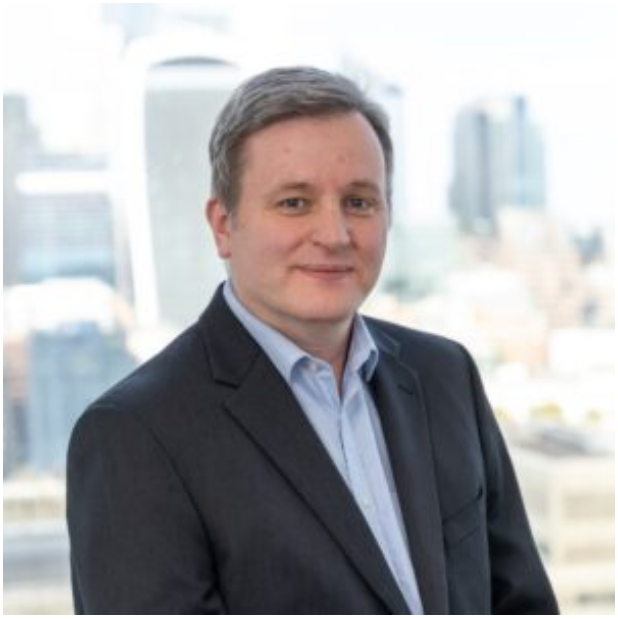
Kluwer Patent Blog

‘Pleadings and evidence in UPC cases should by default be available to third parties’

Kluwer Patent blogger · Thursday, November 30th, 2023

Mathys & Squire has brought a test case to try to improve the transparency of the operations of the Unified Patent Court. The law firm announced this on its website. Kluwer IP Law spoke to Nicholas Fox, partner at the IP firm and one of the people behind the initiative, and asked him what he hopes to achieve.

‘We are looking to clarify the Unified Patent Court’s Rules of Procedure and in particular we are looking to establish a precedent that written pleadings and evidence filed with the court should be available on request unless there are good reasons for keeping such documents confidential.’



I understand you reacted to earlier decisions of UPC divisions concerning the access of documents. Is that correct?

‘Yes. In two earlier cases [1], the Munich section of the central division interpreted the UPC Rules of Procedure to restrict access to documents to third parties who establish they have a “concrete and verifiable, legitimate reason” for accessing documents and evidence filed with the court. We think that this interpretation of the Rules is overly restrictive and should not be followed.

The decisions of the Munich section were referenced in another case, this time in the Nordic-Baltic division where access to written evidence and pleadings was granted. In that case the judge rapporteur suggested that a much lower bar to access was implied by the rules with applicants merely having to provide a “credible explanation for why he/she wants access” to such information and that an application for access “shall be approved unless it is necessary to keep the information confidential”.[2]

Our view is that it is in the interest of transparency and open justice that by default written pleadings and evidence in UPC cases should normally be available to third parties on request.

Exceptions should only be made where there are persuasive, specific and concrete reasons why pleadings and evidence should be confidential.'

What kind of case did you file exactly?
'Our primary filing was a request under Rule 262.1(b) of the UPC Rules of Procedure requesting that the Munich section of the central division make available to us all written pleadings and evidence filed on case no ACT_464985/2023. This is substantially identical to the earlier request previously made by an anonymous third party which was refused by the central division on 21 September 2023.

We cannot be certain of the reasons accompanying the previous request as it is not publicly available. However, we suspect that the previous request did not provide the judge who refused access to the requested documents with the full picture of the Court's obligations under international law, the legislative history of the Rules of Procedure relating to public access to court documents and information on comparative practices in the EPO and national courts as to the factors to consider when permitting or refusing access to court documents. Hopefully, the judge will reconsider in the light of this additional information. If not, we would intend to appeal any decision refusing access to the UPC Court of Appeal.

In addition to our primary request to the UPC central division, we have also applied to make an intervention under Rule 313 of the Rules of Procedure, in the case where the Nordic-Baltic division approved a third-party request to access pleadings and evidence. In that case, an application has been made to stay the order of the Nordic-Baltic division permitting third party access to the pleadings and evidence filed with the court. We have applied to intervene on the grounds that the decision of the Court of Appeal is likely to be determinative of our application before the Munich section and hence we have a legal interest in the outcome of the appeal.'

