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Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

action number:
UPC-CoA-176/2026
UPC-CoA-177/2026

ORDER

of the Court of Appeal of the Unified Patent Court
issued on 2 November 2026
Language of the proceedings/Application for suspensive effect
(Article 74(1) of the UPC Agreement, Rule 223 of the RoP)

APPELLANTS (DEFENDANTS AND COUNTER-CLAIMANTS BEFORE THE COURT OF FIRST INSTANCE)

1. **Netflix Services Germany GmbH,** Berlin, Germany
2. **Netflix International B.V.**, Amsterdam, Netherlands
3. **Netflix Services Italy S.R.L.**, Rome, Italian Republic
4. **Netflix Services France S.A.S.**, Paris, French Republic
5. **Netflix Inc.**, Los Gatos, California, United States of America

(hereinafter collectively referred to as 'Netflix')

represented by Dr Marcus Grosch, Attorney-at-law, and other Attorneys-at-law from the law firm Quinn Emanuel
Urquhart & Sullivan, LLP, Munich, Germany, and Attorneys-at-law from the law firm Hoyng Rokh Monegier, Amsterdam, the Netherlands

APPELLANT (CLAIMANT AND COUNTER-DEFENDANT AT THE COURT OF FIRST INSTANCE)

DivX, LLC, San Diego, California, United States of America

(hereinafter: DivX)

represented by Jasper Meyer zu Riemsloh, Attorney-at-law, and other Attorneys-at-law from the law firm Wildanger Kehrwald Graf von Schwerin & Partner mbB Rechtsanwälte, Düsseldorf, Germany, and Jochen Ehlers and other patent attorneys from the law firm Eisenführ Speiser Patentanwälte Rechtsanwälte PartGmbB, Hamburg, Germany

PATENT AT ISSUE

EP 4 213 033

CURRENT LANGUAGE OF THE PROCEEDINGS

German

DECIDING JUDGES

Panel 2
Rian Kalden, Presiding Judge and legally qualified judge

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Patricia Rombach, legally qualified judge and judge-rapporteur Ingeborg
Simonsson, legally qualified judge
Klaus Loibner, technically qualified judge Andrea
Perronace, technically qualified judge

CONTESTED DECISION OF THE COURT OF FIRST INSTANCE

- Decision of the Munich local division, 15 September 2026
- Action number of the Court of First Instance:
  - UPC-CFI-465/2025 (infringement action)
  - UPC-CFI-1121/2025 (counterclaim for

revocation) FACTS

1. DivX is suing Netflix for alleged indirect infringement of its European patent with unitary effect 4 213 033 (hereinafter: the patent at issue). Netflix has brought a counterclaim for the revocation of the patent at issue.

2. The grant of the patent at issue, filed on 7 January 2008, was published on 7 May 2025. It claims priority from US patent applications 88365907 P and 883659 P dated 5 January 2007. The patent at issue stems from the fourth division of the European parent application EP 2 122 482, which in turn arose from the international application PCT/US2008/050440 with publication number WO 2008/086313 A1 (submitted as Annex QE 2). The divisional application (original application, submitted as Annex QE 1) was published on 19 July 2023. The patent at issue relates to a method for the progressive playback of a media sequence.

3. Independent claim 1 reads as follows in the language of the proceedings:

"A method of progressively playing back, by a client, a media sequence stored as a media file on a remote server (12), wherein the media file includes an index,

the method comprising the following steps performed by the client: obtaining (42) the index from the remote server;
identifying (44) a starting location within the media sequence;
identifying (46), using the index, byte ranges of the media file corresponding to the media required to play the media sequence from the starting location;
placing the identified byte ranges in a request queue;
requesting (46) the byte ranges from the request queue that are required to play the media sequence from the starting location;
buffering the received bytes of information pending the start of playback; and playing back (48) the buffered bytes of information;
wherein the method also comprises the following steps performed by the client, upon receiving (50) a user instruction:

identifying (54), using the index, byte ranges of the media file corresponding to the media required to play the media sequence in accordance with the user instruction;
flushing (110) the request queue;
establishing a request queue using the byte ranges identified in response to the user instruction; and
requesting (46) the byte ranges from the request queue that are required to play the media in accordance with the user instruction,

wherein the method further comprises the following steps performed by the client:

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maintaining a mask indicating the portions of the media file that have been downloaded;
identifying, using the mask, whether at least a portion of a byte range required to play the media in accordance with the user's instruction has already been downloaded;
placing in the request queue only those portions of byte ranges that have not already been downloaded from the remote server to play the media in accordance with the user's instruction; and
requesting (46) the byte ranges from the request queue.

4. On 3 July 2026, the Opposition Division of the European Patent Office (hereinafter referred to as the Opposition Division) summoned the parties to an oral hearing on 1 and 2 October 2026 and issued a qualified notice (Annex WK11).

5. In the contested decision, the Munich local division (hereinafter: the local division) largely upheld the action for infringement and dismissed the counterclaim for revocation. Netflix lodged an appeal against this decision. By notice dated 16 September 2026, DivX indicated its intention to enforce the contested decision.

6. The local division based its decision on the following breakdown of the features.

a	A method of progressively playing back, by a client, a media sequence stored as a media file on a remote server (12), wherein the media file includes an index,	A method for progressively playing back a media sequence stored as a media file on a remote server (12), by a client, wherein the media file includes an index,
b	the method comprising the following steps performed by the client:	wherein the method comprises the following steps performed by the client:
b1	obtaining (42) the index from the remote server;	obtaining (42) the index from the remote server;
b2	identifying (44) a starting location within the media sequence;	identifying (44) a starting point within the media sequence;
b3	identifying (46), using the index, byte ranges of the media file corresponding to the media required to play the media sequence from the starting location;	Determining (46), using the index, byte ranges of the media file that correspond to the media required to play the media sequence from the starting point ;
b_new	placing the identified byte ranges in a request queue;	Placing the identified byte ranges in a request queue;

