



Local division Mannheim
UPC_CFI_471/2023

Order
of the Court of First Instance of the Unified Patent Court, issued
on: *03/07/2024*
concerning EP 2 479 680
concerning App_26934/2024

PLAINTIFFS/RESPONDENTS

- 1) **DISH Technologies L.L.C.** represented by Denise Benz
- 9601 South Meridian Boulevard - 80112
- Englewood - US

- 2) **Sling TV L.L.C.** represented by Denise Benz
- 9601 South Meridian Boulevard - 80112
- Englewood - US

DEFENDANT/APPLICANT

- 1) **AYLO PREMIUM LTD** represented by Tilman Müller-Stoy
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zo-ne - 2540 - Nicosia - CY

- 2) **AYLO Billing Limited** represented by Tilman Müller-Stoy
- The Black Church, St Mary's Place, Dublin 7 -
D07 P4AX - Dublin - IE

- 3) **AYLO FREESITES LTD** represented by Tilman Müller-Stoy
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zo-ne - 2540 - Nicosia - CY

FURTHER DEFENDANTS

- 4) **AYLO BILLING US CORP.**
- 21800 Oxnard Ste 150 - 91367 - 7909 -
Woodland Hills - US

- 5) **BROCKWELL GROUP LLC**
- 19046 Bruce B. Downs Blvd #1134 - 33647 -
Tampa - US

- 6) **BRIDGEMAZE GROUP LLC**
- 12378 SW 82 AVENUE - 33156 - Miami - US

PATENT IN DISPUTE:

European Patent No. EP 2 479 680

SPRING BODY:

Mannheim local division

JUDGES:

This Order was issued by judge-rapporteur Böttcher. LANGUAGE OF THE PROCEEDINGS:

German

SUBJECT: Protection of secrets according to R. 262A VerFO

PROPERTY

The defendants 1) to 3) and the plaintiffs are in dispute about the Order of access restrictions pursuant to R. 262A VerFO, which the defendants 1) to 3) request with regard to information contained in their statement of defence of 13 May 2024 and in the attached Annex BPV 5.

The defendants 1) to 3) are of the opinion that access on the part of the plaintiffs, insofar as it does not concern their authorised representatives, should be limited to a maximum of three reliable natural persons for whom the plaintiffs would have to prove that they needed access for the purpose of conducting the legal dispute in the circumstances of the specific case. Already the

The absence of the individual explanations on the role, function and activity of the named persons and on the necessity of their access required in this respect precludes the granting of access to the three persons named by the plaintiffs. On the basis of the job descriptions researched by the defendants 1) to 3), it must also be assumed that the three persons named as in-house counsel for the plaintiffs each had the same information base. Therefore, there was no need from the outset to grant access to all three named persons. Irrespective of this, the three named persons were unsuitable. The searches of the defendants 1) to 3) had shown that they were representatives based in the USA, authorised by the patent office there, who were above all also active in patent enforcement. There was an evident risk that the confidential information to be protected would be misused to shape the challenged embodiments as part of the programme of the plaintiffs' group of companies to monetise patents, in particular for foreign court proceedings - even if only covertly to hedge litigation risks or litigation strategies - and above all to "optimise" patent applications with a view to the properties of the challenged embodiments. Once knowledge has been obtained, it cannot be concealed in other contexts. Insofar as the three in-house counsel had been granted access in the legal dispute before the Munich I Regional Court, the defendants would now take action against this on the basis of better knowledge.

The necessary case-by-case examination also requires the naming of the group of authorised representatives and their assistants, for whom the need for access must be justified in each case and whose number must be limited to what is necessary for proper legal prosecution. In the absence of other indications, a limitation to four legal representatives (two partners and two associates) is sufficient and necessary (see Düsseldorf local division, UPC_CFI_463/2023, procedural orders of 23 February 2024 and 11 March 2024). It is ruled out that all lawyers and authorised EPG representatives of the law firm of the plaintiffs' legal representatives - in Germany alone over 220 lawyers, worldwide over 4,800 lawyers - require access. This applies all the more to external assistants such as experts. Why representatives of the plaintiffs from the parallel proceedings before the High Court of Justice in London needed access from the law firm of their local legal representatives was neither demonstrated nor was the required limitation in terms of names and numbers provided. In this context, authorised representatives in foreign proceedings who are not admitted as representatives before the UPC pursuant to Art. 48 (1) or (2) UPCA are to be treated like any third party. They are not covered by the minimum level of access granted to authorised representatives and a natural person of the party pursuant to R. 262A.6 of the Rules of Procedure.

