

EIP

When can third parties obtain access to written pleadings and evidence at UPC?

A judge of the Central court in Munich has recently considered a request by a third party for access to written pleadings and evidence under Rule 262.1(b) in two cases. The judge first determined an access request in a revocation action filed by Sanofi against an Amgen patent and shortly afterwards issued his decision on a similar application in a revocation action filed against a patent in the name of Healios KK, Riken and Osaka University. In both cases he refused the request.

Sanofi-Aventis Deutschland GmbH & Others v Amgen Inc - Order of 20 September 2023 (ORD_55152/2023)

This decision concerns a request under Rule 262.1(b) RoP for access to written pleadings and evidence filed in this revocation action. Rule 262.1(b) RoP states that such documents "shall be available to the public upon reasoned request to the Registry". The Applicant indicated that the request was being made on behalf of 'one of his clients'. The judge consulted the parties (per the procedure in Rule 262.1(b) RoP) and the claimants made an objection noting the Applicant was requesting on behalf of an unknown third party so it was not possible to assess the reason for the request. The Judge-rapporteur issued a Preliminary Order indicating that the request could not be granted and gave the Applicant the opportunity to make further submissions.

The Applicant then made the request in his own name stating he wished to form an opinion on the validity of the patent.

The judge-rapporteur refused the access request. He held that the request has to provide

a “concrete, verifiable and legally relevant reason”.

p2

The judge contrasted the automatic right provided by Rule 262.1(a) which says that decisions and orders “shall be published” with the qualified right of Rule 262.1(b) which requires a reasoned request and provides for consultation of the parties. He rejected the suggestion that this was primarily to do with protection of confidential information as regulated by Rule 262.2 RoP or changes to the drafting consequent on the GDPR.

He said that the change from an ‘automatic system’ to an ‘application based system’ means that the default situation is that “third parties can view the register and note the existence of documents but not their contents” and “reasons have to be provided that justify departing from the default situation”.

He took the view there was no legitimate reason in the present case. The wish to form an opinion on validity of a patent out of personal and professional interest is not a sufficiently concrete, legitimate reason. The judge commented that he did not see that access to the pleadings and evidence would be useful let alone necessary for forming an opinion on validity. The Applicant could look instead at the public prosecution history. He also dismissed the point that a patent “confers rights on the patent proprietor(s) with erga omnes effect” on basis that this does not affect that assessment.

The judge granted leave to appeal.

**Astellas Institute for Regenerative Medicine v Healios KK, Riken & Osaka University –
Order of 21 September 2023 (ORD_552745/2023)**

In this second case the Applicant requested a copy of the statement of revocation and of the letter for service on the patent proprietor. The reason given was “so that [he] can be informed of the proceedings before the Unified Patent Court for the purposes of education and training”.

The claimant opposed the access request arguing that “a third party should not be permitted to use the carefully constructed pleadings (prepared at a not insignificant cost) with a view to advancing its own case or commercial interests”. Further the claimant has “no way of verifying how the knowledge gained from reviewing [its] client’s Statement of Revocation will be applied in practice.”

Relying again on his finding in the first case that request has to contain a “concrete, verifiable and legally relevant reason”, the judge held that the reason given was not a legitimate reason for access to the requested documents.

In relation to the request for a copy of the letter of service the judge also stated that such

a document is not 'written pleadings' or 'evidence' and so there is in any event no legal basis to make this type of document available.

p3

Again, the judge granted leave to appeal.

Comment

To those from a common law background the concept that the public should not have access to the pleadings on which an action is founded is somewhat alien, particularly in the case of a patent revocation action where there is always in the background a public interest that an invalid patent should not remain in force. And, of course, patent attorneys are used to being able to view all the documents filed in opposition proceedings at EPO.

It is not yet known whether either of these decisions will be appealed by the Applicants.