



## Hamburg - Local Division

**UPC\_CFI\_537/2024**  
**Final Order**  
**of the Court of First Instance of the Unified Patent Court**  
**delivered on 23/03/2025**

### APPLICANTS

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| 1) | <b>Nintendo Co., Ltd.</b><br>(Defendant) - 11-1 Hokotate-cho, Kamitoba,<br>Minami-ku - 601-8501 - Kyoto - JP | Represented by Johannes<br>Heselberger |
| 2) | <b>Nintendo of Europe SE</b><br>(Defendant) - Goldsteinstraße 235 - 60528 -<br>Frankfurt am Main - DE        | Represented by Johannes<br>Heselberger |

### CLAIMANT

<b>Malikie Innovations Ltd.</b> (Claimant) - The Glasshouses GH2, 92 Georges Street Lower Dun Laoghaire - A96 VR66 - Dublin - IE	Represented by Dr. Marc Grunwald
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### PATENT AT ISSUE

<i>Patent no.</i>	<i>Proprietor/s</i>
<b>EP2579551</b>	<b>Malikie Innovations Ltd.</b>

### DECIDING JUDGE

Judge-rapporteur Dr. Schilling

### SUBJECT OF THE APPLICATION:

Confidentiality request, R. 262A

### MOTIONS OF THE PARTIES:

With submission dated 14 March 2025 the Defendants requested that the sales data in their Statement of defense, marginal numbers 108, 147, 148, 153 and 161, and Exhibit BP08 be declared

confidential and access be restricted to two named reliable natural persons of the Claimant in accordance with R. 262A.1 RoP and that any access beyond this be declared inadmissible. They have also submitted redacted versions of these documents.

The Defendants argued that the sales and profit figures of the Defendants in relation to the product attacked by the complaint and the Defendants' market positioning was highly sensitive business information of the Defendants, which constitutes trade secrets of the Defendants within the meaning of Art. 58 and 24 (1) lit. a) UPCA in conjunction with Art. 2 no. 1 of Directive (EU) 2016/943. They assert that these trade secrets were neither generally known nor readily accessible to the circles that normally deal with this type of information. The information was also not known or readily accessible in the market and is subject to appropriate confidentiality measures on the part of the Defendants and its legal representatives, who have lawful control over the information, as well as appropriate confidentiality agreements have been made with all employees who have access to the information.

They requested that Claimant's internal access to this information should be restricted to two reliable persons to be named to the Court and the Defendants and for whom the Claimant can prove the necessity of the access for the purpose of conducting this litigation. For the purpose of the proceedings, there would be no need in granting access to a larger number than two reliable persons on the Claimant's side and its UPC representatives.

The Claimant commented on the request and asked for an extension of access for two specific employees. It supported the judge-rapporteur's view that the name of a witness cannot be protected as trade secret.

It further argues that the Defendants request was too broad when they ask that any information obtained on a non-confidential basis should still be protected if it originated from them (see item 3 of Defendants' requests). It would be Defendants' responsibility to safeguard their information and, if it was disclosed to Claimant voluntarily, to ensure appropriate security measures are in place. The same principle applied if a third party provides such information to Claimant, even if that third party was bound by a non-disclosure agreement (NDA) with Defendants. As the Claimant would have no contractual relationship with that third party, it could not be held liable for any breach of the NDA by the third party.

The Defendants in their responses did not object the two individuals named by the Claimant. They pointed out that even if the Court does not extend the confidentiality order to the witnesses' personal data, however, Claimant was obliged to handle this data in accordance with the specification of Regulation (EU) 2016/679. Against this background, Claimant was not only precluded from disclosing this data to the public but must also take precautions to limit access to such data to avoid violating the laws on data protection. In particular, Claimant could not simply share this information with any employee but must instead limit access solely to those employees who are actively involved in the given case and who need to know the information.

They argue additionally, that contrary to Claimant's position, to the extent it knows or suspects that information received from a third party is subject to a confidentiality agreement with

Defendants, Claimant would not simply be “entitled to use it”. Instead, the Claimant would be obliged to preserve the confidentiality of such information.

REASONS FOR THE ORDER:

The preliminary order dated 18 March 2025 can be upheld as final order with adding access to the two individuals named by the Claimant.

1.