The plaintiffs are of the opinion that the three named natural persons from their group of companies should be granted access. The named persons conducted the communication with the litigation representatives with regard to the teaching of the patent-in-suit and the technical aspects of the challenged embodiments, among other things. In the parallel legal dispute before the Regional Court of Munich I concerning another patent-in-suit, the named persons were therefore rightly granted access to information on the technical functioning of the attacked embodiments that was treated as confidential there. The

In order to ensure appropriate legal prosecution, (unnamed) auxiliary persons of the plaintiffs' representatives (including experts and their team members) should also be included in the group of persons entitled to access. The same applies to the plaintiffs' representatives in the parallel proceedings pending before the High Court of Justice in London concerning the same challenged embodiments and the English part of the patent in suit. The plaintiffs had a legitimate interest in sharing the confidential information with their legal representatives there. Access by their legal representatives there was also required under the principles of fair procedure and equality of arms because the defendant's legal representative there was too 1) to 3) are also acting as EPG's representative in the present legal dispute.

The defendants 1) to 3) apply,

order that the information highlighted in grey in the statement of defence and the written witness statement of Mr [REDACTED] [REDACTED] information contained in the video streaming process is classified information pursuant to R. 262A of the Rules of Procedure, which must be treated as strictly confidential and may not be used or disclosed outside of the present legal dispute, even after its conclusion; the plaintiffs may only make the designated information available to those representatives of the proceedings and internally only to those employees who have a legitimate interest in it. Internal access is to be limited to a maximum of three reliable persons who are to be named to the court and the defendants. Any further access to the designated information must be declared unauthorised.

The plaintiffs request the following,

that the information described in the statement of defence as requiring secrecy may also be disclosed to the auxiliary persons of the plaintiffs' representatives here and to the plaintiffs' representatives in the parallel proceedings before the High Court of Justice in London concerning the English part of the patent in suit (Case HP-2023-000043), in any case to Mr Mark Heaney, partner in the law firm of the plaintiffs' representatives here, in addition to the groups of persons named in the confidentiality request of the defendants 1 to 3 of 13 May 2024.

REASONS FOR THE DECISION

The admissible application of the defendants 1) to 3) to restrict access to information in their statement of defence and Annex BPV 5 is successful to the extent shown in the operative part. For the rest, it must be rejected. Before implementation, the defendants 1) to 3) must be given the opportunity to draw consequences from this.

1.

There is no dispute between the parties that the information to be protected is a trade secret of the plaintiff, without this being based on incorrect legal considerations.

2.

Whether and to what extent a party's access to certain information contained in submitted documents or evidence is restricted must be assessed taking into account the circumstances of the individual case and weighing the interests of the parties to the proceedings, in particular the application of the party affected by the access restriction to be heard and their right to effective exercise of their rights in a fair procedure on the one hand and the interest of the party requesting protection of confidentiality in the protection of their confidential information on the other. The number of persons authorised to have access must not be greater than necessary to ensure compliance with the right of the parties to the proceedings to an effective legal remedy and a fair procedure and must include at least one natural person from each party as well as the respective lawyers or representatives of these parties to the proceedings (R. 262A.6 VerfO, see already Mannheim local division UPC_CFI_359/2023 of 21 March 2024 = GRUR Patent 2024, 253, 255 f. and Düsseldorf local division UPC_CFI_355/2023 ORD_7096/2024 with identical content).

3.

In the dispute, the plaintiff consists of two parties. The information to be protected concerns complex technical issues. In any case, in this situation, access for three natural persons on the plaintiff's side is generally not objectionable in terms of numbers. The fact that the three named persons may have the same information base does not lead to a different assessment. Particularly in the case of a complex technical matter, it is justified to create the possibility of exchanging and discussing information internally with another person from the same specialist area and to be able to deputise for them if they are prevented from doing so.

4.

Contrary to the opinion of the defendants 1) to 3), there are no serious concerns about the reliability or other suitability of the persons named.

However, a party that names natural persons who are to receive access to confidential information of the other party on its behalf must, in principle, at least indicate their sufficiently outlined field of activity in addition to their function, insofar as the other party otherwise lacks the possibility of categorising the named persons. In the present case, the - sparse - information provided by the plaintiffs was still sufficient for the defendants 1) to 3) to make a sufficient statement under the circumstances of the case.

