



Local division
Vienna
UPC_CFI_33/2024
APP_36807/2024

procedural order
of the Court of First Instance of the Unified Patent Court, Vienna Local
Division
relating to European patent 2 643 717 granted on
12/08/2024

Guiding principle:

1. If an application for the provision of documents and evidence is made by a member of the public pursuant to R 262.1(b) RoP, the interests of that member of the public in obtaining access to the documents and evidence must be weighed against the interests referred to in Art 45 UPCA. These interests include, but are not limited to, the protection of confidential information and personal data ("the interest of one of the parties or other persons concerned"). The general interests of justice and public order must also be taken into account. The general interest of justice includes the protection of the integrity of the proceedings.
2. The protection of the integrity of the proceedings is of the utmost importance, especially during the pending (= ongoing) proceedings, so that the parties can present their arguments and evidence and the court can conduct the proceedings impartially and independently, without influence and interference from external parties in the public domain.

Keywords:

Public access to documents and evidence; protection of the integrity of the proceedings

Applicant:

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LEGAL MATTER:

Plaintiff:

SWARCO Futurit Verkehrssignalsysteme GmbH, Manfred-Swarovsky-Straße 1, 7343Neutal,

represented by: Rechtsanwalt MMag. Alexander Koller,
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with: Patent attorney Werner Barger, BargerPiso& Partner
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Defendant:

STRABAG Infrastructure & Safety Solutions GmbH, Ignaz-Köck-Straße 19,1210

Vienna both represented by: Patent attorney Dr Rainer Beetz,
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STREITPATENT:

EUROPEAN PATENT 2 643 717

DECISION-MAKING BODY/CHAMBER:

Judicial body of the local division Vienna

PARTICIPATING JUDGES:

This Order was issued by the presiding judge and judge-rapporteur Dr Schober.

LANGUAGE OF THE PROCEEDINGS: German

SUBJECT: R. 262.1 (b) RoP - Public access to the case (inspection of files)

BRIEF DESCRIPTION OF THE FACTS:

The plaintiff is suing the defendant for infringement of its European patent EP 2 643 717 B1.

The patent in suit relates to a colour and light-mixing collecting optic for outdoor imaging display panels for spotlights or signalling, consisting of an LED light source as well as a light guide rod arranged in front of it and a collecting lens.

In a public announcement dated 22 October 2022, the defendant received an order from ASFINAG to replace the existing prismatic traffic signs at the A12, VKP Kundl, RFB Innsbruck, AQ km 22, 525 and AQ km 23.007 with LED variable message signs by 14 April 2023 and otherwise by 31 August 2023.

The defendant subsequently installed LED variable message signs at the locations that were the subject of the order, all of which it purchased from a Chinese manufacturer. These LED variable message signs allegedly infringe the patent in dispute.

APPLICATION IN ACCORDANCE WITH R 262.1 (B) RoP

In a document dated 28 June 2024, the **applicant** filed an application pursuant to R 262.1 (b) RoP. It argued that, like the applicant, it offered optical variable message signs and was therefore in competition with the applicant.

On 3 April 2024, the applicant brought an action against the companies Kontron d.o.o., 4000 Kranj (hereinafter defendant 1) and DARS d.d., 3000 Celje (hereinafter defendant 2) before the District Court of Ljubljana (action number: IV PG 557/2024), alleging infringement of the Slovenian part of its European patent EP 2 643 717 by the defendants. In point 34 in conjunction with point 33 of the complaint, the applicant is accused of having supplied the defendant (1) with optical LED traffic signalling devices that infringe the applicant's patent in dispute.

The applicant had not complied with its informal request to provide a copy of the statement of claim in the proceedings before the Vienna local division. It has a direct interest in the documents and the evidence because the plaintiff in the proceedings before the Ljubljana District Court claims that the applicant's products are at least similar to the allegedly infringing product of the defendant in the proceedings before the Vienna Local Division. This would mean that its supplied optical LED traffic signalling systems, which are the subject of the proceedings before the District Court of Ljubljana, infringe the applicant's patent. The defendant in the proceedings before the Vienna local division could be accused of offering or supplying means relating to an essential element of the invention according to claim 1 of the patent in suit under Art 26 UPCA. The similarity between the defendant's product and its product could consist in the fact that both have at least one common essential element of the invention. Therefore, it also has an interest in access to information relating to the validity of the patent in suit.

It also has a direct interest in finding out whether the applicant in the proceedings before the Vienna local division is alleging that the applicant has provided the defendant with optical LED

traffic signalling. This information was also relevant in relation to any application to intervene pursuant to R 313.1 RoP.

COMMENTS OF THE PARTIES

By **procedural order** dated 2 July 2024, the parties to the proceedings were given the opportunity to comment on the application by 17 July 2024 in accordance with R 262 para. 1 lit b RoP.

