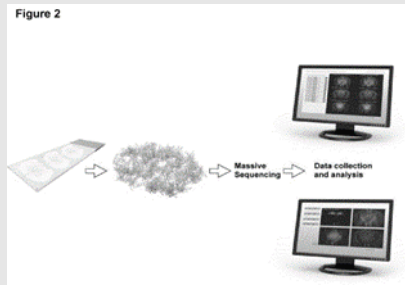


## UPC Court of Appeal, 17 April 2024, Curio Bioscience v 10x Genomics



### PATENT LAW – PROCEDURAL LAW

Appeal admissible despite Curio Bioscience's cut-and-paste-mistakes in the heading of the Statement of claim ([Rule 225 RoP](#))

- The correct information according to R.225(a) – (d) RoP was present later in Section 7 of the said appeal submission and there were no ambiguities as to who was the appellant and who was the respondent.

**To change the language of the proceedings into the language of the patent on grounds of fairness all relevant circumstances shall be taken into account ([Article 49 UPCA](#), [Rule 323 RoP](#))**

- These should primarily be related to the specific case and the position of the parties.
- If the outcome of balancing of interests is equal, the position of the defendant is the decisive factor.
- As a general rule and absent specific relevant circumstances pointing in another direction, the language of the patent as the language of the proceedings cannot be considered to be unfair in respect of the claimant.

22. **Relevant circumstances related to the specific case** may, for example, be the language mostly used in the field of technology involved and, of particular relevance, the language the evidence (including prior art) is primarily written in.

23. **Relevant circumstances related to parties include the nationality or domicile of the parties.** A party must be able to fully understand what is submitted by a representative on its behalf and what is submitted by the other party / parties. [...].

24. Another relevant circumstance related to parties is their size relative to each other. [...].

25. In considering the position of parties, due attention should also be paid to how a change of language will affect the course of the proceedings and may lead to a delay, especially in relation to the urgency of the case. [...]

26. Whether a representative has specific language skills is in general of no significance. [...].

27. The nationality of the judges hearing a case is in general not a relevant circumstance either. [...].

28. [Art. 49\(5\) UPCA](#) provides that in particular the position of the defendant is to be taken into account. If

the outcome of balancing of interests is equal, the position of the defendant is the decisive factor. There is good reason for this.

[...]

34. It follows that for a claimant, having had the choice of language of the patent, with the ensuing possibility that the claimant / patentee may have to conduct legal proceedings in that language, as a general rule and absent specific relevant circumstances pointing in another direction, the language of the patent as the language of the proceedings cannot be considered to be unfair in respect of the claimant.

**No decision on the reimbursement of legal costs will be made in this appeal,**

- since this order of the Court of Appeal is not a final order or decision, i.e. not an order or decision concluding the proceedings pending before the Court of First Instance. ([Article 69 UPCA](#), [Rule 118 RoP](#), [Rule 242 RoP](#)

47. The RoP provide that the principal decision on the obligation to bear the costs of the proceedings will be made in the final order or decision, in particular the decision on the merits ([R.118.5 RoP](#)), optionally in combination with an interim award of costs ([R.150.2 RoP](#)). The final decision is also the best stage of the proceedings to assess whether and to what extent a party can be considered unsuccessful within the meaning of [Art. 69 UPCA](#).

49. As this concept also applies at appeal, [R.242.1 RoP](#) is to be interpreted to mean that if the decision of the Court of Appeal is not a final order or decision concluding an action, the Court of Appeal, in the case at hand, will not issue an order for costs in respect of the proceedings at first instance and at appeal. However, the outcome of the appeal must be considered when, in the final decision on the action at hand, the Court determines whether and to what extent a party must bear the costs of the other party because it was unsuccessful within the meaning of [Art. 69 UPCA](#).

Source: [Unified Patent Court](#)

### UPC Court of Appeal, 17 April 2024

(Kalden, Simonsson, Rombach)

UPC Court of Appeal

UPC\_CoA\_101/2024

ApL\_12116/2024

#### ORDER

of the Court of Appeal of the Unified Patent Court

issued on 17 April 2024

concerning language of proceedings

#### HEADNOTE:

- When deciding on a request to change the language of proceedings into the language of the patent on grounds of fairness, all relevant circumstances shall be taken into account. Relevant circumstances should primarily be related to the specific case and the position of the parties, in particular the position of the defendant. If the outcome of balancing of interests is equal, the position of the defendant is the decisive factor.