b4	requesting (46) the byte ranges from the request queue that are required to play the media sequence from the starting location;	requesting (46) the byte ranges from the request queue that are required to play the media sequence from the starting point;
b5	buffering received bytes of information pending the start of playback; and	buffering received bytes of information until playback begins; and
c	wherein the method also comprises the following steps performed by the client, upon receiving (50) a user instruction:	wherein the method also comprises the following steps performed by the client upon receiving (50) a user instruction:
c1	identifying (54), using the index, byte ranges of the media file corresponding to media required to play the media sequence in accordance with the user instruction;	identifying (54), using the index, byte ranges of the media file corresponding to media required to play the media sequence in accordance with the user instruction;
c2	flushing (110) the request queue;	flushing (110) the request queue;
c_new	establishing a request queue using the byte ranges identified in response to the user's instruction; and	Establishing a request queue using the byte ranges identified in response to the user instruction; and
c3	requesting (46) the byte ranges from the request queue that are required to play the media in accordance with the user instruction,	requesting (46) the byte ranges from the request queue that are are required to play the media in accordance with the user instruction ;
d	wherein the method further comprises the following steps performed by the client:	wherein the method further comprises the following steps performed by the client:
d1	maintaining a mask indicating the portions of the media file that have been downloaded;	maintaining a mask indicating the parts of the media file that have been downloaded;
d2	identifying, using the mask, whether at least a portion of a byte range required to play the media in accordance with the user's instruction has already been	Determining, using the mask, whether at least a portion of a byte range required to play the media in accordance with the user's instruction

	has already been	is required, has already been downloaded;
d_neu	placing in the request queue only those portions of byte ranges that have not already been downloaded from the remote server to play the media in accordance with the user's instructions; and	placing in the request queue only those parts of byte ranges that have not already been downloaded from the remote server in order to play the media in accordance with the user's instructions; and
d3	requesting (46) the byte ranges from the request queue.	Requesting (46) the byte ranges from the request queue

APPLICATIONS BY THE PARTIES

7. Netflix applies for an order to be issued granting suspensive effect to the appeal against the contested decision in the infringement proceedings.

8. DivX opposes the application.

SUBMISSIONS OF THE PARTIES

9. Netflix submits, in essence:

- There has been a breach of Article 76(1) and (2) of the UPC Agreement.
  - DivX had based the realisation of key features on a technical fact that had been realised in the 'Netflix software' for computers with a web browser (Cadmium Player). The court did not agree with this, but—without providing any corresponding grounds put forward by the claimant—based the infringement on the fact that the element relevant to the fulfilment of the claim must be present in another software element outside the contested Netflix software (in this case, a web browser).
  - DivX had claimed, without any basis, that the other Netflix software, which was not intended for computers and browsers (such as the apps for Android or iOS mobile devices), functioned in exactly the same way as the Cadmium software and therefore also infringed the patent. On this basis, the local division then 'found' – in the absence of any substantiated challenge and despite the differences between the streaming concepts at issue here – that the other Netflix software applications were similarly configured and therefore also infringed the patent. In doing so, however, the local division apparently lost sight of the fact that it had not itself based the infringement on a specific design feature of the Netflix software, as alleged by the claimant, but rather on a technical feature within the browser which, in the other embodiments, was clearly not used at all.

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  - With regard to these other embodiments, the local division not only ruled on the basis of an allegation of infringement that the claimant had failed to substantiate, but also demanded that Netflix should have commented on the other embodiments and the differences between them.
- Furthermore, the judgement is based on a manifest error in the interpretation of the claim, in which the local division simply altered the clear sequence of steps – contrary to the wording and technical function – in such a way that the subject-matter of the claim no longer has anything to do with the technical teaching of the patent and is also no longer covered by any of the examples.
- The interpretation of claim 1 of the contested patent, on which the infringement is based, was not disclosed in the original specification. As Netflix was only confronted with this interpretation during the oral hearing, the subject-matter thus defined could no longer be made the subject of an attack in the counterclaim for nullity on the grounds of lack of disclosure in the original specification.
- Netflix had attempted, immediately prior to the opposition hearing, to introduce this interpretation into the opposition proceedings. However, the Opposition Division did not address this interpretation or the corresponding lack of disclosure in the original specification during the hearing, evidently because it considered this interpretation to be manifestly legally flawed.
- The local division disregarded the orders sought by Netflix to protect trade secrets on grounds that were not comprehensible. In any event, some indication should have been given.
- In any event, following the complete revocation of the patent at issue by the Opposition Division, suspensive effect should be ordered. In *Meril/Edwards* (21 November 2024, UPC-CoA-511/2024, para. 21), the Court of Appeal expressly held that conflicts arising from parallel infringement proceedings before the UPC and opposition proceedings before the EPO should be prevented.
- If the granting authority itself reaches the clear conclusion that the grant of the patent is to be revoked, the UPC cannot substitute its own view of the legal position for that of the authority in order to refuse to suspend proceedings or order suspensive effect with regard to the infringement decision. This applies in particular to key technical assessments, such as those at issue in the present case with regard to inventive step. Of course, a different approach might apply here if the Opposition Division’s decision were so manifestly flawed that, following review by the UPC’s panels, a correction in the EPO appeal proceedings were highly probable. No such assessment had been made in the present case, and it could have been made without any error of discretion even on the basis of the grounds for the decision alone; the local division had, however, precluded this by taking and announcing its infringement decision shortly before the Opposition Division’s decision.
- In this case, the granting of suspensive effect to the appeal is mandatory, as the high probability of the European Patent Office (EPO) revoking the patent at issue at first instance has now in fact materialised.
- In its grounds, the local division did not address the issue of non-suspension at all, even though the local division is required to exercise its discretion regarding suspension independently of any application by the parties. This failure to exercise that discretion stands in direct contradiction to the guidelines laid down by the Court of Appeal in Meril/Edwards.

