

UPC CFI, Central Division Paris, 22 January 2024,
NJOY Netherlands v VMR Products

VMR Products and V2 Closes



PATENT LAW – PROCEDURAL LAW

The judge-rapporteur is not to inform a party (even upon request)

- [of the exact deadline provided for by statutory rules before its expires, nor to give the interpretation of statutory provisions or the assessment of facts during the course of a proceedings where it may be helpful to one of the parties. \(Rule 9 RoP\)](#)
- Would lead to an advisory role, which is contrary to the principles of judicial impartiality ([Article 17 UPCA](#)) and of the right of a fair trial (Article 6 ECHR and Article 47 EU Charter of Fundamental Rights).

All written pleadings, including the defence to revocation, are deemed to be served

- [on the day when the relevant electronic message was sent \(Rule 278\(4\) RoP; Rule 271\(6\)\(a\) RoP\)](#)
- 16. [Rule 271 \(6\) \(a\) ‘RoP’](#) states that, in case of service by means of electronic communication, a statement of claim is deemed to be served on the day when the relevant electronic message was sent and this rule is applicable also to the service of the defence to revocation, by virtue of [Rule 278 \(4\) ‘RoP’](#), concerning the service of all written pleadings, which refers to.
- 17. In the current proceedings the notification generated by the system on 13 December 2023 and sent to the Claimant is such ‘relevant electronic message’, so that date should be identified as the date in which the defence to revocation has been served.

Source: [Unified Patent Court](#)

UPC Court of First Instance,
Central Division Paris, 22 January 2024

(Catalozzi)

ORDER

of the Court of First Instance of the Unified Patent Court
Central division (Paris seat)

issued on 22 January 2024

concerning the Generic application No. App_159/2024
lodged in the revocation action No. ACT_571565/2023
UPC_CFI_308/2023

HEADNOTES: service of written pleadings

KEYWORDS: date of service; request for declaration;
judge-rapporteur

REFERENCE CODE ECLI:

APPLICANT:

NJOY Netherlands B.V. - Westerdoksdijk 423,
1013BX Amsterdam, Netherlands
represented by Henrik Holzapfel, McDermott Will &
Emery

RESPONDENT:

VMR Products LLC - 560 20th Street - California
94107 - San Francisco - US
represented by Bernhard Thum, Thum & Partner

PATENT AT ISSUE:

European patent n° EP 3 456 214

PANEL:

Panel 2 of the Central Division - Paris Seat

DECIDING JUDGE: This order has been issued by the
presiding judge and judge-rapporteur Paolo Catalozzi

**SUMMARY OF FACTS AND PARTIES’
REQUESTS:**

1. The applicant has brought a revocation action against the patent at issue before this Seat of the Unified Patent Court, registered as No. ACT_571565/2023 UPC_CFI_308/2023.
2. On 27 November 2023 the respondent has submitted, via the Case Management System, a defence to revocation, which was considered by the Registry as incomplete.
3. Therefore, on 11 December 2023 the respondent, requested to correct the detected deficiencies, has lodged a corrected statement of defence and on 13 December 2023 the Registry has issued the relative notification of positive outcome following the formal check and has notified the corrected defence to revocation to the claimant through an electronic message.
4. On 3 January 2024 the applicant has submitted an application, registered as No. App_159/2024, requesting, under [Rule 9](#) of the Rules of Procedure (‘RoP’), that the Court declares that the defence to revocation was served on the claimant on 13 December 2023 and, as an auxiliary request, that it declares the date of service on the claimant.

GROUND FOR THE ORDER

5. It must be said that [Rule 9 ‘RoP’](#), which the applicant has based its application on, allows the Court to make procedural orders for the purposes of an active case management.
6. In particular, pursuant to para (3) of [Rule 9 ‘RoP’](#), the Court, on a reasoned request by a party, may (a) extend, even retrospectively, a time period referred to in these Rules or imposed by the Court and (b) shorten any such time period.
7. As the case management is the responsibility of the judge-rapporteur during the written and the interim procedure (see [Rule 331 ‘RoP’](#)), the said judge-rapporteur may alter statutory deadlines where he is requested and deems it appropriate.
8. However, nor [Rule 9 ‘RoP’](#), nor, apparently, any other provision contained in the Rules of Procedure, allows the judge-rapporteur to inform a party (even where upon its request) of the exact deadline provided for by statutory rules before it expires.

9. Equally - and more in general – it is not the judge-rapporteur’s task to give the interpretation of statutory provisions or the assessment of facts during the course of a proceedings where it may be helpful to one of the parties.

10. That would lead to confer an advisory role to the judge-rapporteur which is contrary to the principles of judicial impartiality ([Article 17](#) of the Unified Patent Court Agreement) and of the right of a fair trial (Article 6 of the European Convention on Human Rights and Article 47 of the European Union Charter of Fundamental Rights).

11. Besides, it may be added that such an assessment of the judge-rapporteur may not be conclusive, as the relevant interpretation of the relevant provisions is not binding for the panel and for the Court of appeal as they may overturn the assessment; in this latter circumstance the party which complies with the judge-rapporteur declaration might result not be complying with the statutory provisions as differently interpreted by the panel or the Court of appeal.

12. It follows that the interpretation of the provisions concerning the date of service of written pleadings and, consequently, the deadline for lodging the reply to the defence to revocation is the responsibility of the parties and the only duty of the Court is to assess whether that deadline has been met.

13. Notwithstanding the foregoing arguments, taking into account that the application of the rules of procedure is at the outset and in order to avoid unnecessary procedural disputes between the parties, this judge-rapporteur will, as an exception, identify the date in which, according to his opinion, the defence to revocation has been served, specifying that, as previously mentioned, this identification does not impede the panel or the Court of appeal to have a different opinion.

14. Pursuant to [Rule 27 ‘RoP’](#), applicable mutatis mutandis regarding to [Rule 54 ‘RoP’](#), the Registry examines whether the lodged defence to revocation complies with the formal requirements and in case of noted deficiencies invites the defendant to correct them.

15. Respectively, the claimant shall be sent the corrected defence to revocation, not the earlier version that does not meet the requirements.

16. [Rule 271 \(6\) \(a\) ‘RoP’](#) states that, in case of service by means of electronic communication, a statement of claim is deemed to be served on the day when the relevant electronic message was sent and this rule is applicable also to the service of the defence to revocation, by virtue of [Rule 278 \(4\) ‘RoP’](#), concerning the service of all written pleadings, which refers to.

17. In the current proceedings the notification generated by the system on 13 December 2023 and sent to the Claimant is such ‘relevant electronic message’, so that date should be identified as the date in which the defence to revocation has been served.

ORDER

For these grounds, the judge-rapporteur declares that the defence to revocation was served on the claimant on 13 December 2023.

Issued on 22 January 2024.

The Judge-rapporteur

Paolo Catalozzi

REVIEW

Pursuant to [Rule 333 RoP](#), the Order shall be reviewed by the panel on a reasoned application by a party. An application for the review of this Order shall be lodged within 15 days of service of this Order.

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