



Reference numbers:
APL_21943/2024
UPC_CoA_188/2024

Order
of the Court of Appeal of the Unified Patent Court
issued on 3 September 2024

HEADNOTES:

- 1) Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation must be interpreted as meaning that the UPC has international jurisdiction in respect of an infringement action where the European patent relied on by the claimant has effect in at least one Contracting Member State and the alleged damage may occur in that particular Contracting Member State. Where the damage is allegedly caused via the internet, the likelihood of such damage may arise from the possibility of obtaining products and/or using services from an internet site accessible within the territory of the Contracting Member State where the European patent has effect.
- 2) The identification of the place where the harmful event occurred or may occur within the meaning of Art. 7(2) of the Brussels I recast Regulation, does not depend on criteria which do not appear in this provision and which are specific to the examination of the merits, such as the conditions for establishing an indirect infringement within the meaning of Art. 26 UPCA.
- 3) The place “where the actual or threatened infringement has occurred or may occur” as referred to in Art. 33(1)(a) UPCA must be interpreted in the same way as the place “where the harmful event occurred or may occur” of Art. 7(2) of the Brussels I recast Regulation is interpreted in relation to alleged patent infringements.
- 4) The list of preliminary objections of R. 19.1 RoP must be regarded as exhaustive. The application of R. 19 to 21 RoP therefore cannot be extended to other defences, such as abusive procedural conduct and manifest lack of foundation.

KEYWORDS:

Appeal; International jurisdiction; Competence of a division; Parallel proceedings before a national court; Preliminary objections

APPELLANTS (DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1. AYLO PREMIUM LTD

195-197 Old Nicosia-Limassol Road, Block 1 Dali Industrial Zone, 2540 Nicosia, Cyprus

2. AYLO BILLING LIMITED

The Black Church, St Mary's Place, Dublin 7, D07 P4AX, Dublin, Ireland

3. AYLO FREESITES LTD

195-197 Old Nicosia-Limassol Road, Block 1 Dali Industrial Zone, 2540 Nicosia, Cyprus

represented by attorneys-at-law Prof. Dr. Tilman Müller-Stoy and Conor McLaughlin (Bardehle Pagenberg)

RESPONDENTS (CLAIMANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1. DISH TECHNOLOGIES L.L.C.

9601 South Meridian Boulevard, 80112 Englewood (CO), United States

2. SLING TV L.L.C.

9601 South Meridian Boulevard, 80112 Englewood (CO), United States

represented by attorney-at-law Denise Benz (Allen Overy Shearman Sterling)

PATENT AT ISSUE

EP 2479680

PANEL AND DECIDING JUDGES

First panel

Klaus Grabinski, President of the Court of Appeal

Françoise Barutel, Legally qualified Judge

Peter Blok, Legally qualified judge and judge-rapporteur

Eric Augarde, Technically qualified judge

Klaus Loibner, Technically qualified judge

LANGUAGE OF THE PROCEEDINGS

German

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Order of the Court of First Instance of the Unified Patent Court, Local Division Mannheim of 5 April 2024

- Reference numbers: App_10821/2024
 ACT_594191/2023
 UPC_CFI_471/2023
 ORD_18206/2024

FACTS AND REQUESTS OF THE PARTIES

- 1) The respondent sub 1 (hereinafter: DISH) is the registered proprietor of European Patent 2479680 (hereinafter: the patent at issue). The respondent sub 2 (hereinafter: SLING) is the exclusive licensee of DISH.

- 2) The patent at issue concerns a method for presenting rate adaptive streams. The language of the patent at issue is English. Claim 1 of the patent at issue reads as follows in a version structured by DISH and SLING:

1	A method for presenting rate-adaptive streams, the method comprising:
1.1	streaming by a media player operating on an end user station a video from a set of one or more servers,
1.2	wherein each of a plurality of different copies of the video is encoded at a respective different bit rate and each copy is encoded as multiple files on the set of servers,
1.2.1	wherein each of the multiple files independently encapsulates a different portion of the video for playback,
1.2.2	wherein the multiple files across the different copies yields the same portions of the video on playback,