According to the uncontradicted searches of the defendants 1) to 3), the named persons are authorised representatives at the US Patent Office. In any event

In the absence of other indications (to be presented by the applicant of an application pursuant to R. 262A VerfO), persons who are professionally familiar with the handling of confidential information can generally be assumed to be reliable without the need for further explanations by the nominating party.

The fact that the designated persons are active in a technical field related to the patent in suit does not preclude suitability in a specific individual case. It is precisely because of this proximity that such persons are often only able to provide their company and its representatives with the information necessary for effective legal prosecution (Mannheim local division and Düsseldorf local division as cited above; UPC_CFI_463/2023 ORD_8550/2024 (LK Düsseldorf), procedural order of 11 March 2024). The fact that the designated persons may be involved not only with IP applications but also with the enforcement of patent rights does not justify a different assessment. The defendant is sufficiently protected against the stated risk that the designated persons could misuse knowledge obtained about the attacked embodiments in order to enforce other property rights against the attacked embodiments or to optimise property right applications with a view to this, by the fact that the protected information may only be used for the purpose of the present proceedings and that this obligation can be enforced by imposing penalty payments if necessary. Excluding persons who are involved in the registration or enforcement of relevant property rights would place an undue burden on the party affected by this as long as there are no concrete indications that the knowledge obtained is being misused.

5.

There is no reason to restrict access on the part of the plaintiffs' authorised representatives to a certain number or even to EPG representatives and their internal assistants, who must also be named.

According to R. 262A.6 of the Rules of Procedure, the group of persons authorised to access must in principle include the respective lawyers or (other) representatives of the parties to the proceedings. This refers solely to the persons named in Art. 48 para. 1 and para. 2 UPCA. Only these persons are authorised to represent before the UPC and are subject to the Code of Conduct for Representatives adopted on the basis of R. 290.2 CPR. If a secrecy protection order grants access to the authorised representatives or legal representatives without further specification, only those professionals of a law firm who are authorised to represent before the UPC are generally addressed.

In principle, even in the case of an application pursuant to R. 262A of the Rules of Procedure, a party is not required to limit itself to certain UPC representatives from among its authorised representatives or to a certain number, as long as there are no indications (to be presented by the applicant of an application pursuant to R. 262A of the Rules of Procedure) that certain UPC representatives are not reliable. The right of a party to effectively exercise its rights before the UPC is in principle undiminished and also includes the right to determine which and how many representatives are used to handle the case. The authorised representatives are also entitled to

In principle, the EPG is free to determine the group of EPG representatives handling the dispute within the law firm and to change it if necessary.

Due to their organisational sovereignty, the legal representatives are equally free to decide which in-house assistants they use to handle the legal dispute.

The protection of confidential information is sufficiently guaranteed in each case by the fact that the authorised representatives are obliged to keep the confidential information secret and are not only required to do so under professional law, but can also be ordered to do so if necessary by imposing fines. As part of their confidentiality obligations, they are obliged to ensure that only those professionals from their law firm who are authorised to represent them before the UPC have access to the confidential information that they believe they need to cooperate in the legal dispute. They are also obliged to ensure that these professionals do not use the confidential information for other purposes, in particular not in other court proceedings, unless they are expressly authorised to do so by court order. They must also take suitable precautions to ensure that auxiliary staff employed by the law firm also maintain confidentiality. In the absence of any indications to the contrary, the persons authorised to represent under Art. 48 para. 1 or para. 2 UPCA offer sufficient guarantee for the fulfilment of these obligations.

There is generally no requirement to name the individual persons involved in case processing on the part of the authorised representatives and to expand the group if necessary. For the reasons stated, such a requirement would unduly restrict the flexible organisation of case processing.

If authorised representatives wish to use external assistants with regard to confidential information, they must name them in advance so that a court decision can be made on this.

It may be necessary to deviate from these principles, particularly in urgent proceedings for interim legal protection, in order to take account of the requirements of the proceedings (see the special procedural situation in UPC_CFI_463/2023 ORD_8550/2024 (LK Düsseldorf), procedural order dated 11 March 2024).

6.

Insofar as the plaintiffs request that the confidential information may be disclosed to their legal representatives in the parallel proceedings before the High Court of Justice in London concerning the English part of the patent in suit, in any case to Mr Mark Heaney, partner in the law firm of their legal representatives here, this cannot be granted.