- In any event, prior to rejecting the application pursuant to Rule 223 of the RoP, the following questions should be referred to the Court of Justice of the European Union (CJEU) in accordance with Article 367(3) of the TFEU, Article 21(1) of the UPC Agreement and Rule 266.1 of the RoP, and, accordingly, to order provisional suspensive effect at least until the CJEU has issued a preliminary ruling:
    1) Are Article 47(1) and (2) of the Charter of Fundamental Rights, Article 19(1), second subparagraph, of the TEU and Article 3(2) of Directive 2004/48/EC to be interpreted, either individually or taken together, as requiring an interpretation or application of procedural rules relevant under EU law, such as the Rules of Procedure of the Unified Patent Court, under which the suspensive effect of an appeal against an immediately enforceable court order (injunction and an order to provide information and account) for patent infringement must be granted if
        - an Opposition Division of the European Patent Office has revoked the patent at issue in its entirety whilst being aware of a contrary decision on the validity of the patent by the Court of First Instance of the Unified Patent Court, and the decision of the European Patent Office is not yet final (in the alternative: the grounds for the decision of the European Patent Office are not yet available),
        - the decision of the Court of First Instance of the Unified Patent Court is enforceable without the Claimant having to provide security,
        - the Court of First Instance has not carried out a balancing of interests with regard to the conflict between an infringement decision of the Court and a negative decision on the validity of the patent by the Opposition Division of the European Patent Office, and has rendered such a balancing of interests impossible by failing to await the Opposition Division’s decision in the near future, despite the existence of a negative preliminary opinion from the Opposition Division,
        - whereas, in its decision on the counterclaim for revocation of the patent at issue, the Court merely justified its view on the validity of the claimed patent – which diverged from the Opposition Division’s preliminary opinion – by referring to a differing view on the general technical knowledge of the relevant person skilled in the art?

    2) Is Article 47(2) of the Charter of Fundamental Rights of the European Union to be interpreted as requiring an interpretation or application of procedural rules relevant under EU law, such as the Rules of Procedure of the Unified Patent Court, under which the suspensive effect of an appeal against an immediately enforceable court order (for an injunction and an obligation to provide information and account) for patent infringement must be ordered, where
        - the Court of First Instance of the Unified Patent Court has based its infringement decision, in view of the complex subject-matter of the dispute, on an allegation of infringement in both factual and legal terms,
        - which the court raised for the first time at the sole and final oral hearing on the infringement action on its own initiative, without a corresponding submission by the claimant and without a specific indication from the court,

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- whereby the specific grounds and scope of the allegation of infringement raised in court were only apparent from the grounds of the judgment, due to the fact that the allegation had not previously been set out in writing or recorded in the minutes, and
- consequently, prior to the court's decision, neither had the Claimant adopted this specific allegation of infringement as her own, nor had the defendant been able to mount an exhaustive defence against it in both factual and legal terms?

3) Are Article 47(1) and (2) of the Charter of Fundamental Rights of the European Union, Article 19(1), second subparagraph, of the Treaty on European Union, Article 6(1) and Article 9(2) of Directive (EU) 2016/943 – taken individually or in their entirety – to be interpreted as requiring the interpretation or application of procedural rules relevant under EU law, such as the Rules of Procedure of the Unified Patent Court, under which the suspensive effect of an appeal against an immediately enforceable court order (obligation to provide information and account) concerning patent infringement must be ordered if
   - the Court of First Instance of the Unified Patent Court, in its final decision concerning the patent proprietor's claim for disclosure and accounting, states for the first time – without prior judicial guidance and without any discussion having taken place regarding the legal consequences of the possible patent infringement – no confidentiality measures or confidentiality obligations could be ordered in respect of the information to be disclosed, because no application had been made in accordance with Rule 262A of the RoP,
   - even though the defendants in the infringement proceedings had requested in their statement of defence that the information and accounts be made available only to specific persons to be named by the Claimant and be subject to an appropriate duty of confidentiality,
   - and it is undisputed that the data to be disclosed constitutes trade secrets within the meaning of Article 2(1) of Directive (EU) 2016/943?

- DivX is not in a position to compensate for the damages arising from the enforcement proceedings. It is evident that DivX cannot compensate for the pecuniary and non-pecuniary damages arising from a complete cessation of the Netflix service, as demanded of DivX.

10. DivX essentially argues:

- There is no infringement of Article 76(1) of the UPC Agreement. The contested embodiment has remained the same. The local division examined whether the Netflix software was capable of carrying out the protected process. That is the subject matter of the dispute, as defined by DivX.
- Netflix itself had raised the issue of the handover to the browser as a defence. A decision responding to a party's defence cannot come as a surprise to that party. DivX had challenged the software in conjunction with the browser. Nor does Netflix argue that the local division would otherwise have decided differently.
- DivX had argued that the software versions for the various platforms were identical in the functionalities relevant to the infringement. Netflix had not specifically contested this.
- The mere fact that an interpretation adopted by the local division might be open to review is not sufficient to justify the order for suspensive effect.

- Netflix does not allege any disadvantages arising from enforcement. DivX's interests carry significant weight. The patent at issue expires in January 2028. The local division expressly took this into account (decision, para. 351).

REASONS

11. The admissible application for an order for a stay of enforcement is unsuccessful on the merits.

I. Conditions for granting suspensive effect as an order

12. Pursuant to Article 74(1) of the UPC Agreement, an appeal has no suspensive effect unless the Court of Appeal decides otherwise upon a well-founded application by a party. The Court of Appeal may therefore only grant the application if the circumstances of the case justify an exception to the principle that an appeal has no suspensive effect. In this regard, it must be assessed whether, in exceptional circumstances, the appellant's interest in maintaining the status quo until a decision is made on their appeal outweighs the respondent's interest (UPC Appeal Report, 19 June 2024, UPC-CoA-301/2024, para. 7; 19 August 2024, UPC-CoA-388/2024, para. 6, *Sibio v Abbott*; 2 December 2025, UPC-CoA-894/2025, para. 9, *Windhager/Belissa*; 21 August 2026, UPC-CoA-135/2026, para. 26, *Nuna v Cybex*).

