



UPC Court of Appeal
UPC_CoA_56/2026

Order
of the Court of Appeal of the Unified Patent Court
issued on 28 April 2026
request for a discretionary review (R. 220.3 RoP)

APPLICANT (DEFENDANT/COUNTERCLAIMANT BEFORE THE COURT OF FIRST INSTANCE)

Optopol Technology Sp. z o.o., Zawiercie, Poland

(hereinafter: '**Applicant**')

represented by Dr. Oliver Stöckel, attorney-at-law, SKW Schwarz Rechtsanwälte Steuerberater PartG mbB, Munich, Germany

RESPONDENT (CLAIMANT/COUNTERDEFENDANT BEFORE THE COURT OF FIRST INSTANCE)

Topcon Corporation, Tokyo, Japan

(hereinafter: '**Respondent**')

represented by Dr. Matthias Sonntag, attorney-at-law, Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater, Düsseldorf, Germany

PATENT AT ISSUE

EP 2 845 534

DECIDING JUDGE

This order has been adopted by Bart van den Broek as standing judge.

LANGUAGE OF THE PROCEEDINGS

English

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Procedural Order, Local Division Düsseldorf, dated 1 April 2026
- Reference numbers:
 - UPC_CFI_705/2025 (Infringement)
 - UPC_CFI_1620/2025 (Counterclaim for revocation)

SUMMARY OF FACTS

1. On 4 August 2025, Respondent lodged an infringement action against the Applicant before the Local Division Düsseldorf (“LD” or “LD Düsseldorf”) (UPC_CFI_705/2025).
2. On 18 November 2025, Applicant filed its Statement of defence and lodged a Counterclaim for revocation (UPC_CFI_1620/2025).
3. The two-month time period according to R. 29(a) RoP for lodging the Reply to the Statement of defence, the Defence to the Counterclaim for revocation, and an Application to amend the patent (hereinafter together: “Reply”) expired on 19 January 2026 (18 January 2026 being a Sunday).
4. Respondent failed to comply with the prescribed time period and lodged their Reply on 26 January 2026. Respondent did not indicate in the Reply that or why it did not meet the deadline.
5. On 30 January 2026, Applicant filed an application for a decision by default in view of the non-observance of the time period (which it had already requested on 18 November 2025 in case Respondent would fail to comply with the prescribed time period).
6. On the same day, 30 January 2026, Respondent announced to the LD Düsseldorf that it intended to file an Application for Re-establishment of rights (R. 320 RoP).
7. Respondent filed the Application for Re-establishment of rights (“Application”) on 21 February 2026 stating that their representatives had become aware of the missed deadline on 21 January 2026. In the Application, Respondent requested the LD to re-establish the time period set forth in R. 29(a) RoP. In the alternative, Respondent requested the LD to exercise its discretion under R. 9.2 RoP such that the Reply would not be disregarded and would be fully taken into consideration by the Court in its decision on the merits.
8. On 25 March 2026, the Applicant responded to the Application and requested the LD to dismiss the Respondent’s requests.
9. On 1 April 2026, the LD Düsseldorf issued a procedural order (“impugned order”) in which it dismissed the Respondent’s application for re-establishment of rights but retroactively extended the time period for lodging the Reply to 26 January 2026 pursuant to R. 9.3(a) RoP. The LD did not grant leave to appeal.
10. On 16 April 2026, the Applicant lodged a request for a discretionary review of the impugned order pursuant to R. 220.3 RoP. On 20 April 2026, the court fees were paid.

APPLICANT’S REQUEST

11. The Applicant requests that:
 - I. the impugned order is reviewed by the Court of Appeal
 - II. the impugned order is set aside insofar as it
 1. retroactively extends the time period for the submission of the Reply to 26 January 2026, and
 2. dismisses the requests for a decision by default by the Applicant of 18 November

- 2025 and 30 January 2026, and
3. in the alternative to application No. II. 2., dismisses the request by the Applicant of 25 March 2026 to disregard the Respondent's Reply, and to declare inadmissible and disregard the Respondent's Reply and all applications, arguments, contents and requests contained therein.

III. The Court of Appeal

1. rejects the request made by the Respondent in their brief of 21 February 2026, and
2. orders the Court of First Instance to issue a decision by default as applied for by Applicant on 30 January 2026
 - a) for the infringement proceedings (UPC_CFI_705/2025) as follows:
 - (1.) the action is dismissed, and
 - (2.) Respondent bears the costs of the proceedings including adequate reimbursement of the Applicant's costs,
 - b) and for the Counterclaim for revocation (UPC_CFI_1620/2025), as already applied on 18 November 2025, as follows:
 - (1.) EP 2 845 534 B1 is revoked to the extent of claims 1, 2, 3, 4, 6, 8, 11, 12 and 15 for all Contracting Member States in which EP 2 845 534 B1 has effect, in particular for France, Germany and Italy, and
 - (2.) the Court sends a copy of the decision to the European Patent Office and to the national patent office of any Contracting Member States concerned in accordance with Article 65(5) UPCA, and
 - (3.) Respondent bears the costs of the Counterclaim for revocation including adequate reimbursement of the Applicant's costs, and
3. in the alternative to application No. III. 2. above, orders the Court of First Instance to declare inadmissible and disregard the Respondent's Reply and all applications, arguments, contents and requests contained therein.