**KEYWORDS:**

- Change of language of proceedings ([Art.49\(5\) UPCA](#))

**APPELLANT (AND DEFENDANT IN THE MAIN PROCEEDINGS BEFORE THE CFI):**

**Curio Bioscience Inc.**

represented by:

Cameron Marshall, European patent attorney, Carpmals & Ransford

Agathe Michel-de Cazotte, avocat à la Cour, Carpmals & Ransford

**RESPONDENT (AND APPLICANT IN THE MAIN PROCEEDINGS BEFORE THE CFI):**

**10x Genomics, Inc.**

represented by:

Prof. Dr. Tilman Müller-Stoy, Rechtsanwalt, Bardehle Pagenberg

Dr. Axel B. Berger, Patentanwalt, Bardehle Pagenberg

**PATENT AT ISSUE:**

Patent n° [EP 2 697 391](#)

**PANEL OF DECIDING JUDGES:**

This order is issued by the Second panel, consisting of: Rian Kalden, Presiding judge and legally qualified judge Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Rombach, legally qualified judge

**IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE**

**Order of 26 February 2024 by the President of the Court of First Instance**

UPC\_CFI\_463/2023; ACT\_5164/2024

**ORAL HEARING ON:**

2 April 2024

**SUMMARY OF FACTS:**

1. The parties are parties to proceedings before the Court of First Instance, Düsseldorf Local Division, where 10x Genomics has applied for provisional measures against Curio Bioscience (ACT\_590953/2023, UPC\_CFI\_463/2023).

2. On 30 January 2024 Curio Bioscience applied for a change of language of the proceedings from German to English. This application was rejected on [26 February 2024 by the President of the Court of First Instance \(App 5164/2024, UPC CFI 463/2023\)](#).

**PARTIES' REQUESTS:**

3. Curio Bioscience has appealed and asked the Court of Appeal to revoke the order, to order the change of language of the proceedings to English and award Curio Bioscience's costs on the application for the change of language of proceedings.

4. 10x Genomics has asked that the appeal is dismissed. In the alternative, pursuant to [Art. 49 \(5\) UPCA](#), that Curio Bioscience is obliged to provide the Court and 10x Genomics with certified English translations of the German-language pleadings of both parties and of those annexes which are not in English without delay and to bear the costs thereof. 10x Genomics has also asked that Curio Bioscience should bear the costs of the proceedings.

**POINTS AT ISSUE:**

5. Request pursuant to [Art. 49\(5\) UPCA](#) that the language in which the patent was granted be used as language of proceedings ([R.323 RoP](#)).

**SUBMISSIONS OF THE PARTIES:**

*Curio Bioscience*

6. The parties are both US companies, the language of the underlying technology field is English and the majority of the documents in the proceedings are available only in English.

7. A change of language of proceedings would mean that Curio Bioscience would be spared the time needed for and costs of translations from German to English.

8. Curio Bioscience as a defendant is significantly and disproportionately disadvantaged by having to conduct its defense within very short time limits in German, an unfamiliar language to the company.

9. Curio Bioscience employs around 30 persons, compared to about 2000 persons employed by 10x Genomics, and its turnover is below the thresholds established in EU law for SME's, substantially lower than that of 10x Genomics.

10. 10x Genomics will not suffer any disadvantage from a change of language. 10x Genomics has filed documents in English and requested they need not be translated into German and people within 10x Genomics speak English.

11. What 10x Genomics is saying about inadmissibility of the request after the oral hearings have taken place are new arguments that should not be admitted. The arguments also do not hold, as it follows from Art. 74(3) UPCA that proceedings are not finished after the oral hearing but only with the final decision. 10x Genomics 12. The appeal is inadmissible because the Statement of Appeal did not contain the names of the appellant and the respondent properly.

13. It is disputed that Curio Bioscience is an SME, that Curio Bioscience would save translation costs in an amount relevant to the alleged objection of disproportionality, and that Curio Bioscience is unfamiliar with the German language. Curio Bioscience is active in Germany. German is the native language of more than 20 per cent of EU citizens and thus the most widely spoken native language in the EU. In addition, over 10 per cent of Europeans speak German as a foreign language. This means that a total of more than 30 per cent of EU citizens speak German.

14. One of Curio Bioscience's representatives is admitted to the German Bar and used to conduct proceedings in German, and the representative's law firm maintains a German office where several lawyers are proficient in German.

