

# EIP



## UPC Court of Appeal Confirms Deadline to Appeal Orders

AIM Sport Vision v Supponor UPC\_CoA\_500/2023

Order of 26 April 2024 (ORD\_23089/2024)

There has been confusion in some of the first instance divisions of the Unified Patent Court as to whether certain judgments constitute a “Decision” which under Article 73(1) UPCA is appealable within 2 months of notification of the decision, or an “Order” which under Article 73(2)(a) UPCA is appealable within 15 days of notification of the decision. For example, the decision granting a provisional injunction to 10x Genomics against Nanostring[1] wrongly indicated the appeal deadline as 2 months, but the question of whether that was the correct deadline did not arise because the appeal was filed very soon after anyway (Order was dated 19 September 2023 and appeal was filed 26 September 2023). The correct deadline in this type of situation was confirmed in the later decision between the same parties refusing a provisional injunction in relation to a different patent.[2]

The Court of Appeal has now clarified that the two-month appeal deadline for a “Decision” only applies to a final decision on the merits of the case, and not, for example, to a grant or refusal of provisional measures, which constitute an “Order” to which the shorter appeal deadline applies.

The UPC Local Division in Helsinki had refused AIM Sport's application for a provisional injunction and dismissed the infringement action, on the ground that the UPC did not have competence over the patent because it had been opted out (and the purported withdrawal of the opt out was ineffective because of pre-existing national litigation over the patent). The decision, dated 20 October 2023 stated:

#### INFORMATION ABOUT APPEAL

The present decision dismissing the actions constitutes a final decision of the Court of First Instance and may be appealed by the unsuccessful party within two months of the date of the notification of the decision (Article 73(1) UPCA, R.220.1(a) and R.224.1(a) RoP).

AIM Sport filed an appeal on 20 December 2023. The judge-rapporteur invited the parties to comment on the apparent non compliance with R.224.1(b) RoP, according to which the time period for lodging an appeal against an order referred to in Rule 220.1(c) RoP – which includes orders referred to in Art. 60 [orders to preserve evidence] and Art. 62 [provisional and protective measures] UPCA – is 15 days of service of an order.

The Court of Appeal did not agree with AIM Sport's submission that there was effectively only a single action – it considered that infringement proceedings (with a request for a permanent injunction) on the one hand and provisional measures proceedings (where a request for provisional measures may be made) are treated as different proceedings, and that these actions are dealt with separately in the UPCA (Art. 32.1(a) and Art. 32.1(c) UPCA respectively) and also in the RoP (Part 1, Chapter 1, section 1 and Part 3 respectively).

Accordingly when the Court of First Instance finally decides in infringement proceedings, the form of decision is a "final decision" as meant in R.220.1(a) RoP, whether it allows or rejects the request(s). When the Court of First Instance decides in provisional measure proceedings, it does not decide in a "final decision" but in an Order. Consistent with this analysis, R.220.1(c) RoP mentions "orders referred to in Articles (...) 60, 61, 62 (...) of the Agreement".

Moreover, Article 62 UPCA states "The Court may, **by way of order**, grant injunctions (...)". AIM Sport argued that when an injunction is granted, this is by way of an order and that when an injunction is rejected, this would be by a final decision, but the Court of Appeal disagreed, pointing out that this would lead to a situation where the time period for filing a statement of appeal would be different depending on whether the request is allowed (15 days after service) or denied (two months after service).

Accordingly, the Court of Appeal held that the Court of First Instance should have issued

an order in the provisional measure proceedings, separate from the decision in the infringement proceedings, even when both requests were in fact denied for identical reasons and even if combined in one and the same document. In addition, the “Information about appeal” in the decision should have distinguished between the separate proceedings, such that in the infringement proceedings the time period of two months applied and in the provisional measure proceedings the applicable time period was 15 days.

However, in the particular circumstance that the original decision has indicated the wrong deadline, and notwithstanding that the time period for lodging an appeal is a mandatory time limit that cannot be extended (see R.9.4 RoP), the Court of Appeal held that an excusable error had occurred justifying a derogation from that rule. Therefore, the Court of Appeal held that the principle of the protection of legitimate expectations under these exceptional circumstances require that AIM Sport should be allowed to rely on the information provided by the Court of First Instance that the applicable time period for lodging the Statement of appeal was two months, apparently in relation to the action for provisional measures as well as the main action for infringement.

The judgment contains a warning that future appellants may not be so lucky, noting that in another case in which the Court of First Instance incorrectly suggests that the time limit for lodging an appeal against a rejection of a preliminary measure is two months, the outcome may be different, as the Court of Appeal now has clarified the wording used in R. 220.1(c) RoP in this order.

[1] Reported here <https://eipamar.com/en/knowledge-hub/article/10x-genomics-v-nanostring/> ; Order with English translation is here <https://www.unified-patent-court.org/en/node/419>

[2] Reported here <https://eipamar.com/en/knowledge-hub/article/10x-genomics-not-successful-second-time-around/>