Article 9(1) and (2)(a) of Directive (EU) 2016/943 provides that, in judicial proceedings, access to documents submitted by the parties or third parties containing trade secrets or alleged trade secrets may be restricted, in whole or in part, to a limited number of persons on application. This is implemented in the UPC Rules of Procedure in R. 262A.

The Claimant did not contest that the specific information in question, sales and profit figures in the SoD and in exhibit BP 08, constitutes a business secret within the scope of R. 262A RoP. As already pointed out in the preliminary order the personal data of employees cannot be protected as a trade secret, certainly not the name of a witness itself, but as private data with respect to the general public, R. 262.1 RoP. Thus, the Claimant it is obliged to handle this data in accordance with the specification of Regulation (EU) 2016/679 without any Court order. The greying-out of the personal data allows the Claimant to easily identify the data in question.

2.

When deciding the application to grant protection for the allegedly confidential information, the Court has to weigh the right of a party to have unlimited access to the documents contained in the file, which guarantees its fundamental right to be heard, against the interest of the opposing party to have its confidential information protected. Both fundamental principles have to be balanced against each other on the instant facts of the particular case.

a)

Contrary to the Claimant’s position, the Defendants’ request is not too broad when asking that any information obtained on a non-confidential basis should still be protected if it originated from a source that is itself *bound* by a confidentiality agreement with the Defendants or its affiliates. The granting of this request does not interfere with the other party’s right to a fair trial. On the contrary, for the purpose of the present trial the Claimant is not limited to use the confidential information in the proceeding, while observing the limitation of the confidentiality club. It has to be respected that the party disclosing trade secrets in a trial is doing so to maintain its legal rights - not to serve the other party. Therefore, it is not only an acknowledged standard that the confidential information may not be used or disclosed outside these court proceedings unless it has come to the knowledge of the receiving party outside these proceedings. But it is furthermore an acknowledged standard that this exception only applies if this information was obtained by the receiving party on a non-confidential basis from a source other than the disclosing party or its affiliates, provided that this source is not itself bound by a confidentiality agreement with the disclosing party or its affiliates or by any other obligation of confidentiality towards them (comp.

LD Düsseldorf, 22.04.2025 – UPC\_CFI\_16/2024, App\_7739/2025; LD Munich, 10.03.2025 – UPC\_CFI\_846/2024, APP 15/2025).

b)

As a consequence, the Claimant is bound by this Court order making it the Claimant's responsibility to make sure that said confidential information, that might be disclosed to it voluntarily by a third party, is free of any contractual or legal obligation of confidentiality. This burden the Claimant has to bear - and that would have been in place had not the information been disclosed here and was protected by Court order – is not an undue one. This is because, any disclosure of confidential information always bears the risk of having it obtained by third parties, as a perfect protection can hardly ever be ensured. Therefore, it is justified to limit the obtaining party – here the Claimant - also in cases where a third party obtained the information and discloses it to the Claimant, while itself being bound to a confidentiality agreement. However, if the Claimant can verify that the disclosing third party is not bound to confidentiality, the Claimant would not be bound. Thus, the burden on the Claimant is limited to the step of verifying the existence of a confidentiality agreement binding the third party.

The competence of the judge-rapporteur for the present order in written proceedings follows from R. 331.1 in conjunction with 334 and 335 RoP.

#### ORDER

1. By means of a final order the preliminary order dated 18 March 2025 is amended with regards to its section 1:

Additional access is granted to the unredacted version of the Statement of Defence dated March 14, 2025 and the unredacted version of Exhibit BP 08 to the following employees of the Claimant:

- (i) ██████████ Managing Director
- (ii) ██████████ Licensing Executive & European Litigation Counsel

2. Apart from the addition stated above, sections 1. to 5. of the preliminary order dated 18 March 2025 are upheld as a final order.

#### ORDER DETAILS

Order no. ORD\_13311/2025 in ACTION NUMBER: ACT\_52355/2024


UPC number: UPC\_CFI\_537/2024

Action type: Infringement Action

Related proceeding no. Application No.: 12964/2025

Application Type: APPLICATION\_ROP262A

ISSUED IN HAMBURG, MARCH 23<sup>RD</sup> 2025

**Stefan  
Schilling**  Digital unterschrieben  
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Judge-rapporteur

Dr. Stefan Schilling