1.2.3	each of said files having a time index indicating the position of the content in that file in relation to the beginning of the video such that the files whose playback is the same portion of the video for each of the different copies have the same time index in relation to the beginning of the video,
	and wherein the streaming comprises:
1.3	requesting by the media player a plurality of sequential ones of the files of one of the copies from the set of servers over one or more Transmission Control Protocol (TCP) connections based on the time indexes, wherein each file is individually requested by one or more respective HTTP requests over the one or more TCP connections;
1.4	automatically requesting by the media player from the set of servers over the one or more TCP connections subsequent portions of the video by requesting for each such portion one of the files from one of the copies dependent upon successive determinations by the media player to shift the playback quality to a higher or lower quality one of the different copies, wherein each file is individually requested by one or more respective HTTP requests over the one or more TCP connections, said automatically requesting including,
1.4.1	regularly generating a set of one or more factors indicative of the current ability to sustain the streaming of the video using the files from different ones of the copies,
1.4.1.1	wherein the set of one or more factors relate to the performance of the network; and
1.4.2	making the successive determinations to shift the playback quality based on at least one of the set of factors to achieve continuous playback of the video using the files of the highest quality one of the copies determined sustainable at that time; and
1.5	presenting the video by playing back with the media player on the end user station the requested files in order of ascending playback time.

- 3) The appellants (hereinafter: AYLO) are companies that offer video streaming services.
- 4) DISH and SLING brought an infringement action against AYLO and three other parties before the Mannheim Local Division of the Court of First Instance. DISH and SLING request, inter alia, that the Court order AYLO to cease and desist from indirectly infringing claims 1, 3, 5, 6, 8 and 11 of the patent in suit in a number of Member States of the Agreement on a Unified Patent Court (hereinafter: UPCA), including Germany. In their Statement of claim they submitted the following,

on p. 3:

5. The competence of the Local Division Mannheim follows from Art. 1, Art. 33(1)(a) UPCA, since the defendants offer and supply the contested video files and media players worldwide via the websites of the aforementioned streaming services and thus also infringe the patent in suit in the Federal Republic of Germany.

on p. 10:

1. The claimants allege indirect infringement of European Patent No. 2 479 680 [...] by the defendants in the Republic of Austria, the Federal Republic of Germany, the Kingdom of Denmark, the Republic of Finland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Kingdom of Sweden for so-called "streaming" by means of video files and media players offered and delivered via the Internet.

2. By offering and supplying the video files made available for streaming and the media players for streaming videos, the defendants indirectly infringe the patent in suit at least indirectly to the extent claimed. The contested video files and media players are means that relate to an essential element of the invention of the patent in suit.

and on p. 28-29:

1. The attacked embodiments are various streaming services of the defendants. The Defendants offer media players which, when operating on end-user stations, access and stream the Defendants' video files, which can be accessed inter alia, but not exclusively, via the streaming services [various websites].

2. The video files and media players offered and supplied infringe the patent in suit to the extent claimed when they are used by users as intended by streaming videos with internet-enabled end devices - for example PCs, tablets or mobile phones. [...]

3. The offering and supply of the attacked embodiments in the member states listed in the statement of claim is carried out by all of them in the Federal Republic of Germany through the above-mentioned websites, via which the defendants make video files and media players that work on end-user stations available to users for playing such video files - possibly after taking a paid subscription. They are used in the context of streaming videos, i.e. the method of displaying rate-adaptive video streams according to the patent in suit.

5) AYLO lodged a preliminary objection. To the extent relevant to the appeal proceedings, AYLO requested:

- I. that the infringement action be dismissed for lack of jurisdiction of the UPC (R. 19.1(a) of the Rules of Procedure of the Unified Patent Court, hereinafter: RoP);
- II. as an auxiliary request to request I, that the action be dismissed for lack of competence of the Mannheim Local Division (R. 19.1(b) RoP);
- III. as an auxiliary request to request II, that the action be dismissed as manifestly bound to fail (R. 19.1 in conjunction with R. 361 RoP);
- IV. as an auxiliary request to request III, that the action against defendant no. 2 be dismissed as manifestly bound to fail (R. 19.1 in conjunction with R. 361 RoP).

