <p>Rz. 4, 6, 41-57, 68-80, 82-156, 201, 238-269, 280-313,</p> <p>Anlage FBD-K 14, Anlage FBD-K 15, Anlage FBD-K 17, Anlage FBD-K 18, Anlage FBD-K 19, Anlage FBD-K 20, Anlage FBD-K 21, Anlage FBD-K 22, Anlage FBD-K 22a, Anlage FBD-K 23, Anlage FBD-K 24, Anlage FBD-K 25 Anlage FBD-K 26, Anlage FBD-K 27 Anlage FBD-K 28, Anlage FBD-K 29, Anlage FBD-K 30</p>	<p>Informationen bezüglich Lizenzverhandlungen der Beklagten mit der Streithelferin, einschließlich der Bedingungen der gegenseitigen Lizenzangebote</p> <p>(Informationen der Beklagten, die CDA mit der Streithelferin unterliegen)</p>
2.	<p>Klageerwiderung Teil II, Rz. 4, 6, 41-57</p> <p>Anlage FBD-K 12, Anlage FBD-K 13</p>	<p>Informationen bezüglich der Lizenzverhandlungen der Beklagten mit Dritten, einschließlich der Bedingungen der Lizenzverträge und der Identität der Lizenzgeber</p> <p>(Informationen der Beklagten, die NDA mit Dritten unterliegen)</p>
3.	<p>Klageerwiderung Teil II</p> <p>Rz. 408, 413, 418-426</p> <p>Anlage FBD-K 44</p>	<p>Informationen zu Geschäftszahlen der Beklagten</p>

- II. Access to the information classified as confidential under section A. I. is restricted on the part of the plaintiff to the following persons:
1. the authorised representatives of the plaintiff;
 2. following employees of the plaintiff:
 - [...]

- III. The information classified as confidential under section A. I.

must be treated as confidential by the persons named under A. II. They may not be used or disclosed outside these court proceedings unless they have come to the knowledge of the receiving party outside these proceedings. However, this exception only applies if this information was obtained by the receiving party on a non-confidential basis from a source other than the defendants or their affiliates, provided that this source is not bound by a confidentiality agreement with the defendants or their affiliates or by any other obligation of confidentiality towards them.

This obligation also applies to the plaintiff.

The aforementioned persons are also obliged to maintain confidentiality vis-à-vis the plaintiff with regard to the information contained in the unredacted versions of the aforementioned documents.

The obligation to maintain confidentiality shall continue to exist even after the conclusion of the procedure.

- IV. In the event of culpable violation of this Order, the court may impose a penalty payment to be determined according to the circumstances of the individual case for each case of violation.

B. The following Order is issued against the **intervener**:

- I. The information in the statement of claim dated 3 May 2024 (Part II), including the following annexes, listed in the table below is classified as confidential:

	Aufzufinden in	Bezeichnung
1.	Klageerwiderung Teil II Rz. 4-5, 157-191, 315-343, Anlage FBD-K 31, Anlage FBD-K 32, Anlage FBD-K 33, Anlage FBD-K 34, Anlage FBD-K 35, Anlage FBD-K 36, Anlage FBD-K 37, Anlage FBD-K 38, Anlage FBD-K 39	Informationen bezüglich der Lizenzverhandlungen der Parteien, einschließlich der Bedingungen der gegenseitigen Lizenzangebote (Informationen der Parteien, die CDA mit der Klägerin unterliegen)
2.	Klageerwiderung Teil II, Rz. 4, 6, 41-57	Informationen bezüglich der Lizenzverhandlungen der Beklagten mit Dritten, einschließlich der Bedingungen der Lizenzverträge (Informationen der Beklagten, die NDA mit Dritten unterliegen)
3.	Klageerwiderung Teil II Rz. 408, 413, 418-426 Anlage FBD-K 44	Informationen zu Geschäftszahlen der Beklagten

Paragraph 4 of the statement of defence (Part II) is to be allocated exclusively to paragraph 2 of the above table. Its mention under point 1 of the table is irrelevant.

Insofar as the annexes FBD-K 12 and FBD-K 13 are mentioned in paragraphs 41 to 57 of the statement of defence (Part II), these annexes are not covered by the confidentiality order.

II. Access to the information classified as confidential under **section B. I. 1** is restricted on the part of the intervener to the following persons:

1. the authorised representatives of the intervener;

2. following employee of the intervener:

- [...]

III. Access to the information classified as confidential under **B. I. 2 and I. 3.** is restricted on the part of the intervener to the following persons:

1. the authorised representatives of the intervener;

2. the following employees of the intervener:

- [...]

IV. The information classified as confidential under B. I. shall be treated as confidential by the persons named under B. II. and III. shall be treated as confidential. It may not be used or disclosed outside these court proceedings unless it has come to the knowledge of the receiving party outside these proceedings. However, this exception only applies if this information was obtained by the receiving party on a non-confidential basis from a source other than the defendants or their affiliates, provided that this source is not bound by a confidentiality agreement with the defendants or their affiliates or by any other obligation of confidentiality towards them.

This obligation also applies to the intervener.

The aforementioned persons are also obliged vis-à-vis the intervener to keep confidential the information contained in the unredacted versions of the aforementioned documents.

The obligation to maintain confidentiality continues to exist even after the conclusion of the procedure.

IV. In the event of culpable violation of this Order, the court may impose a penalty payment to be determined according to the circumstances of the individual case for each case of violation.

C. The remainder of the defendant's applications are dismissed.

ORDER DETAILS:

on application App_25069/2024 concerning main file reference ACT_590145/2023

UPC number: UPC_CFI_457/2023

Type of proceedings: Action for infringement

Issued in Düsseldorf on 22 July 2024 NAMES

AND SIGNATURES

Presiding judge Thomas

Ronny
Thomas

Digitally signed by
Ronny Thomas
Date: 2024.07.22
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