

Case No. 549550/2023 UPC- CFI 240/2023

No. App_562298/2023 UPC_CFI_240/2023



LOCAL DIVISION OF MILAN UPC

CFI 240/2023

ORDER REJECTING THE REQUEST UNDER ARTICLE 262.1. ROP
OF THE COURT OF FIRST INSTANCE OF THE UNIFIED PATENT COURT ISSUED ON
9/27/2023

Headnotes: the rule in Article 262.1. (ROP) requires that the application be carried out by a third party - private or public-with respect to the parties to the proceedings.

A lawyer who claims to be the defendant's counsel, asserting that he or she has only a writ of mandamus to access the records of the proceeding but not to enter an appearance, and requests access to the file before the service of the summons is perfected in order to obtain prior knowledge of the records, is not a third party.

Keywords:

Rule 262 1.(B) R.o.P. request (rejected): Non-third party. ECLI

Reference Code: not provided

APPLICANT

Attorney X, counsel for Himson Engineering PVT. LTD for the sole purpose of access to the records

PARTIES TO THE PROCEEDINGS

Oerlikon Textiles GmbH & Co KG	actress
Himson Engineering Private Limited	defendant

PATENT IN QUESTION EP

2,145,848

DECIDING JUDGE

Judge-Rapporteur Alima Zana

LANGUAGE OF THE ACTS

Italian

OBJECT OF THE PROCEEDINGS

Article No. 262.1 (b) R.o.P.

THE PROCEDURAL EVENTS

As part of Case No. 549550/2023 on 8/24/2023 an application was filed pursuant to Article 262.1. (B) of the Rules of the Unified Patent Court by Fabrizio X, a lawyer, requesting access to the contents of the file.

The request is motivated by the fact that the defender-with a mandate issued by the defendant for the sole purpose of accessing the file but not the power to be able to stand up and defend-intends in this way to have prior knowledge of the file prior to the service of the writ.

On 1.9.2023, the judge speaker adopted a preliminary order, in which he invited the parties to submit observations.

Within the Office's allotted time scales, the plaintiff filed his own defense note, censuring the irregularity of the request made by the party, but did not object as long as the defendant's time limit for filing was not changed from the time scales established by Article 23 of the R.o.P.

The petitioner, in turn, within the time limit allotted to him did not object to the latter request, insisting on his own demand.

FORM OF THE APPLICANT'S ORDER

The petitioner requests access to the contents of the file, consisting of the court document and all the attached documents.

REASONS FOR THE DECISION

General considerations

The judge speaker, having read the application and examined the parties' submissions, finds that the application cannot be accepted.

The reasons for the rejection need a brief survey regarding the *rationale* for the instrument invoked here, and its prerequisites.

Rule 262 of the P.O.R. governs public access to the records of the Unified Patent Court. This provision is part of my broad framework governing access to the records of institutions Europe, to implement the principle of transparency (Art. 1 TEU) ultimately directed at strengthening the

democratic principle, as a means of information aimed at ensuring control over the actions of public powers.

This general power of public scrutiny has a particular declination -given the specific function and interests involved- with respect to the courts, as opposed to legislative and administrative bodies.

In particular, the right of access of third parties is regulated before the Unified Patent Court-obliged to respect and apply Union law, see, inter alia, Recital No. 9 Agreement on T.U.B.-by Article 262 of the R.O.P., placing itself within the framework in system that provides -as a general rule- for the publicity of both the proceedings (Art. 45 Agreement) and the decisions and orders adopted by the Court (Art.262, para. 1. 1 R.o.P.) and whose Register kept by the Registry is accessible to the public (Art. 10 Agreement cit.)

As already pointed out in a recent precedent of this Office (see decision of the Unified Patent Court, Munich Central Section, 20.9.2023), the request for access under investigation here has regard only to the written pleadings and evidence filed in the file (Art. 262, 1. R.o.P.), since decisions and orders are automatically public, as mentioned above (Art. 262.1.a R.o.P.).

In order to gain access to the written pleadings and evidence filed in the registry, the interested party must make a reasoned request based on concrete, verifiable and legally relevant reasons that can be scrutinized by the court.

The Court evaluates the application after cross-examination with the parties to the trial, The latter may request that confidentiality be maintained with respect to certain confidential information contained therein (see Art. 262 paragraph 2, R.o.P.).

This last relevant profile, however, is not the only one that the Court -in its position of tertiary and neutral role- must evaluate, Other potentially conflicting interests also come into play that could lead to denying access. This principle is crystallized in Article 45 of the Agreement, which cites among the reasons for refusing access, both public policy profiles (such as issues of public policy and the higher interest of justice) and third party protection profiles (when there are other persons involved).

