

**FRENCH REPUBLIC**  
ON BEHALF OF THE FRENCH PEOPLE

**PARIS COURT OF APPEAL**

**Division 5 - 16**  
**International Commercial Chamber**

(No 05/2020, 9 pages)

**JUDGMENT OF 14 JANUARY 2020**

General Directory Entry Number : **RG 19/18332 - No Portalis 35L7-V-B7D-CAXCA**

Decision referred to the Court: Judgement of 19 September 2019 - Paris Commercial Court - RG No 18/04526

**APPELLANTS:**

**MALWAREBYTES INC**

Having its registered office 3979 Freedom Circle, 12th Floor - Santa Clara- California 95054 - UNITED STATES OF AMERICA

Registered in the Delaware Division of Corporations under the number 1354892-92

Represented by its legal representatives

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**MALWAREBYTES LIMITED**

Having its registered office: 1 Albert Quay, 2nd Floor- Cork- IRELAND

Registered in the Companies Registration Office Ireland under the number : 557614

Represented by its legal representatives

*Represented by..., member of the Paris Bar : [...]*

**RESPONDENTS:**

**ENIGMA SOFTWARE GROUP USA LLC**

Having its registered office: 3000 Gulf to Bay Boulevard, Suite 303 - Clearwater, Florida 33759 - UNITED STATES OF AMERICA

Registered in the Florida Division of Corporations under the number : 51-0666461

Represented by its legal representatives

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**ENIGMASOFT LIMITED**

Having its registered office 1 Castle Street, 3rd Floor, Dublin 2 D02XD82- IRELAND

Registered in the Irish Companies Register under the number : 597114

Represented by its legal representatives

*Represented by..., member of the Paris Bar : [...]*

**COURT COMPOSITION**

The case was heard on 2 December 2019 in open court, before the Court composed of:

Mr François ANCEL, President

Ms Fabienne SCHALLER, Judge

Ms Laure ALDEBERT, Judge

who ruled on the case, a report was presented at the hearing by Ms Laure ALDEBERT in accordance with Article 785 of the Code of Civil Procedure.

**Clerk** at the hearing: Ms Clémentine GLEMET

## **JUDGMENT**

- ADVERSARIAL
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

## **I— FACTS AND PROCEDURE**

1. Enigma Software Group USA LLC (Enigma) and Malwarebytes Inc. are two US companies located in Florida and California respectively, which develop and market security software worldwide.
2. Their software programs, downloadable online, protect their users from malware and block viruses by alerting them of the presence of software detected as such on their computer, allowing them to remove them at their discretion.
3. Malwarebytes Limited incorporated under Irish law is a subsidiary of Malwarebytes Inc. which markets the products in the Europe, Middle East and Africa zone, including France.
4. In 2016 Enigma discovered that as a result of the MalwarebytesAntiMalware software revision (hereinafter MBAM), Malwarebytes Inc. software program was blocking its own products, the SpyHunter and RegHunter software.
5. Thus when the user was downloading the MBAM software from the Internet, the Enigma softwares SpyHunter and RegHunter appeared potentially unwanted on the computer (PUP'S Potentially Unwanted Programs) prompting the user to delete them or not to download them.
6. Enigma took the view that this conduct was deliberately malicious and brought in 2016 proceedings in the United States against Malwarebytes Inc. in order to end it and to obtain compensation for damages.
7. The case is currently pending before the California Court of Appeal.
8. On January 8, 2018, Enigma served a writ of summons on Malwarebytes Inc. and its Irish subsidiary Malwarebytes Limited, pursuant to Article 1240 of the French Civil Code, to appear before the Commercial Court of Paris in order to obtain compensation for the anti-competitive harm it considered it had suffered in France as a result of these actions.
9. On 12 December 2018, EnigmaSoft Limited (hereinafter EnigmaSoft), a company

incorporated under Irish law and a subsidiary of the US company Enigma, voluntarily intervened in the proceedings in order to obtain compensation for the damage it considered it had suffered as a result of the same conduct in relation to the Spyhunter 5 software launched on the market in June 2018 and identified as potentially undesirable by the MBAM software.