- 6) DISH and SLING requested that the Court reject the preliminary objection.
- 7) In the order of 5 April 2024 (hereinafter: the impugned order), the judge-rapporteur of the panel of the Court of First Instance rejected the preliminary objection. The reasoning of the judge-rapporteur, to the extent relevant to the appeal proceedings, can be summarised as follows:
- It can be left open whether the deadline for lodging preliminary objections was met by all defendants;
 - The UPC has international jurisdiction for the infringement action pursuant to Art. 31 UPCA in conjunction with Art. 71b(1) and 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) as amended by Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 (hereinafter: Brussels I recast Regulation). The alleged indirect patent infringement concerns the offer and supply of video files and/or the media players required for streaming. The files and the media players are offered and supplied to customers in Germany according to the – to this extent undisputed – submissions by DISH and SLING. Following the case law of the Court of Justice of the European Union (hereinafter: CJEU), the Court does not need to assess whether these acts constitute an (indirect) infringement when examining whether it has international jurisdiction;
 - The other arguments put forward by AYLO – that the action is abusive and manifestly unfounded – are not grounds for a preliminary objection within the meaning of R. 19.1 RoP. These arguments are therefore not to be taken into account in the context of the decision pursuant to R. 20.1 RoP. Rather, the assessment will be made in the final decision on the merits, if necessary.
- 8) AYLO lodged an appeal against the impugned order. In its Statement of appeal AYLO requests that the Court of Appeal:
- I. set aside the impugned order;
 - II. allow the preliminary objection in accordance with request I or the auxiliary requests II to IV.

AYLO's grounds of appeal can be summarised as follows:

- The UPC has no international jurisdiction on the basis of Art. 7 sub (2) in conjunction with Art. 71b sub (1) of the Brussels I recast Regulation or any other provision;
- Art. 7 sub (2) of the Brussels I recast Regulation requires a conclusive argumentation in respect of the alleged infringement on the territory of the Contracting Member States;
- The Statement of claim does not contain a conclusive argumentation. DISH and SLING have not submitted that AYLO's websites are intended to be used for putting the patented method into effect within the territory of the States party to the UPCA (hereinafter: Contracting Member States). According to AYLO, DISH and SLING stated that video files and media players are available through these websites, but did not put forward that these are intended to be used within the territory of the Contracting Member States. Nor have they submitted that the alleged use of the patented method involves servers located in a Contracting Member State;
- The case law of the CJEU on the interpretation of Art. 7 sub (2) of the Brussels I recast Regulation in the context of trade mark infringements cannot be applied in cases concerning indirect patent infringements, which have a double territorial restriction;
- It follows from the CJEU case law that the claimant must submit all objective characteristics of the alleged tort, such as the use of the claim features of a patent;

- For the same reasons, the Mannheim Local Division does not have competence on the basis of Art. 33(1)(a) UPCA. DISH and SLING did not conclusively argue an indirect infringement of the patent in suit in Germany;
 - The legal concept underlying Art. 30(2) of the Brussels I recast Regulation prevents the abusive initiation of multiple proceedings. Such abuse also entails a violation of the fundamental right to a fair trial and a conflict with the functioning of the internal market within the meaning of Art. 26 of the Treaty on the Functioning of the European Union (hereinafter: TFEU);
 - Manifest lack of foundation is an unwritten preliminary objection. Even if it were not a preliminary objection, the Court of First Instance should have decided on it;
 - AYLO filed the preliminary objection in a timely manner. Pursuant to R. 271.6(b) RoP, service is deemed to take place on the tenth day following posting of the statement. In view thereof, AYLO was served with the Statement of claim not before 28 January 2024. Moreover, the Court's case management system indicates 28 January 2024 as the date of service.
- 9) DISH and SLING responded to the appeal requesting that the Court of Appeal reject the appeal. Their response can be summarised as follows:
- The appeal must be rejected because it is unfounded;
 - The impugned order is correct, as none of the grounds of R. 19.1 RoP apply;
 - The objections of AYLO are unfounded because AYLO commits acts of infringement within the territory of the Contracting Member States and in the Federal Republic of Germany via their globally accessible websites, irrespective of the location of their servers and the top-level domain;
 - Whether the alleged acts of the defendants constitute patent infringement is a question of the merits of the action;
 - The list of preliminary objections given in R. 19.1 RoP is exhaustive. AYLO's submissions relating to manifest lack of foundation and abusive litigation must therefore be disregarded. In addition, these submissions are unfounded;
 - The preliminary objection by appellant sub 2 was not filed within the applicable time limit and is therefore inadmissible.