15. 10x Genomics has a legitimate interest in ensuring that its representatives can act in their native language before a local division located in Germany comprised of four German speaking judges, regarding an infringement on German territory.

16. [Art. 49\(5\) UPCA](#) refers to language of 'the proceedings'. In view of [Art. 52\(1\) UPCA](#), the stage between the oral hearing and the decision is not to be considered part of the proceedings and therefore a language change can no longer be ordered and the

request becomes inadmissible after the oral hearing has taken place, which is the case here.

#### **GROUNDINGS FOR THE ORDER:**

##### R.225(a – b) RoP

17. It is true that when Curio Bioscience, at the request of the Court of Appeal, submitted the German translation of its appeal on 5 March 2024, the description of the parties in the heading suffered from editorial mistakes in that the company names of both parties figured both as appellant and respondent. The appeal submission was nevertheless considered to fulfil the formal requirements pursuant to R.225 RoP. The Court of Appeal takes the view that Curio Bioscience's cut-and-paste-mistake does not constitute a formal ground for dismissing the appeal. The correct information according to R.225(a) – (d) RoP was present later in Section 7 of the said appeal submission and there were no ambiguities as to who was the appellant and who was the respondent.

##### *In substance*

18. At the request of one of the parties and after having heard the other parties and the competent panel, the President of the Court of First Instance may, on grounds of fairness and taking into account all relevant circumstances, including the position of parties, in particular the position of the defendant, decide on the use of the language in which the patent was granted as language of proceedings. In this case the President of the Court of First Instance shall assess the need for specific translation and interpretation arrangements (Art. 49(5) UPCA and R.323.3 RoP).

19. The President of the Court of First Instance has a margin of discretion when assessing fairness. On appeal, the review is consequently limited.

20. Even with this limited scope of review, the order must be set aside, because it is based on an incorrect reading of what constitutes fairness and what circumstances are relevant under Art. 49(5) UPCA.

21. When deciding on a request to change the language of proceedings into the language of the patent on grounds of fairness, all relevant circumstances shall be taken into account. Relevant circumstances should primarily be related to the specific case and the position of the parties.

22. Relevant circumstances related to the specific case may, for example, be the language mostly used in the field of technology involved and, of particular relevance, the language the evidence (including prior art) is primarily written in.

23. Relevant circumstances related to parties include the nationality or domicile of the parties. A party must be able to fully understand what is submitted by a representative on its behalf and what is submitted by the other party / parties. It follows that if the language of the proceedings is not the language of a party, this is not compensated by the fact that its representative is proficient in the language of the proceedings. The party itself is then still dependent on translations of the statements and evidence lodged on either side. It is a matter of common knowledge that this takes time and incurs costs, as translations - even if machine

translations are used - will have to be carefully checked by the representative.

24. Another relevant circumstance related to parties is their size relative to each other. A multinational company with a substantial legal department has more resources to deal with and coordinate international disputes in different languages than a small company with limited resources that is only active on a limited number of markets.

25. In considering the position of parties, due attention should also be paid to how a change of language will affect the course of the proceedings and may lead to a delay, especially in relation to the urgency of the case. A delay is generally disadvantageous to a claimant. On the other hand, given the strict time limits, it can be extra burdensome for a defendant to defend itself in a language other than its own language, especially in summary proceedings such as those for provisional measures.

26. Whether a representative has specific language skills is in general of no significance. That is particularly so in international disputes where a representative is typically chosen not only for his own skills, but also for the international multi-disciplinary and multi-lingual environment he works in and where usually a team of several representatives with various skills is involved.

27. The nationality of the judges hearing a case is in general not a relevant circumstance either. The Court of Appeal notes that if a claimant fears that judges will overlook nuances in the factual and legal submissions if these are in the language of the patent, this risk can be countered by providing language translations and by offering, at their cost, simultaneous interpretation at the hearing.

28. Art. 49(5) UPCA provides that in particular the position of the defendant is to be taken into account. If the outcome of balancing of interests is equal, the position of the defendant is the decisive factor. There is good reason for this.

29. A claimant bringing an action before a local or regional division where several languages have been designated pursuant to Art. 49(1) and/or Art. 49(2) UPCA, already has the advantage that it may choose any of those languages as the language of proceedings (R.14.2(a) RoP). Often, a claimant also has a choice where to bring its action, since each local or regional division where an actual or threatened infringement takes place has competence.