APPLICANT'S SUBMISSIONS (SUMMARY)

12. Applicant is of the opinion that the impugned order is manifestly erroneous for three main reasons:
 - the Court of First Instance erred in reclassifying the application made by Respondent under R. 320 RoP as an application under R. 9.3(a) RoP,
 - the Court of First Instance failed to recognize that the grounds provided by Respondent in their application under R. 320 RoP do not satisfy the requirements for the grounds of an application under R. 9.3(a) RoP and do not justify the retroactive extension of the time period for lodging the Reply, and
 - when exercising its discretion, the Court of First Instance erroneously confined itself to the assessment of a single human error by the assistant of Respondent's representatives, although the Applicant had demonstrated a seven-fold failure by Respondent's representatives, and the Court of First instance failed to take into account the bad faith behaviour of the Respondent when dealing with the missed deadline.
13. In addition, Applicant is of the opinion that the impugned order raises the following fundamental legal questions that have not yet been addressed by the Court of Appeal:
 1. whether an application under R. 320 RoP can be re-interpreted as a R. 9.3(a) RoP application,
 2. whether the reasoning for a R. 320 RoP application can be used as reasoning for a R. 9.3(a) application,

3. what the implications are of bad faith and non-compliance with the rule to file applications for a time period extension as soon as possible, for the application and grant of a retroactive time period extension, and
4. whether the missing of the deadline to file a defence against a Counterclaim for revocation can result in a decision by default.

GROUNDS FOR THE ORDER

14. The request for discretionary review is admissible but must be denied.
15. If the Court of First Instance does not allow an appeal against a procedural order it has made (R. 220.2 RoP), the affected party may, pursuant to R. 220.3 RoP, file a request for discretionary review with the Court of Appeal within 15 days. The Court of Appeal (standing judge) shall issue an order on the request in accordance with R. 220.4 RoP.
16. When deciding whether to allow a discretionary review, it should be considered whether the impugned procedural order of the Court of First Instance is manifestly incorrect and whether the impugned order raises a fundamental question of law, that its review is necessary to ensure a consistent application and interpretation of the Rules of Procedure or any other objective of the discretionary review (CoA, UPC_CoA_489/2024, 6 September 2024, *Motorola v. Ericsson*; UPC_CoA_805/2025, 1 September 2025, *Centripetal v. Keysight*).
17. The impugned order is not manifestly incorrect.
18. In accordance with the order of this Court in *Angelalign v. Angel Technology* (UPC_CoA_37/2026, 10 March 2026), the LD dismissed the application for re-establishment of rights pursuant to R. 320 RoP and used its discretion to retroactively extend the time period for lodging the Reply based on R. 9.3(a) RoP. The LD did not exceed its discretionary powers in coming to this decision.
19. As stated above, the Respondent (alternatively) requested the LD in the Application to use its discretion such that the Reply would be fully taken into consideration in the decision on the merits. The LD complied with this request by retroactively extending the time period for lodging the Reply to the date on which the Reply was submitted, i.e. 26 January 2026. Although R. 9.3(a) RoP was not specifically mentioned in the Application, it was not unreasonable for the LD to interpret the Application to include such a request, in particular in view of the alternative request in the Application to use its discretionary powers to allow the Reply dated 26 January 2026 into the proceedings.
20. Contrary to Applicant's assertion, the reasoning contained in the Application was equally applicable to the (implicit) request for a retroactive time period extension pursuant to R. 9.3(a) RoP. Based on this reasoning and on the submitted evidence (in particular the chapter "Deadlines and Deadline Control" of the Gleiss Lutz *Handbuch* and the various statements of Respondent's representatives and their assistant) the LD concluded that a system of checks had been put into place within the representatives' law firm and that despite this system, the deadline was missed by a human error, in particular by the assistant of Respondent's representatives incorrectly noting the prescribed time period in the system on which the Respondent's representatives relied. In the opinion of the Court of Appeal, the LD's determination that this was an excusable human error is understandable and reasonable in view of the facts and evidence of the case (cf. UPC_CoA__37/2026, 10 March 2026, *Angelalign v. Angel technology*, para. 32).

21. This also applies to the decision of the LD regarding the timing of the (implicit) request for a retroactive extension of the time period. Although the Court of Appeal agrees that such a request should generally be made as soon as possible, it was not unreasonable for the LD to consider it excusable that in this case, wherein the order of this Court in *Angelalign v. Angel Technology* was not yet issued, the request was made in the Application within the time period set out in R. 320 RoP.
22. Moreover, when exercising its discretion, the LD correctly considered that the extension of the time period would not cause any delay in the proceedings. The Applicant was able to respond to the Reply within the time period specified in the RoP and the oral hearing (to be held on 15 December 2026) was not affected by the extension. Also in this respect, the Local Division did not exceed its discretionary powers by retroactively extending the time period for the Reply to 26 January 2026.
23. Finally, in the impugned order, the LD took note of the Applicant's allegation of bad faith (paragraph 9) and its assertion that there were more human failures than the single human error by the representative's assistant (paragraph 10). The fact that these circumstances were not explicitly mentioned in the LD's discretionary assessment does not make the impugned order manifestly erroneous. It merely means that the LD weighed the facts differently than the Applicant considers to be correct.
24. The other requirements for a review of the discretionary decision are also not apparent in the present case. The "fundamental legal questions" mentioned by the Applicant have been addressed by the above considerations (questions 1-3) or are deemed irrelevant in view of these (question 4).

ORDER

The request for discretionary review is dismissed.

This order was issued on 28 April 2026

Bart van den Broek, standing judge