GROUNDS FOR THE ORDER

Principles for the interpretation of Article 7(2) of the Brussels I recast Regulation

- 10) The UPC is a common court within the meaning of Art. 71a(1) of the Brussels I recast Regulation (Art. 71a(2)(a) of the Brussels I recast Regulation). Therefore, the UPC has jurisdiction where the courts of a Contracting Member State would have jurisdiction under the Brussels I recast Regulation in an action within the meaning of Art. 32(1) UPCA (Art. 71b(1) of the Brussels I recast Regulation).
- 11) Under Art. 7 sub (2) of the Brussels I recast Regulation, the courts of a Contracting Member State would have jurisdiction in an infringement action within the meaning of Art. 32(1)(a) UPCA against a person domiciled in an EU Member State where the harmful event occurred or may occur in that Contracting Member State.
- 12) In accordance with settled case-law of the CJEU, Art. 7(2) of the Brussels I recast Regulation (and the identical provision of Art. 5(3) of Regulation 44/2001) must be interpreted as follows:

- i) The provisions of the Regulation must be interpreted autonomously, by reference to its scheme and purpose (see CJEU 16 May 2013, C-228/11, ECLI:EU:C:2013:305, *Melzer*, paragraph 22). There is no basis for interpreting Art. 7(2) of the Brussels I recast Regulation by reference to the applicable rules on non-contractual civil liability (see ECJ 19 September 1995, C-364/93, ECLI:EU:C:1995:289, *Marinari/Lloyd's Bank*, paragraph 19);
- ii) The expression 'place where the harmful event occurred or may occur' in Art. 7(2) of the Regulation is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (see, *Melzer*, paragraph 25);
- iii) First, it is clear from that case-law with respect to allegations of infringements committed via the internet that the place where the alleged damage occurred within the meaning of Article 7(2) may vary according to the nature of the right allegedly infringed (see, CJEU 3 October 2013, C-170/12, ECLI:EU:C:2013:635, *Pinckney/KDG Mediatech*, paragraph 32, and 19 April 2012, C-523/10, ECLI:EU:C:2012:220, *Wintersteiger/Products 4U*, paragraphs 21 to 24);
- iv) Second, the likelihood of the damage occurring in a particular Member State is subject to the requirement that the right in respect of which infringement is alleged is protected in that Member State (see, *Pinckney*, paragraph 33, and *Wintersteiger*, paragraph 25);
- v) Finally, it is clear from that case-law that in order to attribute jurisdiction to a court to hear an allegation of infringement in matters of tort, delict and quasi-delict, the identification of the place where the alleged damage occurred also depends on which court is best placed to determine whether the alleged infringement is well founded (see, *Pinckney*, paragraph 34, and *Wintersteiger*, paragraph 27);
- vi) The allegation of an infringement of an intellectual and industrial property right, in respect of which the protection granted by registration is limited to the territory of the Member State of registration, must be brought before the courts of that State. It is the courts of the Member State of registration which are the best placed to ascertain whether the right at issue has been infringed (see, *Pinckney*, paragraph 37, and *Wintersteiger*, paragraphs 25 and 28, with respect to national marks);
- vii) The issue as to whether the conditions under which a right protected in the Member State in which the court seized is situated may be regarded as having been infringed and whether that infringement may be attributed to the defendant falls within the scope of the examination of the substance of the action by the court having jurisdiction (see, *Pinckney*, paragraph 40, and *Wintersteiger*, paragraph 26). At the stage of examining the jurisdiction of a court to adjudicate on damage caused, the identification of the place where the harmful event giving rise to that damage occurred for the purposes of Article 7(2) of the Brussels I recast Regulation cannot depend on criteria which are specific to the examination of the substance and which do not appear in that provision. Article 7(2) lays down, as the sole condition, that a harmful event has occurred or may occur (see, *Pinckney*, paragraph 41);
- viii) Thus, unlike Article 17(1)(c) of the Brussels I recast Regulation, which was interpreted in Joined Cases C-585/08 and C-144/09, Article 7(2) thereof does not require, in particular, the activity concerned to be 'directed to' the Member State in which the court seized is situated (see, *Pinckney*, paragraph 42);
- ix) It follows that, as regards an alleged infringement of a copyright, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the court seized if the Member State in which that court is situated protects the copyrights relied on by

the plaintiff and the alleged damage may occur within the jurisdiction of the court seised; That likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction of the court seised (see, Pinckney, paragraphs 43-44).