The weighing of the mutual interests shows that the interests of the defendants 1) to 3) considerably outweigh the interests of the plaintiffs in unrestricted access in this respect (R. 262A.5 VerfO). The confidential information relates to the technical design of the contested embodiments. Insofar as it is not disclosed to the plaintiffs

were otherwise known, they would have no knowledge of this without the present litigation. The interest of the plaintiffs alone in ensuring that their respective legal representatives in the proceedings here and the parallel proceedings before the High Court of Justice exchange information extensively for effective and coordinated litigation does not justify making the confidential information available to the plaintiffs' representatives from the London proceedings. This would undermine the legitimate expectation of effective confidentiality protection in the proceedings conducted before the Unified Patent Court on the basis of the UPC Rules of Procedure. Both proceedings are independent, concern different territories and can therefore in principle be conducted independently of each other. Insofar as an UPC representative of the defendant also acts as its representative in the London proceedings, this does not justify a different assessment. In particular, neither the principle of procedural equality of arms nor the principle of a fair trial justify the requested grant of access. It is irrelevant whether these principles apply to all proceedings. In any case, the requested grant of access is not necessary because the defendant, as the holder of the confidential information, is free to share its confidential information with its representatives in the London proceedings anyway. The fact that the plaintiffs do not have this option is in the nature of the case and does not require compensation. Moreover, even if the plaintiffs also had a representative who represented them in both the proceedings here and in the London proceedings, this representative would not be permitted to use the confidential information for the purposes of the London proceedings.

As a counter-motion to the application of the defendants 1) to 3) pursuant to R. 262A VerfO, the plaintiffs' application does not require formal rejection.

7.

Since the defendants 1) to 3) were not fully successful with their application pursuant to R. 262A VerfO, they must be given the opportunity to withdraw their submission in the unredacted version or to request a review by the adjudicating body before it is made available to the plaintiffs in accordance with this Order. In deviation from the previous provisional Order, a period of seven days is sufficient for this.

ORDER

1. The following information is classified as confidential in accordance with R. 262A VerfO:
 - the statements contained in the statement of defence of 13.05.2024 on the process of streaming video files (cf. the greyed-out statements in recitals 69, 74, 76, 81, 118, 121, 122, 124, 127-129 to facilitate the work, but not as the specific subject matter of the application)
 - the written testimony of Mr ██████████ on the process of streaming video files (Annex BPV 5).

2. Access to the unredacted version of the statement of defence dated 13 May 2024 and the unredacted version of Annex BPV 5 is restricted to the following persons on the part of the plaintiffs:
 - a) the plaintiffs' counsel and their internal support staff
 - b) External experts on request
 - c) the following employees on the plaintiff's side:
 - Mr [REDACTED] [REDACTED] Corporate Counsel,
 - Mr [REDACTED] [REDACTED] Corporate Counsel, and
 - Mr [REDACTED] [REDACTED] Vice President & AGC, IP
3. The persons named under item 2 are obliged to treat the confidential information under item 1 as strictly confidential - even beyond the proceedings - and to use the confidential information exclusively for the purposes of these proceedings. The aforementioned persons are also obliged to maintain confidentiality vis-à-vis the plaintiffs with regard to the information contained in the unredacted versions of the aforementioned documents. 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 1) to 3) or their affiliated companies, provided that this source is not bound by a confidentiality agreement with the aforementioned defendants or their affiliated companies or by any other confidentiality obligation towards them.

These obligations also apply to the plaintiffs.
4. A penalty payment in an amount to be determined by the court may be imposed for each case of non-compliance with this Order.
5. In all other respects, the application of the defendants 1) to 3) dated 13 May 2024 for the protection of confidential information is rejected.
6. The information and documents that are the subject of this Order will not be made available to the plaintiff in accordance with this Order before 10 July 2024. Until then, the defendants 1) to 3) have the opportunity to withdraw the unredacted versions. In this case, they shall be deemed not to have been submitted to the file and may not be used by the court or the opposing party in the proceedings and may not be made available to the aforementioned employees of the plaintiff's side. The confidentiality protection ordered by this Order remains unaffected.

ORDER DETAILS

Order No. ORD_33986/2024 in PROCEDURE NUMBER: ACT_594191/2023

UPC number: UPC_CFI_471/2023

Nature of the action: Action for infringement

No. of the related procedure Application No.: 26934/2024

Type of application: APPLICATION_ROP262A

NAMES AND SIGNATURES

Issued in Mannheim on 03 July 2024

Dirk Andreas
Cooper

Cooper
judge-rapporteur

Digitally signed by Dirk
Andreas Böttcher
Date: 2024.07.03
18:43:37 +02'00'