30. In addition, the claimant has the choice when to initiate an action. Except in cases of urgency it can decide for itself how much time it wants to spend on the preparation of the statement of claim, whereas the defendant is immediately bound to strict time limits (subject to an extension of time, which requires a reasoned request).

31. Furthermore, where the claimant is asserting a patent, it must also be taken into account that it chose the language of the patent when filing the patent application. Upon filing, the applicant is (or should be) aware that the language choice made when filing entails legal consequences for the proceedings before the EPO. As a

rule, the language of the patent, i.e. either English, French or German, shall be used as the language of the proceedings in all proceedings before the EPO. According to [Art. 14\(8\) of the EPC](#), entries in the European Patent Register shall be made in the three official languages of the European Patent Office, but the entry in the language of the proceedings shall be authentic. By choosing the language of the patent, the applicant thus also (should) anticipate(s) that in fact he and his representatives may have to carry out proceedings in that language.

32. This rationale applies equally for a patent holder who has acquired the patent (or patent application). When acquiring the patent or the application, the acquirer must be prepared for the fact that the language of the proceedings before the European Patent Office is the language of the patent.

33. In the UPC proceedings, the importance of the (choice of) language of the patent is underlined by [Art. 49\(6\) UPCA](#), according to which the language of proceedings at the central division shall be the language in which the patent was granted. This means that a patent proprietor must also anticipate to litigate there in the language of the patent.

34. It follows that for a claimant, having had the choice of language of the patent, with the ensuing possibility that the claimant / patentee may have to conduct legal proceedings in that language, as a general rule and absent specific relevant circumstances pointing in another direction, the language of the patent as the language of the proceedings cannot be considered to be unfair in respect of the claimant.

35. Also in infringement actions, the language in which the patent was granted is often of importance, such as with claim construction. This is reflected in [Art. 49\(3\) UPCA](#), which allows the parties to agree on the use of the language in which the patent was granted as the language of proceedings, subject to approval by the competent panel. If the panel does not approve their choice, the parties may request that the case be referred to the central division.

36. Applying the general principles set out above to the present case, the Court of Appeal is of the opinion that the request to change the language of the proceedings into the language of the patent, i.e. English, must be allowed. The reasons for this are as follows.

37. The Court of Appeal considers what Curio Bioscience has brought forward about both companies being US companies, that the language of the underlying technology field is English, that the infringement evidence 10x Genomics relies on is almost exclusively in English, and that the majority of the evidence Curio Bioscience relies on for its defense is also in English, none of which is disputed by 10x Genomics, to be relevant circumstances of considerable weight.

38. Curio Bioscience has in addition argued that it is an SME, and a much smaller company compared to 10x Genomics. The Court of Appeal takes the view that it is not decisive for this case whether Curio Bioscience is an SME. There is consequently no reason to decide on the admissibility of the facts and/or evidence Curio has

referred to here, nor whether Curio Bioscience fulfils the criteria for SME's under EU law. Even without these assessments it is however evident that Curio Bioscience is a smaller company than 10x Genomics. It follows that the disadvantage of the language of the proceedings being different from their company language, is a heavier burden for Curio Bioscience than it is for 10x Genomics.

39. The circumstances that 10x Genomics has brought forward to justify its choice for German as the language of the proceedings are considered to be of less or no relevance. That fact that 20 % of EU citizens would speak German as a native language and 10 % as a foreign language, does not relate to the dispute, nor to the parties. It also does not follow from that fact that Curio Bioscience as a US based company is familiar with the German language, even if Curio Bioscience is active on (also) the Germany market. Deciding to bring its products on the European market, including Germany, does not mean that Curio Bioscience therewith accepted, or should have accepted, German as the language of the proceedings in the Unified Patent Court either, as 10x Genomics contends.

40. The language qualifications of the representatives are, as said, not a circumstance related to the parties themselves and not relevant here. It cannot take away that the language of the parties is different from the language of the proceedings. The fact that the case is pending at the local division Düsseldorf in Germany and that all four judges (also) speak German is not relevant here either. All of them also speak English and the perceived risk that (some of) the judges would overlook nuances in the submissions if the language were to change to English could be countered by providing translations.