10. In the course of the proceedings, Malwarebytes USA and Malwarebytes Ireland raised in limine litis an objection of lack of jurisdiction of the Paris Commercial Court in favor of the U.S. courts and, in the alternative, raised a plea of lis pendens in favor of the U.S. court first seized of the same dispute.
11. By judgment dated 19 September 2019, the Paris Commercial Court ruled out the objections of lack of jurisdiction and lis pendens raised by Malwarebytes Inc. and Malwarebytes Limited, and ordered them in solidum to pay Enigma Software Group LLC the sum of EUR 40,000 and EnigmaSoft the sum of EUR 20,000 pursuant to Article 700 of the French Code of Civil Procedure.
12. The Malwarebytes companies appealed the decision in accordance with Articles 83 et seq. of the Code of Civil Procedure regarding jurisdiction and, after having been authorized to do so by order of 22 October 2019, had Enigma Software Group USA LLC and EnigmaSoft summoned by bailiff's acts of 25 October 2019 for a hearing on 2 December 2019 before the International Commercial Chamber of the Paris Court of Appeal.
13. The present proceedings are governed by the Protocol relating to proceedings before the International Chamber of the Paris Court of Appeal, which has been agreed on by the Parties.

## **II— CLAIMS OF THE PARTIES**

14. **According to their latest submissions sent electronically on 14 October 2019**, the appellants request the Court, under Articles 42, 46, 73, 74, 75, 100, 102 and 105 of the Code of Civil Procedure, European Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the case law of the Court of Justice of the European Union, to overturn the judgment handed down by the Paris Commercial Court on September 19, 2019 in all its provisions and, ruling again, to decline the jurisdiction of the Paris Commercial Court in favor of the Court of First Instance of the District of California.
15. In the alternative, in the event that the plea of lack of jurisdiction is rejected, and in view of the lis pendens, they request that the Paris Commercial Court jurisdiction be declined in favor of the Court of First Instance for the Northern District of California and, in any event, that the voluntary intervention of Enigma Soft limited be declared inadmissible.
16. They ask that all the applications, claims and demands of the Enigma companies be dismissed and request that they be ordered in solidum to pay each the sum of EUR 50,000 pursuant to Article 700 of the Code of Civil Procedure and to pay all the costs.
17. According to their submissions in response communicated electronically on November 27, 2019, the Enigma companies ask the court, under Article 7 - 2° of Regulation n°1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), known as "Brussels I bis Regulation (recast)", and Articles 46 and 100 of the Code of Civil Procedure, to uphold the judgment handed down on September 19, 2019 by the Paris Commercial Court in all its provisions and to dismiss the Malwarebytes Inc. and

Malwarebytes Limited of all their claims and submissions.

18. They therefore request that the case be referred back to the Paris Commercial Court and that Malwarebytes Inc. and Malwarebytes Limited be ordered to file submissions on the merits of the case and, in any event, that they be ordered jointly and severally to pay to them the sum of EUR 50,000 each under Article 700 of the Code of Civil Procedure and to pay all the costs of the present proceedings.

### **III — PLEAS OF THE PARTIES**

19. In substance, the appellant companies Malwarebytes Inc. and Malwarebytes Ltd. (hereinafter "Malwarebytes") challenge the voluntary intervention of EnigmaSoft which is, according to them, a tax optimisation structure artificially brought into the proceedings in an attempt to justify the jurisdiction of the Paris Commercial Court.
20. They point out that EnigmaSoft is not involved in the development of the disputed software and has no real commercial activity, and produce in support of their claim the investigations carried out by Deloitte, which they have commissioned for this purpose.
21. In support of their plea of lack of jurisdiction, the appellants object that the court did not distinguish between the rules of jurisdiction that apply to Malwarebytes Inc. and the ones that apply to Malwarebytes Ltd. and that it found that a harmful event occurred in France whereas the harmful event relates to the development of the disputed software by Malwarebytes Inc. located in the United States, so that the American courts shall have jurisdiction.
22. They point out that the facts complained of in the summons relate to the revision of PUP's identification criteria by Malwarebytes Inc. on 5 October 2016, which took place in Santa Clara, where the developers of Malwarebytes Inc. are located and that it is only because of the new configuration of the Malwarebytes software that the defendants claim to suffer from disparagement and misappropriation of their customers constituting unfair competition practices.
23. They deduce from this that, contrary to the analysis of the Commercial Court, the harmful event is not located in France but in the United States, which does not allow to rule for the international jurisdiction of the French court.
24. They add that the Irish company Malwarebytes Ltd, which is in no way involved in the design of the software and the disputed revision of the MBAM program, is not a serious defendant and that its domicile cannot justify the jurisdiction of the French courts.
25. In addition, they submit that the place of marketing of the disputed software on the Internet does not make it possible to locate the existence of a harmful event in France either, since the products in question are essentially distributed in the United States and are available on the site [www.malwarebytes.com](http://www.malwarebytes.com), which is not specifically intended for the French public, citing in support of their claim the established case-law of the Court of Cassation (No. 06-20230 louis Vuitton v. Google Inc. and Google France).
26. They also claim that, in application of European case-law on disparagement of legal persons, the competent court is, in addition to the court of the domicile of the victim of the disparagement, the court of the country where its economic activity is preponderant, which is not the case in France for the company Enigma Ltd (Case C -194/16 - 17 October 2017).