13) In the light of this case-law, Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation must be interpreted as meaning that the UPC has international jurisdiction in respect of an infringement action where the European patent relied on by the claimant has effect in at least one Contracting Member State and the alleged damage may occur in that particular Contracting Member State. Where the damage is allegedly caused via the internet, the likelihood of such damage may arise from the possibility of obtaining products and/or using services from an internet site accessible within the territory of the Contracting Member State where the European patent has effect.

UPC has international jurisdiction

14) In the light of the foregoing, the Court of First Instance rightly held that the UPC has jurisdiction in this case pursuant to Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation.

15) The harmful event put forward by DISH and SLING in their Statement of claim is that AYLO through its websites offers and supplies video files and media players to end-users in, inter alia, Germany, which, when operating on the end-user stations, perform the method claimed in the patent in suit. DISH and SLING argue that this constitutes an indirect infringement of the patent at issue. This is sufficient to establish the jurisdiction of the UPC pursuant to Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation, since (as is not disputed) the patent at issue has effect in, inter alia, Germany, and (that) AYLO's websites are accessible in, inter alia, Germany.

16) AYLO's complaint that DISH and SLING have not submitted that AYLO's servers are located within the territory of the Contracting Member States must be rejected. Where, as in the present case, the damage within the meaning of Art. 7(2) of the Brussels I recast Regulation is allegedly caused via the Internet, the likelihood of such damage arises from the possibility of obtaining products and/or using services from a website accessible within the territory of the Contracting Member State in which the European patent has effect, even if the server is located outside that territory (see paragraph 13 above). More specifically, the likelihood of damage in this case arises from the accessibility of AYLO's websites through which users in the Contracting Member States can obtain means (media players and video files) which, according to DISH and SLING, relate to an essential element of the patented invention and are suitable and intended for putting the invention into practice.

17) AYLO's argument that DISH and SLING did not put forward that the video files and media players which AYLO offers and supplies through its websites are intended to use the patented method in the territory of the Contracting Member States, must be rejected.

18) Firstly, the argument is based on the assumption that the establishment of jurisdiction on the basis of Art. 7(2) of the Brussels I recast Regulation requires a conclusive argumentation by DISH and SLING for the alleged indirect patent infringement in the Contracting Member States

and a submission of all objective characteristics of the alleged tort. More specifically, AYLO argues that DISH and SLING should have put forward the facts and circumstances to meet the double territoriality requirement for establishing an indirect patent infringement, i.e. a violation of the right to prevent indirect use of the invention within the meaning of Art. 26 UPCA. However, the identification of the place where the harmful event occurred or may occur within the meaning of Art. 7(2) of the Brussels I recast Regulation, does not depend on criteria which do not appear in this provision and which are specific to the examination of the merits, such as the conditions for establishing an indirect infringement within the meaning of Art. 26 UPCA (see above, paragraphs 12)i) and 12)vii). A conclusive argumentation relating to the conditions of Art. 26 UPCA is required for granting the claims in the infringement action, but is not decisive for the establishment of jurisdiction pursuant to Art. 7(2) of the Brussels I recast Regulation.

