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The “UPC-saisie” Netherlands Style: the New Trend to Come? “Oh Djadja, Y a pas moyen Djadja”

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Forget about Gangnam Style, it is overrated. Aya Nakamura Djadja is more than ever the dance-floor song of the moment (especially since her performance at the 2024 Olympics Game opening ceremony). Is Joost Luchtballon able to dethrone the French Queen? Same question for UPC: after the French and the Italian Styles, now we also have the “UPC-saisie” Netherlands Style, can it dethrone the oldest ones? In any case, from a personal point of view, I would be happy to try it, if any interesting trade-show takes place in the Netherlands (*UPC_CFI_554/2024, Local Division in the HAGUE, September 25, 2024, Data Detection Technologies Ltd vs. Doytec Automation Ltd*).

Here are the facts of our new UPC-saisie Style. At the “Seeds meets technology 2024” (SMT) trade-show, held in the Netherlands from 24 to 26 September 2024, employees of DATA DETECTION TECHNOLOGIES LTD (“DDT”), which is the owner of a European patent EP713 (protecting a method and apparatus for obtaining accurate counting and division of individual items from bulk quantities into single packages), noted that DOYTEC AUTOMATION LTD (“Doytec”) was exhibiting a seed-counting machine (“C-1012”) reproducing with high plausibility, in their view, claims 1 to 8 of patent EP713.

As the proof of the alleged infringement could only be obtained by means of an evidence preservation order DDT filed, on 25 September 2024, an *ex parte* evidence preservation application with the Local Division in the Hague (“the Court”), seeking the physical seizure of C-1012 and all its technical, promotional and commercial documentation, during the SMT exhibition. On 25 September 2024, the Court issued the order, immediately enforceable under rule 196.3 RoP, authorizing the seizures requested by DDT. Firstly, the Court considered that the reasonably available evidence had been provided by DDT that, on the one hand, it had no reason to doubt the validity of the patent in question, the applicant having sufficiently proven the validity of its patent EP713 in view of the absence of opposition/revocation action filed against it, and that, on the other hand, the suspicion of patent infringement by Doytec seemed plausible. Secondly, the Court considered that the application for ex-partes was sufficiently motivated in view of the extreme urgency of the situation, with the exhibition closing on 26 September, and the fact that the evidence might no longer be available once the exhibition was over, since Doytec was based in China, and the technical and commercial documentation relating to the C-1012 machine could easily be destroyed or cease to be available.

This order, particularly favorable to the applicant, is an illustration of the speed with which the UPC judges issue their orders, and therefore of their ability to deal with the urgency of an

infringement situation, the Court having granted the seizure on the very day of the application, without hearing the defendant and without making the enforceability of the measure conditional on the provision of the security provided for in rule 196.6 RoP. The Court follows the same simple reasoning as the other ones with have had to deal with this kind of request up until now (LD Paris, 14 November 2023, UPC_CFI_397/2023; LD Milan, 25 September 2023, UPC_CFI_286/2023 and UPC_CFI_287/2023, and LD Milan, 13 June 2023, UPC_CFI_127/2023), checking in particular, successively.

- Its competence.
- That the request complies with the provisions of rule 192.2 RoP relating to the content of the application and the concise description of the future proceedings on the merits (the mere assertion by the applicant that it will initiate proceedings on the merits against the defendant is sufficient);
- That the applicant provides reasonably available evidence of its rights on a valid patent and of the alleged infringement (article 60 UPCA).
- That the urgency and the absence of a hearing of the defendants be justified (rules 194.2 and 197 RoP).
- That the balance of interests must be respected.