Only the applicant made a statement and objected to the requested access to the application including evidence (in all its variants). The applicant had not even generally asserted that its product was identical to the object challenged in these proceedings. Nor had it been substantiated that or to what extent the applicant's products would actually have the same or similar characteristics as the objects attacked in these proceedings, let alone what the alleged similarities (conformity of characteristics) should be. The applicant thus does not show any legitimate interest in the inspection of the files. It would obviously first like to gain knowledge from the documents as to whether - and if so, in which characteristics - its products are at all similar to the contested objects. Thus, it would first like to find out in reality whether it could possibly assert an interest that would possibly justify an application under R 262.1 (b) RoP. This interest is not sufficient to override the protection of the integrity of the proceedings.

The decisive factor for the question of whether the outcome of the proceedings before the Vienna local division could have an effect on the legal relationship between the applicant and the defendant is not whether the applicant alleges any circumstances that could speak in favour of a "legal relationship" between the applicant and the defendant, but only whether such a relationship (e.g. a supply contract, as the applicant alleges) actually exists. In order to clarify this, however, the applicant does not need access to the file, especially since she herself must know with which companies she has contractual relationships or (legal) business relationships.

REASONS FOR THE ORDER:

R 262 RoP continues the principle of procedural publicity under Art 45 UPCA also for access to the procedural information contained in the Register and takes particular account of the public interest in information. Decisions and Orders (see R 350.5 and 351.3 RoP) are part of the content of the Register and must therefore be made accessible to the public - after redaction of personal data - without restriction. On the other hand, documents and evidence - due to the General Data Protection Regulation (GDPR) - can only be viewed upon a reasoned application (see ECJ C-268/21 [para. 46ff]); in addition, the parties can oppose such an application with an application for confidential treatment (see *Tilmann/Plassmann*, EPG Section 262 RoP para. 3).

The provisions of the UPCA and the RoP of the UPC are in line with Regulation (EC) No 1049/2001, according to which, according to the fourth recital and Art 1, the public should be granted the greatest possible right of access to the documents of the institutions. The purpose is to create transparency that enables better participation of citizens in the decision-making process and greater legitimacy, efficiency and accountability of the administration to the public.

citizens in a democratic system. However, the right of access is subject to restrictions for reasons of public or private interest. According to the second indent of Article 4(2) of Regulation (EC) No 1049/2001, access to a document may be refused in order to protect legal proceedings and legal advice, which guarantees the integrity of the proceedings.

The right of a third party to access documents and evidence in court proceedings could also lead to the infringement of other rights conferred by EU law, in particular on the companies concerned - such as the right to professional or business secrecy - or on the individuals concerned - such as the right to the protection of personal data. The ECJ has therefore clarified that the interests justifying the disclosure of information and those justifying its protection must be weighed up by the courts in the context of the applicable law in each individual case, taking into account all relevant aspects of the case (ECJ C-360/09, *Pfleiderer* [para. 31]; C-536/11 - *Donau Chemie AG* [para. 34]).

The GDPR has placed the processing of personal data under additional protection, according to which the principle of data minimisation (see Art 5 para 1 lit c GDPR) requires that personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. The court must therefore also determine whether the disclosure of personal data is adequate or relevant. In order to assess these requirements, the court is obliged to take into account the conflicting interests at stake when assessing whether it is appropriate to order the production of a document containing the personal data of a third party (CJEU C-268/21 - *Norra* [para. 46]).

In its decision of 10 April 2024 (UPC_CoA_404/2023), the Court of Appeal of the UPC commented on the requirements for (file) inspection in accordance with R 262.1 (b) RoP as follows:

"(47) The public generally has an interest in written documents and evidence being made available. This enables a better understanding of the decision in the light of the arguments put forward by the parties and the evidence adduced. It also enables scrutiny of the court, which is important for public confidence in the court. This general interest of a member of the public usually arises after a decision has been made. At this point, there is already a decision that needs to be understood and the handling of the dispute by the court can be scrutinised.

(48) Protecting the integrity of the proceedings ensures that the parties can present their arguments and evidence and that the court is impartial and independent, without influence or interference from external parties in the public domain. As a rule, the interest in the integrity of the proceedings only plays a role during the ongoing proceedings.

(49) This means that these interests - the general interest mentioned above and the protection of the integrity of the proceedings - are usually properly weighed against each other when a member of the public is granted access to documents and evidence after the proceedings have been terminated by a decision of the court.

(50) The Court of Appeal points out that once the decision of the Court of First Instance has been issued and an appeal is or can be lodged, this only applies to the documents and evidence of the proceedings at first instance. The denial of access to these documents no longer serves to protect the integrity of the proceedings, because the publicly accessible decision contains the arguments and evidence presented by the parties and is therefore not accessible to the public.

can already be the subject of public debate."