- 19) Secondly, DISH and SLING submitted that the media players and video files are offered and supplied to users of AYLO's websites in, inter alia, Germany, and are suitable and intended to put the claimed invention into effect *on the end-user stations*. Therefore, if the double territoriality requirement would be relevant for the purposes of establishing jurisdiction, the submissions would be sufficient to conclude that the video files and media players offered and supplied by AYLO are intended for putting the patented invention into effect in, inter alia, Germany. Whether DISH's and SLING's submissions are based on a correct interpretation of the claims of the patent at issue and whether end-user stations actually carry out the claimed method, will have to be determined in the context of the examination of the merits of the case.
- 20) AYLO's argument that DISH and SLING did not submit that AYLO's websites are directed at users in the Contracting Member States is inadmissible. As DISH and SLING rightly pointed out, AYLO did not raise this argument during the proceedings before the Court of First Instance. As the argument opens up a whole new debate and AYLO has not provided any justification for the late submission, the Court of Appeal will disregard it pursuant to R. 222.2 RoP.
- 21) The argument must also be rejected on its merits. The argument is based on the assumption that the establishment of jurisdiction on the basis of Art. 7(2) of the Brussels I recast Regulation requires that AYLO's websites are directed at users in the Contracting Member States. This assumption is incorrect. Where the damage is allegedly caused via a website, Art. 7(2) of the Brussels I recast Regulation does not require that the website be directed at users in the territory of the Member States concerned (see above, paragraph 12)viii).
- 22) The Court of Appeal rejects AYLO's argument that DISH's and SLING's submissions are insufficient to establish the jurisdiction of the UPC with respect to the Contracting Member States other than Germany (the Republic of Austria, the Kingdom of Denmark, the Republic of Finland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Kingdom of Sweden). It can be left open whether AYLO's view that Art. 71b(1) of the Brussels I recast Regulation requires a country-by-country assessment of the UPC's jurisdiction is correct. DISH and SLING submitted that the patent at issue has effect in each of the Contracting Member States listed in the Statement of claim and that AYLO through its websites offers and supplies to users in those Contracting Member States means relating to an essential element of the patented invention (the media players and video files) which are suitable and intended for putting the invention into practice at the end-user

stations. The conclusion as to the jurisdiction of the UPC must therefore be the same for each of the Contracting Member States concerned.

- 23) AYLO's argument that the jurisdiction of the UPC must be determined on the basis of the submissions in the Statement of claim, cannot lead to a different assessment. All the facts and circumstances on which the Court of Appeal's assessment is based, can be found in the Statement of claim. The assessment is not based on the facts and circumstances which DISH and SLING submitted in their Statement of response on appeal in support of their argument that AYLO's websites are directed to users in the Contracting Member States and, in particular, to users in Germany.

No need to refer to the CJEU

- 24) There is no need to refer the question of the interpretation of Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation to the CJEU. In the light of the case-law of the CJEU cited in paragraph 12) above, there is no reasonable doubt as to the correct interpretation of those provisions (see CJEU 6 October 1982, Case-283/81, ECLI:EU:C:1982:335, *CILFIT*, paragraph 21, and CJEU 6 October 2021, C-561/19, ECLI:EU:C:2021:799, *Consorzio Italian Management and Catania Multiservizi*). Moreover, the outcome of the appeal does not depend on that interpretation. As the Court of Appeal set out above, the appeal must be rejected even on the basis of the alternative interpretation of Art. 7(2) argued by AYLO under which the double territoriality restriction must be taken into account.

Competence of the Mannheim Local Division

- 25) The Mannheim Local Division rightly held that it has competence in respect of the infringement action pursuant to Art. 33(1)(a) UPCA.
- 26) The Court of First Instance assumed that the place "where the actual or threatened infringement has occurred or may occur" as referred to in Art. 33(1)(a) UPCA must be interpreted in the same way as the place "where the harmful event occurred or may occur" of Art. 7(2) of the Brussels I recast Regulation is interpreted in relation to alleged patent infringements. The Court of Appeal shares this view because the provisions have a similar purpose, namely to define a ground of jurisdiction or competence on the basis of the connection between the subject-matter of the dispute and the court or division respectively.
- 27) AYLO raised the same objections to the competence of the Mannheim Local Division as it put forward in respect of the international jurisdiction of the UPC. These objections are therefore inadmissible and/or unfounded for the same reasons as the reasons given above by the Court of Appeal in relation to the international jurisdiction of the UPC.

Parallel proceedings before a national court

- 28) The Court of First Instance rightly rejected AYLO's argument that the UPC must decline jurisdiction on the grounds that DISH and SLING initiated patent infringement proceedings against AYLO before the Munich Regional Court one day before lodging the infringement action with the UPC based on the same acts and on a patent from the same family as the patent in suit.

