



10 March 2025 | Features | Unified Patent Court | David Schmidt And Zachary Grinovich Of Knobbe Martens

## Non-practising entity litigation at the UPC: A US perspective

**The European court has been good for claimants—NPEs included. David Schmidt and Zachary Grinovich of Knobbe Martens track what’s happened so far.**

The Unified Patent Court (UPC) is nearing the completion of its second year, and as many had anticipated, its broad injunctive powers have enticed non-practising entities (NPEs) to avail themselves of the forum.

Of particular interest to NPEs, and by extension to US stakeholders with global intellectual property (IP) assets or European operations, is the emerging jurisprudence on granting injunctions.

This article explores several landmark decisions regarding injunctions and a few other noteworthy subjects from the UPC's first year that will likely impact NPE activity in the European Union, from the perspective of US practitioners.

## Background

NPEs have sought to benefit from the UPC's powerful injunctions. At least [14 NPEs](#) have filed infringement claims with the UPC, and these claims now make up nearly [15% of all litigation](#) at the court.

In at least one case, an NPE reached a settlement after bringing UPC proceedings. (***Network System Technologies v Texas Instruments***, UPC\_CFI\_513/2023; ACT\_597691/2023).

## NPE status is not detrimental to provisional injunctions

To obtain an injunction in the US, a patentee must demonstrate that monetary compensation is inadequate and irreparable harm will ensue if the court does not enjoin the infringement.

Because they typically offer no products and instead seek to license their patents, NPEs often have difficulty meeting these requirements for an injunction in the US. While injunctions are generally available to patentees in many European jurisdictions, whether the UPC would adopt an approach similar to the US remained unclear until recently.

In ***10x Genomics v NanoString Technologies*** (UPC\_CFI\_2/2023; ACT 459746/2023), the UPC's Munich Local Division confirmed that the status of an applicant as an NPE does not affect its right to request a provisional injunction.

The court highlighted that NPEs, as patent proprietors and licensors, could suffer long-term harm if infringements are not stopped. This decision suggests that showing "long-term harm" in the UPC may be easier than showing irreparable harm in the US.

Interestingly, in ***Philips v Belkin*** (UPC\_CoA\_549/2024; APL\_51838/2024; App\_53031/2024) the UPC Court of Appeals (CoA) offered relief to the defendant on the basis of irreparable harm.

In that case, the court suspended an injunction pending appeal, finding that the defendant's interest in having the order suspended outweighed the patent holder's interest in enforcing its rights.

Specifically, the court found that the defendant was likely to suffer "irreparable harm" from the injunction. Although irreparable harm is not required to obtain a provisional injunction, it may be sufficient to suspend one that is on appeal.

## Other factors for provisional injunctions

The UPC also considers the “urgency” of the patent holder in enforcing his or her rights. For this factor to weigh against an injunction, the Hamburg Local Division indicated that a patentee must have “behaved in such a negligent and hesitant manner in the pursuit of its claims that, from an objective perspective, it must be concluded that the infringed party is not interested in promptly enforcing its rights.” (*Ballino BV v UEFA*, UPC\_CFI\_151/2024; 33145/2024.)

The Local Düsseldorf Division in *10X Genomics v Curio Bioscience* (UPC\_CFI\_463/2023; ACT\_5164/2024) stated that, once a claimant has gathered all the information necessary to proceed with litigation, they must file for provisional measures within one month.

However, some divisions, including the Lisbon Local Division, have shown more flexibility as to the required timeliness. (*Ericsson v AsusTek*, UPC\_CFI\_317/2024.)

In contrast to US practice, the public interest does not factor substantially into the UPC’s decision to grant injunctions. In *Mammut Sports Group v Ortovox Sportartikel* (UPC\_CoA\_182/2024; APL\_21143/2024), the Court of Appeals affirmed an *ex parte* provisional injunction in the context of an avalanche rescue device.

The court declined to articulate a standard for third-party interests, stating that questions as to the weight of “third-party” interests were “left open” because other avalanche survival devices, including those of the claimant in the case, remained available in the market.

## Considering the merits of the case

When deciding whether to issue a provisional injunction, the UPC focuses on the strength of infringement and invalidity arguments. Article 62 of the Agreement on a Unified Patent Court (UPCA) required that claimants demonstrate a “sufficient degree of certainty” of the alleged infringement in order to receive a provisional injunction.