13. An order granting suspensive effect may be considered, in particular, where the order against which the appeal is brought is manifestly erroneous (UPC Court of Appeal, 19 August 2024, UPC-CoA-388/2024, para. 7; 29 October 2025, UPC-CoA-549/2024, para. 59; *Belkin v Philips*; 21 August 2026, UPC-CoA-135/2026, para. 27, *Nuna v Cybex*) or if enforcement of the contested decision would render the appeal largely futile (UPC Court of Appeal, 6 November 2023, UPC-CoA-407/2023; 2 May 2024, UPC-CoA-177/2024, para. 10).

14. Furthermore, a breach of fundamental procedural principles, such as the right to be heard, may justify the order for suspensive effect if it cannot be ruled out from the outset that the court would have reached a different conclusion had the breach not occurred (UPC Court of Appeal, *Belkin v Philips*, para. 61; 15 July 2026, UPC-CoA-93/2026, para. 18; 15 July 2026, UPC-CoA-93/2026, para. 18, *Siemens v Hologic*).

15. In accordance with Rule 223.2 of the RoP, an application for suspensive effect must contain (a) the grounds on which the appeal should be granted suspensive effect and (b) the facts, evidence and legal arguments put forward. This means that such an application must, on its own, enable the Court of Appeal to rule on it, where necessary even without further information. References to passages in documents in the first-instance file are permissible, provided that these are identified with sufficient specificity (UPC Court of Appeal, *Belkin v Philips*, para. 62; cf. *Siemens v Hologic*, para. 19).

II. Statement of grounds for infringement regarding the request queue relating to the 'Netflix software' for computers with a web browser (Cadmium Player)

16. Measured against these principles, the local division's grounds for infringement regarding the 'Netflix software' for computers with a web browser do not justify an order granting suspensive effect to the appeal.

17. In the proceedings at first instance, Netflix argued that the contested embodiment using the Cadmium Player did not maintain a queue as defined by the invention, because a 'MediaRequest' – i.e. a byte range request – was passed to the browser via an interface as soon as it was created. The local division left open the question of whether sub-list 3 itself could be regarded as a request queue (decision, para. 276) and assumed that the transfer to the browser did not deviate from the teaching of the patent at issue. The client is constituted by the end device – in this case, a computer with a browser – and the contested Netflix software installed thereon. For the purposes of carrying out the teaching of the patent at issue, it is irrelevant whether the contested software or the end device, together with any software installed thereon, maintains a queue in accordance with the invention. The suitability of the contested embodiment to carry out the method protected by claim 1 of the patent at issue is also given even if the queue is formed by the end device or the browser formed thereon (decision, para. 278). In so far as Netflix has stated that it is not aware of how the respective browser specifically communicates with the server, and that this cannot be influenced, this argument falls short. This submission does not constitute a substantial challenge and leaves unaffected the suitability of the contested embodiment to apply the method according to the invention, where appropriate in conjunction with other parts of the client (Decision, para. 279). In fact, the contested software does not operate without any influence on the queue, even if it is maintained by the browser. This becomes apparent in relation to the clearing of the request queue. For if a user instruction were to be issued stating that the new playback position lies outside the area already downloaded, the request queue would be emptied; that is to say, the first byte range requests – which, according to Netflix's submission, had been passed to the browser – and which had not yet been sent, would no longer be sent. In this regard, the local division appealed to a table in the statement of claim which is said to indisputably reflect the actual circumstances regarding the byte-range requests created, sent and/or already received over a certain period of time for the playback of a media sequence in the event of a user instruction (decision, para. 280). In the local division's view, as evidenced by Sub-list 3, two byte range requests were generated immediately prior to the user input, which had not yet been sent to the server and were therefore in a queue. These byte range requests would not be sent even after the user input; they no longer appeared in Sub-list 2. Accordingly, in the view of the local division, the contested embodiment must have caused the queue to be cleared. This is because, following the user input, two new byte-range requests were generated, which were also in the queue (Sub-list 3), before they were subsequently sent to the server (Sub-list 2, para. 281).

18. Netflix considers the fact that the grounds for the judgement refer to the browser to constitute a change in the grounds for the infringement finding. The means challenged by DivX no longer maintains the request queue in accordance with the patent in suit, nor is this queue deleted within the Netflix software;

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but rather this is independently transferred to the browser by the local division. The browser is not itself part of the contested means. DivX had merely referred to the browser in general terms with regard to the suitability of the contested embodiment (Netflix software) for carrying out the method, but not with regard to the essential elements of the invention (Article 26 of the UPC Agreement), namely the claim features of the request queue and its 'flushing'. Even with regard to Netflix's submissions, DivX maintained its classification of sub-list 3 as a 'request queue' without effectively refuting Netflix's arguments or, on that basis, establishing a case for infringement based on the browser.

Breach of Article 76(1) of the UPC Agreement

19. The alleged breach of Article 76(1) of the UPC Agreement does not exist.

20. Pursuant to Article 76(1) of the UPC Agreement, the court shall rule in accordance with the applications made by the parties and may not award more than is claimed (*ne ultra petita*). Consequently, the parties are the 'masters of the proceedings'; the principle of party disposition applies. According to this principle, the claimant or applicant determines the subject-matter of the proceedings (UPC Court of Appeal, 27 March 2026, UPC-CoA-898/2025, para. 54, *ONWARD Medical v Niche Biomedical*).

21. The content and scope of the applications within the meaning of Article 76(1) of the UPC Agreement are determined not solely by the wording of the application, but by the facts presented in support of it. The subject-matter of the dispute, to which the court is bound pursuant to Article 76(1) of the UPC Agreement, is determined by the claimant's or applicant's application and the factual circumstances on which it is based (see UPC Court of Appeal, 14 February 2025, UPC-CoA-383/2024, para. 158, *Abbott v Sibio*). These factual circumstances include all facts which, when viewed reasonably from the parties' perspective, form part of the set of facts submitted for decision and which the claimant puts forward in support of the claim. In a patent infringement action, the decisive factor is the factual circumstances put forward by the claimant from which patent infringement is alleged to arise. As a rule, therefore, what matters is the specific configuration of a contested product or process which, according to the claimant's submission, is alleged to mean that the product or process fulfils the features of the patent claim.

