



UPC_CFI_555/2024
Preliminary Order
of the Court of First Instance of the Unified Patent Court
delivered on 18/11/2024

APPLICANT

Malikie Innovations Ltd.

(Claimant) - The Glasshouses GH2, 92 Georges Street
Lower Dun Laoghaire - A96 VR66 - Dublin - IE

Represented by Dr. Marc
Grunwald

RESPONDENT/S

1) Nintendo of Europe AG

(Defendant) - Goldsteinstraße 235 - 60528 -
Frankfurt am Main - DE

Statement of claim served on 17/10/2024

2) Nintendo Co., Ltd.

(Defendant) - 11-1 Hokotatecho, Kamitoba, Minami-
ku - 601-8501 - Kyoto - JP

Statement of claim served on _____

PATENT AT ISSUE

Patent no.

Proprietor/s

EP2579551

Malikie Innovations Ltd.

No SPC details provided

DECIDING JUDGE

Judge-rapporteur

Stefan Schilling

LANGUAGE OF PROCEEDINGS:

English

SUBJECT-MATTER

Request for rectification of the name of Defendant 1)

SUMMARY OF FACTS

Reference is made to the Court's order 05 November 2024 regarding the application of 31 October, with which the Claimant formally requests for rectification of the name of Defendant 1), in particular, that the designation of Defendant 1) be changed from Nintendo of Europa AG to Nintendo of Europe SE, alternatively to substitute Nintendo of Europa SE for Nintendo of Europe AG. The Claimant stated that the company form of Defendant 1) was erroneously designated "AG" instead of "SE". At that time, Nintendo of Europe AG had already been succeeded, and therefore replaced, by Nintendo of Europe SE by way of universal succession. Reference is made to the additional arguments brought forward by the Claimant in its submission.

The Court informed the parties with the said order dated 05 November, that it intends to grant the request for rectification of the name of Defendant 1).

Attorney-at-law Johannes Heselberger commented on this proposal on 13 November with the following via e-mail:

"We understand the Court's considerations and would not object to Claimant's requests for correction of Defendant 1). Taking into account that Defendant 1) was "erroneously designated" by Claimant (request, page 1, mn 1) due to a lack of diligence in preparing the Statements of Claim (the facts being readily available from public registers) and taking into account that such errors cause considerable confusion on the recipient's side (no "AG" exists any more; it is not self-understood that any communication to the former "AG" is and must be accepted by the "SE"'s reception staff), we request to consider the Statements of Claim to be served on Defendant 1) only with the date of correction of the identity of Defendant 1), with the consequence that the deadline for filing the Statements of Defense starts only then. This appears all the more practical as the Statements of Claim have not been served on Defendant 2) yet."

He asked for the Court's confirmation of the starting point(s) of the deadlines for the Statements of Defense.

The Claimant disputed the motion to set the date of service to the date of correction of the identity of Defendant 1) with submission 15 November 2024.

GROUND FOR THE ORDER

The request for rectification of the name of Defendant 1) is granted. The date of service on Nintendo of Europe SE is determined to be effected 17 October.

1.

According to the case law of the Court of Appeal, which the Claimant correctly cited, the Court may allow the claimant to rectify an error, if the claimant has not correctly named the defendant in the statement initiating the proceedings (comp. CoA, 03.04.2024 - UPC_CoA_433/2023 - APL_588420/2023). The request can be granted if the defendant is not unreasonably prejudiced by the incorrect statement of name and its rectification. As a rule, there will be no unreasonable

prejudice if, despite the incorrect statement of name, it must have been clear to the defendant and to the Court, based on the circumstances of the case, that the claimant intended the statement for revocation to be directed against the defendant (CoA, 03.04.2024 - UPC_CoA_433/2023 - APL_588420/2023).

Applying this standard, the request for rectification is to be granted as the Nintendo of Europa SE followed the Nintendo of Europa AG by way of universal succession. It is undisputed that there did not and still does not exist any other company in Germany with the name "Nintendo of Europe" and that the successor company has taken over all assets and business premises, e-mail-addresses and the VAT-number of Nintendo of Europa AG. Based on these facts, there was no doubt that it had been clear to the Nintendo of Europe SE that the statement of claim was intended to be directed against it as the present and sole successor of Nintendo of Europe AG.

2.

The Statement of Claim dated 18 September 2024 was posted to the company Nintendo of Europe AG on 07 October 2024 by the sub-registry of the Court of First Instance. Delivery took place on 15 October. According to Rule 272.6 lit. b RoP service via registered letter shall be deemed to be served on the addressee on the tenth day following posting, unless it has failed to reach the addressee, has in fact reached him on a later date or the acknowledgement of receipt or equivalent has not been returned. Based on this rule service on Nintendo of Europe AG is therefore to be deemed effected 17 October (not 20 October as erroneously stated in the preliminary order of 05 November).

The present case does not give any room to determine a deviating date of service. As stated above, there was no doubt that it must have been clear to the Nintendo of Europe SE that the statement of claim was intended to be directed against it as the present and sole successor of Nintendo of Europe AG. The Claimant did not agree on an extension of the time-limit, either.

ORDER

1. The designation of Defendant 1) is changed from Nintendo of Europe AG to Nintendo of Europe SE.
2. The date of service on Nintendo of Europe SE is determined to be effected 17 October. This is the starting point for the time-limit of the Statement of defence.

INSTRUCTIONS TO THE REGISTRY

This order – and the Claimant's submission dated 15 November – is to be sent electronically to attorney-at-law Johannes Heselberger as he is not yet listed in the CMS.

ORDER DETAILS

Order no. ORD_59817/2024 in ACTION NUMBER: ACT_53365/2024

UPC number: UPC_CFI_555/2024

Action type: Infringement Action

Related proceeding no. Application No.: 59463/2024

Application Type: Generic procedural Application