In *10X Genomics v NanoString* (UPC\_CoA\_335/2023; APL\_576355/2023), the Court of Appeals clarified that the “sufficient degree of certainty” standard is satisfied where claimants show that infringement is “more likely than not.” Defendants opposing provisional injunctions are held to the same standard for showing invalidity.

This standard has supported favourable outcomes for patent holders. [Around 60%](#) of asserted patents have been upheld, arguably suggesting that the UPC has been relatively patentee friendly in its initial decisions.

## Other UPC trends that provide advantages to NPEs

Several other developments at the UPC offer advantages to NPEs and other claimants.

1. **Presumption of Validity:** Although the UPC does not automatically presume a patent is valid, defendants are required to prove that a patent is "more likely than not" invalid. This shifts the burden to the defendant and provides claimants an inherent advantage.
2. **Speed of Proceedings:** The UPC aims to bring cases to hearing within one year of filing, and so far, it has largely succeeded in meeting this goal. This fast pace can benefit claimants, as it forces defendants to respond quickly, potentially leading to mistakes or overlooked defenses. In cases involving provisional injunctions, defendants are often given only 30 days to prepare their opposition.
3. **Permanent Injunctions:** The UPC has issued permanent injunctions in every case where it has found that a patent was infringed. This consistent approach to granting permanent injunctions provides substantial leverage to claimants, including NPEs, when seeking settlements. This includes both cases determined to date in which a FRAND defence was raised (it being found in both cases that the defendants had not demonstrated their willingness to license.) (*Panasonic v Oppo*, UPC\_CFI\_210/2023; *Huawei v Netgear*, UPC\_CFI\_9/2023.)

## Other noteworthy developments

While not directly related to injunctions, several other developments in UPC rulings are relevant to NPE litigation and worth noting.

1. **Security for Costs:** Defendants have utilised security for costs as a protective measure, particularly in NPE litigation. If a defendant can show that the claimant is unlikely to be able to pay costs if they lose the case, the court may require the claimant to post security.

In *Ballino BV v UEFA*, the Local Hamburg Division required a claimant to provide €56,000 (\$60,712) in security where the claimants' only assets were the asserted patents.

The Paris Local Division required €400,000 (for similar reasons and noted that domicile outside of the EU could weigh in favour of requiring security. (*ICPillar v ARM*, UPC\_CFI\_495/2023).

1. **Amendment of asserted patents:** Even if a patent requires amendment to overcome an invalidity challenge, it can still serve as the basis for an injunction. In *Franz Kaldewei v Bette* (UPC\_CFI\_7/2023; ACT\_459767/2023), the Local Düsseldorf Division granted a permanent injunction based on an amended claim, which was accepted following the claimant's auxiliary request. Other Local Divisions have reached similar conclusions, including the Local Munich Division in *Edwards v Meril* (UPC\_CFI\_15/2023).

- 2. Accusations of multiple products:** In *Network System Technologies v Texas Instruments* (UPC\_CFI\_514/2023; ACT. NO. 597692/2023), the UPC clarified that a patent holder is not required to analyze each accused product in detail at the outset of litigation.

In that case, the NPE accused 27 products of infringement but only provided a detailed analysis for one. The court ruled that this was acceptable at the initial stages of litigation.

- 1. Jurisdiction over infringement in non-UPC countries:** The UPC has confirmed it can issue injunctions for infringement in non-UPC countries where the defendant is domiciled in a UPC member state. (*Fujifilm v Kodak*, UPC\_CFI\_355/2023).

This practice was implicitly endorsed in *BSH v Electrolux* (C-339/22), in which the Court of Justice of the European Union upheld a Swedish national court's jurisdiction over infringement of a foreign patent.

## Conclusion

In summary, the first two years of the UPC have been an illuminating period with many advantageous developments for claimants, including NPEs.

In view of these outcomes, we expect increased UPC-NPE activity in the coming years. Understanding the court's emerging practices will be key to navigating this evolving legal environment.

**[David Schmidt](#) is a partner at Knobbe Martens.**

**[Zachary Grinovich](#) is an associate at Knobbe Martens.**

**[Chris de Mauny](#) of the San Francisco office of Bird & Bird provided valuable background information and assistance for this article.**

**<https://www.worldipreview.com/unified-patent-court/non-practising-entity-litigation-at-the-upc-a-us-perspective>**