



Local division Mannheim

UPC_CFI_210/2023
order
of the Court of First Instance of the Unified Patent Court issued on
14 February 2024

Here: Request for submission and confidentiality pursuant to Rules 190/191, 262, 262A of the Rules of Procedure

Patent in suit

<i>Patent no.</i>	<i>Holder</i>
EP 2568724	Panasonic Holdings Corporation

The following applies to the procedure

Secrecy regime

met.

In doing so, the court has determined that there is typically a recognisable need for confidentiality of business-related information contained in licence agreements. The procedure described in steps below enables the parties to obtain comprehensive protection of secrets and allows the parties to submit the documents in the protected proceedings even without a court order to produce them. If, according to the parties' consensus, the clauses usually contained in licence agreements do not permit production until a court order is issued, the background to this is to involve the respective licence agreement partner in the production and the secrecy protection granted in the proceedings prior to any production in the court proceedings. This interest is comprehensively taken into account by the subsequent proceedings, so that a court order to produce the respective documents does not appear appropriate for the time being. Rather, the agreement of the respective licence agreement partner must be obtained on this basis if necessary or, in the event of a refusal, a separate decision on the production must be made. The interests of the licence agreement partner of the party wishing to submit a licence agreement in the proceedings must therefore be safeguarded by the party wishing to submit it. In this context, it must be taken into account that the documents in question are those that the party wishes to submit and that it is able to contact the third party concerned directly and

efficiently. The court would have to inform the third party

In the case of a third party who is generally not represented by a lawyer, it is often necessary to take the time-consuming route of serving court documents abroad in accordance with the HZÜ or EuZVO. It also seems appropriate to arrange for the third party's statement to be submitted via the party because the party itself has contributed to making it more difficult to submit documents in court proceedings by concluding corresponding contractual clauses.

The confidentiality regime is organised as shown below:

1. The party's legal representative uploads the document containing confidential information without any redactions when it is submitted. As this document is the basis for the court's decision on the application for secrecy, the document must be submitted **without any redaction** (see also the order of the Düsseldorf local division of 14 February 2024 Order No. 8075/2024, App_7937/2024 regarding ACT_590953/2023 = UPC_CFI_463/2023). **The document is initially not visible to the opposing party and their legal representatives. Only the court can see the document.**
2. When uploading, the legal representative has the option of indicating in the case management system (CMS) that the document contains confidential information.
3. For this purpose, the legal representative is requested by the CMS to upload a redacted version of the document.
4. The legal representative then starts the workflow provided for the application pursuant to Rules 262 and 262A of the Rules of Procedure in the CMS and uploads his application to Rule 262 of the Rules of Procedure or Rule 262A of the Rules of Procedure.
In this workflow, which is a "related proceeding" to the main proceedings, the legal representative is asked to select and confirm the documents to be kept secret again. In this workflow, however, the document to be kept secret is not uploaded again - it is only in the workflow of the main proceedings. In the 262/262A workflow, only the application is submitted.
5. The application under point 4. regarding Rule 262A of the Rules of Procedure may - if there is a need for this - be linked to an **intra-procedural condition to the effect** that the document which is the subject of the application **shall only be deemed to have been filed** and may be used in the proceedings by the opponent and by the court in the proceedings if the court fully grants the interim application securing the opponent's opportunity to comment and concluding the secrecy protection proceedings, if the court **fully** grants the interim application for protection of secrecy, which secures the opponent's opportunity to comment, and the application for protection of secrecy, which concludes the secrecy protection proceedings, and then - after hearing the opponent - issues a final order to this effect.
6. If the court intends not to grant the application or to grant it only in part, it will **first** grant the applicant a hearing and invite him to make the final decision as to whether the document should be deemed to have been filed and to take further account of the opponent and the court in the proceedings when making its decision.

can be considered. If the applicant decides to have the document treated as not submitted, its content will not be taken into account by the court when reaching a decision, nor may it be used by the opponent in the proceedings - or, of course, outside of them.

7. In response to the application under point 4, the court issues **a provisional confidentiality protection order in the first step**, which **temporarily** places the document **under comprehensive protection** on the basis of the applicant's unilateral submission to date that it is information to be kept secret, before the document is made accessible to the opposing legal representative - and initially only to him. If, as in the present case, it concerns the submission of licence agreements relating to SEP patent licences, a corresponding provisional interest in protection will generally be affirmed. If, in individual cases, the court has doubts as to whether the information which the applicant claims to be confidential is actually confidential, it will point this out to the applicant and give him the opportunity to comment if it does not intend to issue a provisional protective order. If the applicant then decides not to accept the document as filed, it will not be taken into account in the decision and will not be made available to the opponent in its unredacted version.
8. If the submission of the document to be filed is made conditional in accordance with paragraph 5, the opposing counsel shall initially be authorised to use the document solely for the purpose of commenting on the application in accordance with Rule 262A of the Rules of Procedure.
9. After the interim order comprehensively protecting the document for the purposes of the statement has been issued, or at the same time as it is issued, the court instructs the registry to make the relevant confidential documents available to the opponent in their unredacted version via the CMS. The registry releases the documents manually using the available back-office function. **Only now does the opposing lawyer - and initially only the opposing lawyer - have access to the so-called "unredacted version" for the first time.**
10. If the opposing legal representative indicates that he is not in a position to comment on the confidential nature of the information contained in the document until he has consulted with a natural person from his party, he must name this person or persons. The applicant will then be given another opportunity to comment on this, in particular on the suitability of the persons named. Depending on the circumstances of the case, the circle of persons who have access to the document is then extended accordingly by means of an adapted temporary protection order. These persons are also initially authorised to use the information solely for the purpose of commenting on the application in accordance with Rule 262A of the Rules of Procedure.
11. Upon receipt of the opposing party's statement, the court may grant further opportunity to comment or decide on the merits of the application if it considers it to be **allowable**.

12. If the court deems the application **to be only partially allowable or not allowable**, it will inform the applicant of this **prior to the decision** and give the applicant the opportunity to comment if the application was subject to the condition set out in section 5.

If the applicant decides to accept the document as not having been submitted, the court may not take it into account when making its decision. The opponent may not use the document either in the proceedings or outside the proceedings. However, since the document was the subject of the proceedings, at least with regard to the application under Rule 262A of the Rules of Procedure, it will remain in the file with a view to a possible appeal.

13. In the event of a request for access to the file by a third party not involved in the proceedings pursuant to Rule 262.3 of the Rules of Procedure, the document is protected from disclosure by the parallel application pursuant to Rule 262.2 of the Rules of Procedure and is not part of the access to the file by third parties.

Against the background of this regime, a decision on the applications under Rule 190 of the Rules of Procedure is not intended for the time being. It had to be taken into account that at this early stage of the proceedings, before receipt of the Reply and defence to the actions for annulment, it is not possible to make a valid assessment of whether the submission of documents relating solely to the FRAND aspect could be relevant. The parties have the opportunity to submit the documents they deem relevant and to clarify and take into account any affected third-party interests themselves. Any documents to be produced can be submitted via an application under Rule 9 (Generic procedural application) in conjunction with a corresponding application under Rules 262/262A of the Rules of Procedure (here too, only the redacted version is initially visible to the opponent) or with the main pleadings that are still outstanding.

Issued on 14 February 2024

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Dr Tochtermann
Presiding judge and judge-rapporteur