Accordingly, the Court of Appeal was obviously guided not only by Art 45 UPCA, but also by the Regulation (EC) No 1049/2001 cited in the receipt, the GDPR and the case law of the ECJ and, in particular, imposed a restriction on a general interest in information in relation to pending (=ongoing) proceedings in the sense of a reasoned application. In the reasoned application, the applicant's interest in access to the file must be set out in order to be able to carry out the required balancing of interests. The fact that the Court of Appeal did not refer to the requirement that a decision be final can be explained by Art 75 para 1 sentence 2 UPCA. According to the second sentence of Article 75(1) UPCA, the Court of Appeal shall normally decide on the merits of the case itself and the case shall only be referred back to the Court of First Instance in exceptional cases. According to the system of the UPCA and the RoP of the UPC, it is therefore not necessary to take the *res judicata* effect of a decision as a precautionary measure, but the general (information) interest of a member of the public can, as a rule, be affirmed after a decision - including that of the court of first instance - has been issued.

Until a decision is reached, however, the applicant - in the judge-rapporteur's opinion - must demonstrate an interest in the sense of a legal interest in her reasoned application, by which is meant an interest established by the legal system and approved by it, which goes beyond the mere economic interest or the interest of information. During pending proceedings - including before the UPC - the requested inspection must have a significance/impact for the legal circumstances of the third party (=applicant), whereby this interest must also be concrete.

The application for access to the file is usually necessarily based on an interest in investigation. The applicant can only gain knowledge of the relevant circumstances by inspecting the file. However, a legal interest can only be recognised if the applicant wants to find out something from the file that she does not know but needs to know in order to protect her interests. The legal interest cannot be denied by stating that the applicant wants to inspect the file in order to collect material for a possible enforcement of a claim. However, the request for access may fail due to the balancing of interests under data protection law and also due to the protection of the integrity of the proceedings if the protected confidentiality interests are to be considered more important than such research by the applicant. When weighing up the interests, particular consideration must be given to whether it is difficult or almost impossible for the applicant to enforce her claims without access to the files. The greater the applicant's difficulties in providing evidence, the more likely it is that her interest in inspecting the files will outweigh her interest in confidentiality.

Against this background, the applicant's application pursuant to R 262.1 (b) RoP for access to the application submitted, including the evidence in all the variants requested, must be rejected at the current stage of the proceedings. The protection of the integrity of the ongoing proceedings already outweighs the interest in information asserted by the applicant, so that the parties can present their arguments and evidence and so that the court can conduct the proceedings impartially and independently, without influence and interference from external parties in the public sector. There is also the necessary protection of the personal data contained in the documents.

As regards the merits of its application, the applicant merely submits that the plaintiff in the proceedings before the District Court of Ljubljana claims that its products are similar to the products of the defendant in the proceedings before the Vienna local division; these would have all the features of claim 1 of the patent in suit. In doing so, however, it does not assert any legal interest in the

above. It does not even claim that it wishes to assert claims against the parties to the proceedings in question, nor that it has any difficulties in providing evidence.

In order to assess whether the applicant's product fulfils one or more features of the patent in suit, it does not need the statement of claim including the evidence of these ongoing proceedings. The patent in suit EP 2 643 717 B1, including the description and drawings, is freely accessible to the applicant as an explanatory aid. She is therefore in a position to assess the scope of protection of this patent herself or have it assessed by a person skilled in the art in accordance with the principles for the interpretation of a patent claim (see UPC_CoA_335/2023 and CoA 8/2024).

Based on this, the protection of the integrity of the proceedings and the protection of the personal data contained in the documents must currently take precedence over the applicant's interest in the transmission of the requested information during the ongoing proceedings of the first instance.

The applicant also does not need the requested information to find out whether it is accused in the present proceedings of having supplied the defendant with patent-infringing optical LED traffic signalling systems. The applicant rightly points out that the applicant itself should know whether and how it is in a contractual relationship with the defendant. The assessment of the possible legal validity of the patent in dispute can still be ascertained by the applicant after a decision has been made.

ORDER:

The applicant's applications for access to the application, the documents including the evidence dated 28 June 2024 pursuant to R 262.1 lit b RoP are dismissed (in all variants).

Note: According to Art 73 UPCA and R 220.2 RoP, an appeal may be lodged against the procedural order within 15 days of service

Issued in Vienna on 12 August 2024 NAMES

AND SIGNATURE

**Walter
Schober** Digitally signed by
Walter Schober Date:
2024.08.12
09:54:20 +02'00'

Presiding judge Dr Schober