It follows, therefore, that the possible consent of the already constituted parties to the lawsuit may not be sufficient -in the cases mentioned above- to determine the granting of the request for access.

It follows from the above observations that:

- to the notion of "*Public*" should be included all third parties--public or private--different and distinct from the parties to the trial (who must be heard following the request);
- the application must be supported by a precise, concrete and current reason pertaining to access to the written pleadings and evidence of a trial already pending between other parties, from which the applicant is unrelated;
- parties to the trial may oppose reasons of confidentiality with respect to certain information in the file;
- the consent of the parties to the trial -under certain circumstances- may not be sufficient to enable access.

The case under consideration

That being said in general, the petition cannot be granted since it is uneven both in subjective and objective terms and in terms of the rationale of the institution whose application is invoked.

As for the subjective profile, the party making the claim does not qualify as a third party to the proceedings. This is an advocate who:

- declares that he is acting as a representative of the respondent, prior to the service of the writ;
 - precises that he received the subpoena only to access the file, but not to join the lawsuit;
 - founded his request in the need to be able to examine the file prior to notification Of the introductory act.

In subjective terms, therefore, the petitioner does not qualify as a third party, private or public, unrelated to the litigation, to which the P.O.R. grants the power to use the instrument referred to in Article 262.1. (b).

Therefore, the petitioner is not entitled, by his own perspectives, to exercise the instrument used.

Symmetrically, objectively:

- the petitioner has not made explicit its own independent, concrete and verifiable legitimate interest different from the position of the respondent company;
- the reason for the request consists-in fact-in Himson's interest in having more time to prepare its defenses than the time between the service of the writ and the time limit prescribed by Article 23 of the R.oP. for the purpose of its constitution.
So, it is an internal interest in the procedural dialectic between the parties that does not project to the outside, respect, not reflecting on the proper sphere of the public and the community at large.

As for the *rationale* of the institution, its purpose -that is, to allow the greatest possible transparency of the Court's activities with respect to third parties- is not solicited here and would not be achieved if the application were granted ,since knowledge of the acts and documents remains internal to the procedural relationship between plaintiff and defendant.

Finally and for the sake of completeness: as mentioned, the consent of the already constituted parties to the lawsuit is not sufficient to determine the granting of the application, where other and different interests, referred to in Article 45 of the Agreement, are found to deny access.

Although in the present case the plaintiff does not plead in principle against access, subject to the preservation of established procedural scans, the Court must take into account the position of the "*other parties involved*," here the defendant. Indeed, there is a lack of evidence that Himson -still unincorporated- has given a mandate to the 'petitioner, since:

- power of attorney was not filed (which, in any case, the petitioner claims to possess only for access to the file but not for validly filing a lawsuit);
- the petitioner does not have the CMS system access code delivered to the respondent at the time Of service of the writ of summons.

This appreciation is not precluded by the rule in Article 285 R.o.P. and the related power of the court to ask the lawyer to prove representative power (in the different case in which following the filing of the lawsuit the relevant power is contested by the other party): in fact, the plaintiff has already anticipated that he has not received a litigation mandate from the defendant at present

CONCLUSIONS

The applicant has not provided any allegation that he is a third party to the proceedings, entitled to access by reason of a legitimate, concrete and verifiable -autonomous from that of the parties in lite- to access the registry for the counterfeiting action.

For this reason, the application should be rejected.

PERMISSION TO APPEAL

The importance of the correct interpretation for the system of Article 262.1. (b) of the P.O.R., in light of the Institute's underlying *rationale*, highlighted above, suggests that the appeal should be allowed, also in light of the need for a consistent interpretation, within the system, as expressly indicated by Preamble No. 8 of the P.O.R.

Appeal against this decision is therefore allowed.

ORDER

For these reasons, having consulted the constituted parties, the judge speaker

Dismisses the application.

Order number 569313 in Case No. 549550/2023

UPC number CFI 240/2023

Type of action: counterfeiting

Related Proceedings No. 562298/2023

Type of application: application ex art. 262

R.o.P. So decided in Milan, September 27, 2023

The judge speaker

Alima Zana

The Chancellor

Appeal information

Appeal is permitted. This order may be appealed within 15 days from the service of this order, which is to be considered in this sense as a decision of the Tribunal, (Art. 73.2(b)(ii) of the UPCA and 220.2., 224.1(b) of the Rop.