22. In the statement of claim, DivX based its allegation of infringement on the fact that, once downloaded, the Netflix software (client application) causes the user's respective end device to become a playback device within the meaning of patent claim 1 (statement of claim, para. 68). It is only through the Netflix software that the computer or a mobile device is enabled to carry out the patented method (Statement of Claim, para. 88). Netflix itself summarised DivX's submission in the statement of grounds for the application as follows: together with the web browser, the contested Netflix software 'Cadmium' enables the computer to carry out the protected method (Statement of Application, p. 5). Furthermore, DivX argued in the statement of claim that the Netflix software distributed by Netflix in Germany is a means relating to an essential element of the invention described in patent claim 1. This is because the software is a client application which configures the computer, television (or another end device) to carry out a method for the progressive playback of a media sequence comprising the steps defined in more detail (Statement of Claim, para. 241). When playing films in

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a computer's browser whilst accessing Netflix, the computer – that is, the client – carries out a streaming process (Statement of Claim, para. 216).

23. The local division based its finding of infringement on this set of facts, by basing its decision on the suitability of the contested embodiment to configure the computer to carry out the method protected by claim 1 of the patent at issue. In so far as the local division assumed that this suitability would also be present if the queue were formed by the end device or the browser running on it (para. 278), it does not go beyond the core of the facts of the case put forward by DivX. As Netflix itself states, DivX's browser was referred to in general terms with regard to the suitability of the contested embodiment (Netflix software) for carrying out the method (Statement of Claim, p. 8).

24. The defendants themselves have submitted that the Cadmium Player forwards the requests to the browser and that the browser decides whether to send them (decision, para. 52). According to Netflix's submission, DivX has 'in fact not contested' this submission (statement of claim, p. 9). In this case, the assertion of fact is deemed uncontested pursuant to Rule 171.2 of the RoP (see UPC Court of Appeal, 19 June 2025, UPC-CoA-402/2024, para. 17, *Alexion v Samsung*). The local division was therefore entitled and obliged to base its decision on this uncontested submission (see *Alexion v Samsung*, para. 17).

25. The fact that DivX identified sub-list 3 of the Netflix software as a request queue within the meaning of the patent at issue (Statement of Claim, para. 208, para. 221), which is deleted in accordance with the claim (Statement of Claim, paras. 209, 230 and 231), and also persisted in this view in its Reply, does not preclude this. DivX assumed that the 'request queue' did not require byte-range requests that had already been generated, but that a directory would suffice (Reply, para. 72). In doing so, DivX merely expressed a legal opinion to which the court is not bound, as the interpretation of a patent claim is a matter of law (see Alexion v Samsung, para. 18).

Breach of Article 76(2) of the UPC Agreement

26. Nor is there any inadmissible surprise decision.

27. Pursuant to Article 76(2) of the UPC Agreement, decisions on the merits may only be based on grounds, facts and evidence which have been put forward by the parties or introduced into the proceedings by order of the court, and on which the parties have had the opportunity to comment. The parties are thus to be given the opportunity to be heard before a decision affecting their rights is taken, so that they may influence the proceedings and their outcome. As this can be done not only through the presentation of facts but also through legal arguments, Article 76(2) of the UPC Agreement guarantees the parties the right to comment not only on the facts underlying the decision ("facts and evidence") but also on the legal position ("grounds"). In doing so, the court is free to apply the law as it sees fit. The parties are expected to be familiar with the applicable law and the relevant case law, and to anticipate how these will be applied to the specific facts of the case (*Alexion v Samsung, para. 20*). Consequently, Article 76(2) of the UPC Agreement does not impose a comprehensive duty on the court to ask questions, seek clarification or provide information regarding the legal view on which the court intends to base its decision. Rather, the opportunity to comment on the court's legal views under Article 76(2) of the UPC Agreement serves solely to protect against surprise decisions. The adequate guarantee

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the right to be heard requires that the parties, exercising the due care expected in such matters, are able to recognise which submissions may be decisive for the decision. This is because it may ultimately amount to preventing a submission on the legal position if the court relies on a legal point of view without prior notice, or assesses a set of facts or a submission in a manner which even a conscientious and knowledgeable representative would not need to anticipate, given the course of the proceedings to date, even taking into account the diversity of tenable legal views.

28. Measured against these standards, the local division cannot be held responsible for a breach of the right to be heard under Article 76(2) of the UPC Agreement. As explained, the local division was obliged to base its decision on the fact that the Cadmium player forwards the requests to the browser and the browser decides on their transmission (para. 24). Since DivX essentially claimed that, in conjunction with the web browser, the contested Netflix software 'Cadmium' enabled the computer to carry out the protected method, a conscientious and knowledgeable representative would have had to anticipate that the local division would examine whether the contested embodiment configured the computer to carry out the method of the invention even under the circumstances alleged by Netflix.

29. Irrespective of this, it can be ruled out from the outset that the court would have reached a different conclusion had it been given such guidance. In this regard, Netflix merely argues that, had such a point been raised, Netflix would have demonstrated to the local division the scope of the court's jurisdiction. Given the reasoning set out in the decision, it appears unlikely that the local division would have regarded the directory in Sub-list 3—the only one that could be considered a 'request queue'—as such (Statement of Claim, p. 17). As no breach of the scope of the court's jurisdiction is apparent, pointing out such a breach would not have led the local division to reach a different assessment.

III. Examination of infringement with regard to further

embodiments: inadmissible 'fishing expedition'

30. With regard to infringement by versions other than the web browser version (streaming players, games consoles, set-top boxes, Blu-ray players, smartphones and tablets, as well as computers and laptops), the local division referred to the reasoning concerning the web browser version (Cadmium Player) (decision, para. 317). It justified this on the grounds that DivX had argued that the software versions of the Netflix software intended for the various platforms were identical in the functionalities relevant to the patent infringement (Statement of Claim, para. 318). Contrary to Netflix's view – according to the local division – this sufficed to constitute a conclusive submission. Netflix had not substantially contested this submission. Netflix merely argued that DivX had drawn the wrong conclusions from an alleged streaming concept and that, in the absence of a specific submission by DivX, there was no admissible submission. This argument did not hold water. It would have been incumbent on Netflix to comment on any differences between the software variants. As Netflix had not done so, DivX's submission was undisputed (para. 319).