41. The Court of Appeal has consulted the panel of the Local Division by way of analogy with [R.323.3 RoP](#). The judge-rapporteur has replied that given the complexity of the case and the stage of the proceedings (the oral hearing has already taken place and the judge rapporteur has started to draft a decision), a change of language would entail additional work which could delay the proceedings.

42. The Court of Appeal recognizes that a change of language at this stage of the proceedings may prolong the time necessary for drafting an urgent preliminary measure decision. However, it should be observed that the Federal Republic of Germany has designated English as language of proceedings for the Düsseldorf Local division with an indication in the meaning of [R.14.2\(c\) RoP](#). The judge-rapporteur may provide that the Court may make any order and deliver any decision in the official language of the Contracting Member State – German – together with a certified translation. The additional work would then be limited to the translation of the decision and is thus of limited weight. 43. According to the Court of Appeal, the relevant circumstances brought forward by Curio Bioscience carry more weight than the relevant circumstances brought forward by 10x Genomics. The conclusion is



that the language of the patent, i.e. English, shall be used as the language of the proceedings.

44. The Court of Appeal rejects the argument advanced by 10x Genomics that no change of language can be ordered after the last oral hearing in the proceedings at the Court of First Instance. From [Art. 74\(3\) UPCA](#) it is clear that an appeal with respect to (inter alia) an order pursuant to [Art. 49\(5\) UPC](#) / [R.323 RoP](#) has to be decided before the Court of First Instance may give a decision in the main proceedings (and not before the last oral hearing in the proceedings at the Court of First Instance). There is no reason why a language change request must not be decided after the last oral hearing of the Court of First Instance. To the contrary, the language of the proceedings at the Court of First Instance also determines the language of proceedings at the Court of Appeal ([Art. 50 UPCA](#)). The applicant of a [R.323 RoP](#) request therefore continues to have an interest in its request also after the oral hearing.

45. The Court of Appeal denies 10x Genomics' request that Curio Bioscience shall provide certified English translations of the case file documents that are not in English, at its costs. Given the possible application of [R.14.2\(c\) RoP](#), there is no need for specific translation arrangements at the Court of First Instance. Should the order of the Court of First Instance be appealed, the parties are requested to file uncertified translations of their own statements at first instance, at their own cost, pursuant to [R.7.2 RoP](#).

#### *Costs*

46. No decision on the reimbursement of legal costs will be made in this appeal, since this order of the Court of Appeal is not a final order or decision, i.e. not an order or decision concluding the proceedings pending before the Court of First Instance.

47. The RoP provide that the principal decision on the obligation to bear the costs of the proceedings will be made in the final order or decision, in particular the decision on the merits ([R.118.5 RoP](#)), optionally in combination with an interim award of costs ([R.150.2 RoP](#)). The final decision is also the best stage of the proceedings to assess whether and to what extent a party can be considered unsuccessful within the meaning of [Art. 69 UPCA](#).

48. The concept laid down in [R.118.5 RoP](#) that the principal decision on the costs of proceedings is made in the final order or decision is in line with [R.150.1 RoP](#), according to which it is only after the decision on the merits that the successful party may seek a cost decision, meaning a decision for the determination of the costs to be borne by the unsuccessful party ([R.150.1 RoP](#)). This concept is also confirmed by the fact that the scale of ceilings for recoverable costs adopted by the Administrative Committee, which the Court must take into account when determining the reimbursement of representation costs, indicates ceilings based on the value of the proceedings as a whole ([R.152.2 RoP](#)).

49. As this concept also applies at appeal, [R.242.1 RoP](#) is to be interpreted to mean that if the decision of the Court of Appeal is not a final order or decision concluding an action, the Court of Appeal, in the case at

hand, will not issue an order for costs in respect of the proceedings at first instance and at appeal. However, the outcome of the appeal must be considered when, in the final decision on the action at hand, the Court determines whether and to what extent a party must bear the costs of the other party because it was unsuccessful within the meaning of [Art. 69 UPCA](#).

#### **ORDER**

1. The order of the President of the Court of First Instance of 26 February 2024 is set aside. The language of proceedings shall be English.

2. Should the order on provisional measures of the Court of First Instance be appealed, the parties shall file uncertified English translations of their own statements lodged in those proceedings, at their own cost, pursuant to [R.7.2 RoP](#).

Issued on 17 April 2024

Presiding judge: Rian Kalden

Legally qualified judge and judge-rapporteur: Ingeborg Simonsson

Legally qualified judge: Patricia Rombach

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