Furthermore, following the same reasoning as French case law on saisie-contrefaçon, it is sufficient for the Court to consider that the burden of proof requirement has been met if the evidence provided by the applicant, which is reasonably accessible, renders the suspicion of patent infringement plausible (e.g., Paris Court of First Instance, 7 September 2021, RG n° 15/06549, the applicant must provide "*reasonably accessible evidence, establishing by a minimum of documents the reality of the alleged infringement, without however requiring proof or prima facie evidence thereof, which the measure is precisely intended to establish*"). In the present case, the following evidence is deemed sufficient to raise a plausible suspicion of infringement: the applicant's explanation of the method and apparatus protected by its patent EP713, the written testimony of two of his employees, and the detailed comparison of the C-1012's operating features as observed at the SMT exhibition.

To establish the need for *ex-parte* proceedings in accordance with rule 197.1 RoP, the Court relies here on the elements usually taken into consideration in similar cases, i.e. a threshold which remains particularly low. In the same vein, the Milan local division noted in an order dated 13 June 2023 that the need for *ex-parte* proceedings was justified in view of the risk that the evidence would no longer be accessible once the show was over (i.e. June 14, 2023), the defendant being a foreigner, and the documents easy to conceal or destroy. In contrast, while it also held that the parties could not be summoned before the end of the fair, due to excessively tight deadlines (LD Milan, 13 June 2023, UPC_CFI_127/2023), in the present commented order the Court confined itself to the risk of destruction of evidence.

The application of the principle of proportionality by the Court remains also favorable to the applicant since, where judges have sometimes been able to rely on specific circumstances such as the position of the parties (the applicant being a small company and the defendant one of its former clients, see LD Paris, 14 November 2023, UPC_CFI_397/2023/ORD_587064/2023) to justify a preponderant risk for the applicant, in this case, the Court merely states, without justification, that the threat of definitive loss of evidence to the applicant is greater than the defendant's exposure to the enforcement of the measures requested.

However, the Court is less laconic on the question of confidentiality, and therefore on the question of the disclosure of the information gathered by the applicant. In fact, after having established the modalities of execution of the seizure, entrusting a technical expert (patent attorney) with this task, assisted by a Bailiff, it follows the applicant's reasoning to the effect that DDT should not be authorized to be present during the execution of the order, and that no information should be communicated to them, so that the obligation to respect confidential information can be respected, in accordance with article 60. 1 UPCA and 7.1 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

However, the Court points out that the procedure initiated based on article 60 UPCA, while aimed at preserving evidence, is also aimed at disclosing the evidence to the applicant, such disclosure remaining indispensable with regard to the legitimate aim pursued by the seizure, i.e. the use of the evidence in proceedings on the merits (Court of Appeal, July 23, 2024 -Apl n° 20002/2024-UPC CoA no.177/2024). This necessary respect, on the one hand for the protection of confidentiality, which requires the defendant to be heard on the disclosure of evidence that may contain such information, and on the other hand for the legitimate purpose pursued by a request to preserve evidence, thus leads the Court to consider the level of caution suggested by the applicant reasonable, and consequently to postpone the applicant's accessibility to the seized information until October 30, 2024, unless the defendants have in the meantime made use of the possibility offered to them to request confidentiality.

Regarding confidentiality, the order is not the best a patentee could get. From what I understood, it is close to what we are doing in Belgium also: an expert will set what can be disclosed or not after the seizure. Of course it is a good protection for the seized company. But it also less aggressive for the patentee, especially since the seizure is already lead by an Expert appointed by the Court (who could be solely accompanied by a representant of the patentee). In other words, for a trade show where you only want to seize a product, like in the case reported, it is not a problem. On the contrary, for an ordinary saisie in which the patentee wants to seize as much relevant documents as possible, I would (with no doubt) use a French saisie.

Thus, the Dutch Division demonstrated the UPC capacity to handle quickly and efficiently a UPC saisie but also confirmed the latter is less aggressive (and so less favorable to the patentee) than her old French cousin. As such, the saisie Netherlands Style will not be the new patent Gangnam Style, we still have to listen (or sing or dance) Djadja (only the day you are performing a saisie, don't be worry): *"Oh Djadja, Y a pas moyen Djadja."*

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