When do you expect a final decision of the Court of Appeal?
'Probably a decision will be made sometime early next year.'

The accessibility of documents at the UPC has been an issue for years. Could you explain why this is such a controversial topic?
'There are differences of approaches in the national courts to access to documents. Some courts take the view that legal proceedings are private matters and that access to court documents should therefore be restricted. Other courts have a much more open approach which we have mentioned in our application.

By way of example, pleadings in English proceedings are automatically available on request. Similarly, written documents and evidence are automatically available on request in Swedish litigation and indeed the principle of public access (*"offentlighetsprincipen"*) is considered an essential principle of Swedish constitutional law. Possibly, the best example of openness relevant to the kinds of cases which will be dealt with by the UPC is the European Patent Office, which makes all pleadings and evidence in opposition proceedings available to the public on its website, unless a party provides specific and concrete reasons as to why public access would be prejudicial to specific and concrete personal or economic interests.

We are not taking the position that everything filed with the court must always be available for public access. It is inevitable that there will on occasions be good reasons to keep information off the public record, be that because it relates to personal information or business or trade secrets.

Rather, our position is that when assessing their obligations under the Rules of Procedure, the default should be that evidence and pleadings should be accessible on request and that access should only be denied if there are good grounds for doing so.'

Are you satisfied with the way access to documents has been laid down in the UPCA and the Rules of Procedure?

'Public access to documents has been enshrined in the UPC Rules of Procedure from very early on in the drafting process. Early drafts of what became Rule 262 simply stated that:

"*Written pleadings and written evidence lodged at the Court and recorded by the Registry shall be available to the public for on-line consultation, unless a party requests that certain information be kept confidential and the Court makes such an order*."

However, it is evident that the Drafting committee struggled to combine this principle of openness with a mechanism to enable the Court to keep sensitive information, such as trade secrets or personal information, off the public record. The final form of the Rules does provide a process for doing just that. The rules provide parties to litigation with an opportunity to comment before a judge decides on whether to make documents public. There is absolutely nothing wrong with that approach. What we are taking issue with is whether access to court documents should be restricted to third parties with a concrete and verifiable, legitimate reason for accessing documents or whether it is a right available to the public at large.'

So far, we've talked about the legal side of the access to documents. But there have also been a lot of complaints about the practical side: the CMS which hasn't been functioning too well. Do you have experience with this?

'Filing the request with the Munich section generally passed without a hitch. The only real problem was the tendency of pdf files to inexplicably explode in size when being converted to pdf-a format so that they can be "signed" before filing. The CMS system has a limit on the size of files that it accepts and what would appear to be a perfectly acceptable document for filing would be pushed over this limit by the conversion process, which meant that we had to divide our evidence into smaller parts.

Rather more significantly, we did have problems with filing our application for intervention in the Nordic Baltic appeal. We don't know why but the CMS system refused to acknowledge the existence of that case and hence it was impossible to use the CMS to file our request. In the end we had to resort to asking local attorneys to file our request into the court in Luxembourg by hand. Our help ticket, asking for assistance to resolve this issue so that we can file the application electronically, is still outstanding.'

The UPC has been functioning for half a year now. What is your overall impression. Is this an improvement for the IP-intensive industry?

'Undoubtedly, the Unified Patent Court is an improvement on having to enforce European patents in national courts on a country-by-country basis. Some teething problems are only to be expected. But all the evidence to date is that the UPC will be an improvement on what has gone before.'

[1] Order no. 550152 in ACTION NUMBER: ACT_459505/2023 issued 20 September 2023 (UPC number UPC_CFI_1/2023) & Order no. 552745 in ACTION NUMBER: ACT_464985/2023 issued on 21 September 2023

[2] Order No. 543819 in ACTION NUMBER: ACT_459791/2023 issued on 17 October 2023

(UPC number UPC_CFI_11/2023)

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