31. Netflix argues that the allocation of the burden of presentation and proof on which the decision of the local division is based amounts to a 'fishing expedition' not provided for in the Rules of Procedure. It remains entirely unclear which functionalities DivX considers to be 'important' for the patent infringement, and what the differences in the technical design are. If Netflix were required to respond to this submission, it would, for example, have to explain all functionalities that might potentially be considered as a request queue or screen.

32. The manifest error alleged by Netflix does not exist. The allocation of the burden of proof and the burden of presentation underlying the local division's decision does not amount to discovery. Netflix would have been able to dispute DivX's submission that the software versions were identical in their essential features in general terms, without any further specification being required. A party making an assertion of fact must substantiate it in the required form if it is contested or is likely to be contested by the other party (UPC Court of Appeal, 3 October 2025, UPC-CoA-534/2024, para. 211, *Belkin v Philips*). As a general rule, a patent proprietor bringing an action for alleged patent infringement must, in the statement of claim, set out for each individual feature of the patent claim that it is embodied in the contested embodiment. DivX complied with this requirement in respect of the Cadmium player. If, as in this case, the patent holder alleges that further embodiments are identical in their essential features, this may, depending on the circumstances of the specific case, suffice to constitute a conclusive submission. In this case, the defendant, in turn, fulfils its burden of proof by disputing, in general terms, that such identity exists. Since it does not appear from Netflix's submission that Netflix has, in any event, disputed DivX's submission in general terms, it cannot currently be assumed that it was manifestly erroneous for the local division to treat the submission regarding identity as undisputed.

Lack of grounds for infringement and an indefinite injunction

33. Netflix complains that DivX has not argued that the other 'non-browser' embodiments are also identical with regard to the elements corresponding to the browser. Such an identity would also be surprising, as it is well known that software solutions for mobile platforms such as Android or iOS do not feature a browser at all. There is therefore a manifest legal error because, in this respect, there is no statement of grounds for infringement; in any event, such a statement would be grossly vague, as one could only speculate as to which other elements, in place of the browser, are intended to maintain the request queue.

34. Nor can a manifest error be affirmed in this respect. Since, in the view of the local division, the suitability of the contested embodiment to carry out the method protected by claim 1 of the patent at issue is also given where the queue is formed by the end device or the browser running on it (decision, para. 278), the mere fact that a browser is not present does not, in the view of the local division, alter the finding of infringement, provided that the requirements for a queue set out by the local division are met. As set out above (para. 32), it is not manifestly erroneous for the local division to have based its decision on the fact that the software versions are identical in their essential functions. If that is the case, however, the local division was entitled to assume that, in software versions without a browser, the queue is at least present in the terminal device.

35. Nor is the operative part of the decision vague. Its scope must be determined on the basis of the grounds given (*Abbott/Sibio*, para. 158).

IV. Interpretation

36. The local division assumed that the procedural step according to feature d2 could be carried out before that of feature c1 (decision, para. 295).

37. Netflix considers this interpretation to be manifestly incorrect, as it is unambiguously clear from the wording that feature c1 cannot be carried out after feature d2. Feature d2 specifically echoes the wording of feature c1, according to which byte ranges are identified that correspond to the media required to play the media sequence in accordance with the user's instructions. Accordingly, feature d2 expressly presupposes that byte ranges have already been identified under feature c1, which would be accessible for the purpose of checking whether the relevant data has already been downloaded. Any other interpretation would contradict the unambiguous wording and would also be logically untenable. According to the claim, prior to the identification of the byte ranges required in accordance with the user's instructions under feature c1, these required byte ranges could not yet exist.

38. This does not demonstrate an obvious error. Feature c1 relates to "the byte ranges", whilst feature d2 concerns "a portion of a byte range". The relationship between the method steps cannot be inferred from the wording. There is no linguistic link such as "the" or "said". Irrespective of this, the interpretation of a patent claim does not depend solely on its exact wording in the linguistic sense. Rather, the description and the drawings must always be taken into account as aids to interpretation of the patent claim (UPC Court of Appeal, 26 February 2026, UPC-CoA-335/2023, NanoString v 10x Genomic). On summary examination, it cannot be established that the local division's view proves to be untenable (see UPC Court of Appeal, 29 October 2024, UPC-CoA-549/2024, para. 60, *Belkin v Philips; Siemens v Hologic, para. 21*).

V. Applications for confidentiality

39. Netflix stated in its statement of defence that, with regard to the applications for disclosure and accounting under Rule 191 and Rule 190.1, second sentence, of the RoP, an order should be made that the information be made available only to specific persons to be named by DivX and that it be subject to an appropriate duty of confidentiality. The information sought by DivX constitutes highly sensitive commercial data which constitutes trade secrets within the meaning of Article 2(1) of Directive (EU) 2016/943.

40. The local division held that there was no application in accordance with Rule 262A of the RoP. Netflix's mere reference to the fact that the information to be disclosed constituted trade secrets was not sufficient for this purpose. Confidentiality obligations could not simply be ordered by the court on this basis, because the intended scope of the obligations was entirely unclear in both substantive and personal terms (decision, para. 331).

41. Netflix unsuccessfully challenges these considerations, in so far as they are relevant here, as manifestly erroneous.

42. If it is foreseeable to the defendant that the information requested relates to trade secrets and other confidential information, the defendant is required to raise this during the main proceedings so that, where necessary, appropriate measures to protect the confidential information can be ordered in the final judgment (UPC Court of Appeal, 14 October 2025, UPC-CoA-699/2025, para. 45, *Kodak v Fuji*; 29 January 2026, UPC-CoA-930/2025, para. 27, *EOFlow v Insulet*).

43. It need not be determined whether the local division went too far in its requirements regarding the form of such an application. Since DivX had already set out in the statement of claim (para. 256, para. 260) that there were no grounds for confidentiality, or that such grounds could be accommodated by the possibility of redacting specific information as provided for in the application, Netflix would have been required to set out in greater detail which information was confidential and for what reasons, and which required protection going beyond the redaction provided for. In any event, the local division's view that the scope of the obligations sought is entirely unclear in substantive terms is not open to criticism. In view of DivX's submissions in the statement of claim, there was also no need for the local division to draw attention to this.