- 29) AYLO refers to Art. 30(2) of the Brussels I recast Regulation, under which a court may decline jurisdiction if the court first seised has jurisdiction over a related action pending before a court of another member state and its law permits the consolidation of the actions. However, AYLO has not shown that the conditions for the application of this provision are met. Moreover, even if the conditions are met, the provision does not require the Court to decline jurisdiction. It provides that the Court “may” do so. The fact that the actions are based on the same acts and that the patents belong to the same family, is not sufficient to conclude that the Court of First Instance overstepped the boundaries of the discretion it has in this respect.
- 30) AYLO’s argument that the Court in this case must exercise its power under Art. 30(2) of the Brussels I recast Regulation because it is an abuse of law to bring parallel infringement actions on the basis of related patents, must fail. The Court of Appeal can leave the question of whether there is an abuse of law undecided in this order. If there is an abuse of law, the objection must still be rejected on the ground that AYLO has not shown that the conditions for the application of Art. 30(2) of the Brussels I recast Regulation are met. Moreover, there are other safeguards against abuse than the application of Art. 30(2) of the Brussels I recast Regulation. For example, in the impugned order the Court of First Instance referred to the possibility of declaring the action inadmissible. AYLO has not demonstrated that declaring the action inadmissible would be an insufficient safeguard against the alleged abuse. For this reason alone, AYLO’s argument must be rejected. For the same reasons, AYLO’s references to the fundamental right to a fair trial, the principles of fairness and proportionality and the proper functioning of the internal market, must fail.

No unwritten preliminary objections

- 31) The Court of First Instance rightly rejected AYLO’s argument that abuse and manifest lack of foundation are unwritten preliminary objections within the meaning of R. 19 RoP.
- 32) R. 19 to 21 RoP provide for a special procedure for deciding on preliminary objections. This procedure differs in several respects from the general procedure for dealing with defences (R. 23 et seq. RoP) and the special procedure for deciding actions which are manifestly inadmissible or manifestly lacking any foundation in law (R. 361 RoP). For example, the failure to lodge a preliminary objection within the time period is treated as a submission to the jurisdiction of the Court and the competence of the division (R 19.7 RoP), the preliminary objection is decided by the judge-rapporteur (R. 20.1 RoP) and the decision or order of the judge-rapporteur is subject to appeal under certain conditions (R. 21 RoP). Against this background, the list of preliminary objections of R. 19.1 RoP must be regarded as exhaustive. The application of R. 19 to 21 RoP therefore cannot be extended to other defences, such as abusive procedural conduct and manifest lack of foundation.
- 33) The limited scope of the preliminary objections procedure does not, however, prevent the judge-rapporteur, the presiding judge or the panel from using case management powers to identify issues at an early stage, to decide the order in which issues are to be resolved, to direct a separate hearing to any issue and to dismiss a claim after a decision on a preliminary issue makes a decision on further issues irrelevant to the outcome of the action (see, to that effect, R. 332(b) and (d) and R. 334(d), (e) and (g) RoP). Thus, the judge-rapporteur, the presiding judge or the panel may decide to deal with a particular defence, such as abusive procedural conduct or manifest lack of foundation, at an early stage of the proceedings.

34) AYLO has not argued that the judge-rapporteur's decision on the defences of abusive conduct and manifest lack of foundation is a case management decision. Moreover, if it were a case management decision, an appeal against it would be inadmissible. The only remedy against a case management decision of the judge-rapporteur is a request for review by the panel (CoA 11 January and 21 March 2024, UPC_CoA_486/2023; APL_595643/2023, *Netgear/Huawei*).

Timeliness of the preliminary objection

35) Since the Court of Appeal agrees with the Court of First Instance that the preliminary objection must be rejected, there is no need to decide on DISH's and SLING's complaint that the appellant sub 2 filed the preliminary objection too late.

Conclusion

36) It follows from the foregoing that the appeal must be rejected as unfounded.

ORDER

The appeal is rejected.

This order was issued on 3 September 2024.

Klaus Grabinski President of the Court of Appeal	
Françoise Barutel Legally qualified judge	
Peter Blok Legally qualified judge and judge-rapporteur	
Eric Augarde Technically qualified judge	
Klaus Loibner Technically qualified judge	