VI. Conflict with the Opposition Division's decision

44. Netflix argues, without success, that, in view of the Opposition Division's decision, the likelihood that the patent at issue will also be revoked with legal effect is so great that the continuation of enforcement proceedings during the course of the present appeal proceedings would unduly prejudice Netflix's interests. The local division should already have stayed the proceedings; in any event, now that the patent at issue has been fully revoked, suspensive effect must be ordered.

45. Pursuant to Article 33(10) of the UPC Agreement and Rule 295(a) of the RoP, the Court may stay proceedings in respect of opposition proceedings concerning the patent at issue if a swift decision by the European Patent Office is to be expected. Where the suspension of infringement proceedings is at issue, this also applies in cases where it can be assumed that an appeal will be lodged against that decision (see UPC Court of Appeal, 21 November 2024, UPC-CoA-511/2024, para. 19, *Meril/Edwards*). This follows from the clear wording (*Meril/Edwards,* para. 20) and the purpose of the Rules, which is to avoid conflicts between decisions in infringement proceedings and decisions of the opposition divisions (*Meril/Edwards,* para. 21). Unlike decisions in parallel nullity and opposition proceedings, decisions in parallel infringement and opposition proceedings may be incompatible. Such conflicts should generally be avoided, even if the decision of the Opposition Division is subject to appeal, which has suspensive effect (*Meril/Edwards*, para. 21).

46. However, the court is not obliged in every case to stay the proceedings concerning the infringement action if a swift decision by the Opposition Division is to be expected. As is apparent from the wording 'may', the decision to stay the proceedings is at the court's discretion. The question of whether or not to order a stay depends on a balancing of interests and the circumstances of the specific case, such as the stage reached in the opposition proceedings, the stage reached in the infringement proceedings, and whether the patent is likely to be revoked in the opposition proceedings. In this context, the

fact that the expected decision of the Opposition Division is not legally binding and is likely to be appealed against is merely one of many factors to be taken into account in the exercise of that discretion (*Meril/Edwards*, para. 22).

47. The court may also consider other measures to avoid conflicting decisions. For example, the court may continue the infringement proceedings and prepare for the oral hearing, whilst postponing the date of the oral hearing to a time after the Opposition Division's decision or the statement of reasons therefor. Alternatively, it may hold the oral hearing as planned and order the parties to inform the court of the outcome of the opposition proceedings, and then decide on the further course of the proceedings on the basis of that information. A further option is to continue the infringement proceedings and make use of the option under Rule 118.2(b) of the RoP (*Meril/Edwards*, para. 25).

48. The local division's decision does not address the question of a stay of proceedings or any of the other possible alternative measures. This does not constitute an error, let alone a manifest error. Netflix has not argued, nor is it apparent, that Netflix has applied for a stay of proceedings or any of the other possible measures. Against this background, it was not necessary to state reasons as to why the local division refrained from ordering a stay.

49. There is neither an error of discretion nor a failure to exercise discretion; the local division's decision is in line with the principles established in Meril/Edwards. It is clear from the grounds of the decision that the local division considered the reasons set out in the qualified notice from the Opposition Division, but was unable to concur with the view expressed therein and therefore wished to continue the infringement proceedings without a stay. This is not open to criticism. As is apparent from Rule 118.2(b), second sentence, of the RoP, a stay must be ordered even in the absence of a corresponding application from the parties only if the local division is of the opinion that the relevant claims of the patent are highly likely to be declared invalid by the final decision in the nullity proceedings or by a final decision of the European Patent Office – provided that the final decision of the European Patent Office is to be expected in the near future.

50. Since the local division was bound to have anticipated the situation that has now arisen and it is not manifestly erroneous that the local division refrained from ordering a stay, the fact that the Opposition Division revoked the patent following the issuance of the contested decision is, for the same reasons as those already set out in the preliminary opinion, and which the local division had already taken into account, is not in itself a ground for ordering that the appeal have suspensive effect.

51. Netflix argues, without success, that the possibility of a conviction for infringement where the Opposition Division takes a different view impairs the defendant's rights of defence. In doing so, Netflix appeals, without success, to Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). This provision grants not only the alleged infringer effective rights of defence, but also the patent proprietor the right to an effective remedy (see Opinion of the Advocate General, 22 February 2024, C-339/22, para. 89, *BSH-Hausgeräte*). The

RoP, in Rule 118.2(b), second sentence, have balanced the conflicting interests in such a way that the patent holder's interest in an effective remedy prevails, at least as long as there is no high probability that the patent will be definitively revoked in the near future.

52. It follows from Article 47 of the Charter of Fundamental Rights that the defendant must, in any event, have an adequate means of defence at their disposal in order to challenge the legal position (see ECJ, 17 November 2022, C-175/21, paras. 32, 59–64, *Hartmann International Industries*). This right to an effective remedy may be invoked solely on the basis of Article 47(1) of the Charter of Fundamental Rights of the European Union, without its content having to be specified by other provisions of EU law or by provisions of the domestic law of the Member States (ECJ, *Hartmann International Industries*, para. 32). Nevertheless, subject to the existence of relevant EU rules, such as those laid down in the Enforcement Directive, it is, in accordance with the principle of procedural autonomy, for the domestic legal system of each Member State to determine the procedural arrangements for such remedies, provided, however, that, in cases governed by EU law, those procedures are no less favourable than in similar cases governed by national law (principle of equivalence), and that they do not render the exercise of the rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness, ECJ, *Hartmann International Industries*, para. 65).

53. The defendant's rights of defence are sufficiently safeguarded by the fact that the defendant may apply to the local division for a stay of proceedings, on which the local division must rule after weighing up the conflicting interests.

54. Neither Article 47 of the Charter of Fundamental Rights of the European Union nor Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 (the Enforcement Directive) implies that conflicting decisions regarding the legal position must be ruled out. Netflix therefore unsuccessfully appeals to judgments of the Court of Justice of the European Union (CJEU) concerning the General Data Protection Regulation, the aim of which is to ensure uniform and consistent application throughout the Union for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data (CJEU, 12 January 2023, C-132/21, para. 54; 28 June 2026, C-414/24, para. 43, *Data Protection Authority*).

VII. No referral to the Court of Justice of the European Union (CJEU)

55. Contrary to Netflix's view, the order granting suspensive effect is also not necessary in order to refer the questions raised by Netflix to the CJEU for a ruling.

56. There is no reason to stay the proceedings pursuant to Rule 266(5), first sentence, of the RoP and to request a ruling from the CJEU pursuant to Article 21 of the UPC Agreement, Rule 266(1) of the RoP in conjunction with Article 267 TFEU on the questions raised by Netflix. As a common court of the Contracting Member States and part of their judicial system, the UPC, in accordance with Article 21, first sentence, of the UPC Agreement – like any national court – cooperates with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, in particular in accordance with Article 267 TFEU. Pursuant to Rule 266(1) of the RoP, at any stage of the proceedings where a question is referred to the Court which the Court considers must be decided by the Court of Justice of the European Union before a judgment can be issued, the Court of Appeal must request a ruling from the Court of Justice on that question. A

No referral is required in the case of questions that are not relevant to the decision or in the case of questions that have already been clarified by the CJEU or whose answer is obvious. For details and the relevant decisions of the CJEU, reference is made to the order of the Court of Appeal in the *expert/Viosys* case (20 August 2025, UPC-CoA-380/2025).

Order granting suspensive effect due to the revocation of the patent by the Opposition Division despite knowledge of the divergent decision of the local division

57. The first question referred for a preliminary ruling essentially concerns whether Article 47(1) and (2) of the Charter of Fundamental Rights of the European Union, Article 19(1), second subparagraph, of the TEU and Article 3(2) of the Enforcement Directive, either individually or taken together, require an interpretation of the relevant procedural rules whereby the suspensive effect of an appeal against an immediately enforceable court order (cease and desist, as well as an obligation to provide information and account) must be ordered where an Opposition Division of the European Patent Office has revoked the patent at issue in its entirety, whilst being aware of a contrary decision on the validity of the patent by the Court of First Instance of the Unified Patent Court, and the decision of the European Patent Office is not yet final.

58. As set out (above, paras. 52–54), it is obvious and requires no further clarification that, when interpreting the procedural rules, Article 47 of the Charter of Fundamental Rights of the European Union and the principles arising from the TRIPS Agreement and the Enforcement Directive must be observed. The Court of Justice of the European Union has already held that, in accordance with the principle of procedural autonomy, it is a matter for the domestic legal system of each Member State to determine the procedural arrangements for legal remedies, whilst observing the principles of equivalence and effectiveness (see paragraph 52 above). It is clearly not possible to infer from EU law that the decision of the Opposition Division takes precedence. The defendant's rights of defence are clearly safeguarded by the fact that the defendant may apply for a stay of proceedings before the local division issues its decision, and that a stay must be ordered if there is a high probability that the patent will be revoked with legal effect in the near future.

59. No other conclusion can be drawn from the fact that the grounds for the European Patent Office's decision are not yet available, and the decision of the Court of First Instance of the Unified Patent Court is enforceable without security, and that, in its decision on the counterclaim for revocation of the patent at issue, the Court justifies its view on the legal position—which diverges from the Opposition Division's preliminary opinion—merely by a different interpretation of the general technical knowledge of the relevant person skilled in the art.

60. It is evident that the interpretation of the Rules of Procedure is a matter for the UPC and that there is no principle under EU law which requires a reasoned decision to stay proceedings even in the absence of a corresponding application by the defendant.

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Infringement of Article 47(2) of the Charter of Fundamental Rights

61. Reference Question 2 essentially concerns the question of whether Article 47(2) of the Charter of Fundamental Rights is to be interpreted as requiring an interpretation or application of the relevant procedural rules such that the suspensive effect of an appeal against a judicial order for patent infringement which is immediately enforceable must be ordered, where the Court of First Instance has based its infringement judgment, in terms of both fact and law, on an allegation of infringement which the court raised for the first time at the sole and final oral hearing on the infringement action, on its own initiative, without a corresponding submission by the claimant and without specific guidance from the court.

62. This question is not relevant to the decision. As set out above (para. 23), there is no lack of corresponding submissions by the claimant.

Confidentiality measures

63. Reference 3 concerns the question of whether Article 47(1) and (2) of the Charter of Fundamental Rights of the European Union, Article 19(1), subparagraph 2 TEU, Article 6(1) and Article 9(2) of Directive (EU) 2016/943, taken individually or as a whole, are to be interpreted as requiring an interpretation of the relevant procedural provisions whereby the suspensive effect of an appeal against an immediately enforceable court order (obligation to provide information and account) for patent infringement must be ordered where the Court of First Instance states in its final decision, without prior notice, no confidentiality measures could be ordered in respect of the information to be disclosed because no application had been made in accordance with Rule 262A of the RoP, even though the defendants had requested in their statement of defence that the disclosure of information and the provision of accounts be made accessible only to specific persons to be named by the Claimant and be subject to an appropriate duty of confidentiality.

64. This question is not decisive. As explained above, it can be left open whether the local division overreached the requirements regarding the form of a confidentiality application (para. 43).

ORDER

I. With the consent of the parties, English is designated as the language of the proceedings in cases UPC-CoA-176/2026 and UPC-CoA-177/2026.

II. Netflix's application for an order granting suspensive effect to the appeal against the decision on the merits of the Munich local division's decision of 15 September 2026, UPC-CFI-465/2025, and all other applications are dismissed.

Issued on 2 November 2026

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Rian Kalden, Chair and legally qualified judge

Patria Rombach, legally qualified judge and judge-rapporteur

Ingeborg Simonsson, legally qualified judge

Klaus Loibner, technically qualified judge

Andrea Perronace, technically qualified judge, is unable to sign in person for technical reasons