27. In the alternative, they raise the plea of *lis pendens*, arguing that the parent company Enigma brought an identical action in the United States prior to the present dispute in respect of liability under US law against the US company Malwarebytes, based on the same facts of revision of Malwarebytes' quarantine software when users downloaded the disputed program.
28. They state that these proceedings are pending before the Court of First Instance of the Northern District of California and that the dispute in the United States concerns the worldwide marketing of Enigma's products and seeks compensation for its loss, which necessarily includes the loss suffered in France.
29. In reply, the Enigma companies maintain that EnigmaSoft Ltd has a genuine commercial activity and that it is entitled to bring an action for compensation for its separate damage on the French territory.
30. On the plea of lack of jurisdiction, they reply that the court ruled correctly with regard to the European and French provisions with regard to the two Malwarebytes companies by finding the international jurisdiction of the French courts based on the location of the harmful event, since it is the interference of Malwarebytes software with their SpyHunter software by French users that takes place in France when they download the product online, which is the harmful event from which they seek the liability of the companies Malwarebytes and Malwarebytes limited on the basis of Article 1240 of the Civil Code.
31. They argue that it is settled case-law that the location of the harm in France is sufficient to ground the international jurisdiction of French courts, regardless of whether the harm arises from an operative event located abroad.
32. They thus argue that the circumstance that the Malwarebytes software has been revised in the United States is irrelevant.

#### **IV — REASONS FOR THE DECISION**

##### **On the admissibility of the voluntary intervention of ESL Ireland before the Commercial Court**

33. According to Article 329 of the Code of Civil Procedure, “intervention is principal when it raises a claim in favor of the person making it. It is admissible only if its author has the right to act in respect of that claim”.
34. In the present case, the proceedings show that EnigmaSoft Ltd. filed voluntary intervention submissions before the Paris Commercial Court at the hearing of 12 December 2018 seeking, *inter alia*, on the basis of Article 1240 of the Civil Code, that the Malwarebytes companies be ordered to pay—the sum of EUR 200,000 by way of compensation for the damage suffered as a result of the interference of the MBAM software with the Spyhunter 5 software, since, in its view, those are identical anti-competitive conducts to those alleged by Enigma with regard to its program.
35. Two affidavits from the accounting consultant and the CEO of Enigma Ltd, that are not challenged by the accounting elements identified by Deloitte from publications, show that Enigmasoft Ltd does indeed own the software which it developed over a period of 18 months

before putting it on sale to the public on 22 June 2018, which rebuts the appellants' allegations that it was created solely for tax reasons.

36. It is further established that it is claiming compensation for its own damages for the launch of a separate Spyhunter 5 software program which appears to be a new product that it markets.
37. The link between the voluntary intervention of EnigmaSoft limited and the initial claims made by Enigma in first instance is not disputed, since they concern identical interference with their software with regard to the detection of PUP's by the Malwarebytes security software on the internet.
38. Thus EnigmaSoft limited pursues its own right of compensation for damages which it is entitled alone to exercise, so that its intervention is admissible.
39. The decision shall be upheld on this count.

### **On the international jurisdiction of the Paris Commercial Court**

40. It is recognised that in the present case, the provisions of Article 46 of the Code of Civil Procedure apply as regards the American company Malewarebytes Inc., which provide that :

*“ The plaintiff may bring proceedings before, at his option, in addition to the court of the place where the defendant resides: - in matters relating to tort or delict, before the court of the place where the harmful event occurred or before the court within which jurisdiction the damage was-suffered ” ;*

41. As far as the Irish company Malwarebytes is concerned, Article 7.2 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 ("Brussels I Regulation (recast)") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shall apply, which reads as follows:

*“ A person domiciled in a Member State may be sued in another Member State: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur ” ;*

42. Although the court did not formally distinguish in its judgment the analysis of the jurisdiction of the French courts with regard to the American and Irish companies Malwarebytes, it ruled on the basis of the French and European grounds of jurisdiction with reference to the aforementioned texts which designate "the court of the place where the harmful event occurred or may to occur" (wording of the Brussels I Regulation (recast)) or "the court of the place where the harmful event occurred or the court within which jurisdiction the damage was suffered" (Article 46 of the Code of Civil Procedure), which comes to the same.
43. According to CJEU case-law (and in particular *Melzer* C-228/11, paragraph 25), the expression "place where the harmful event occurred" in Article 5(3) of Regulation No 44/2001, now Article 7(2) of Brussels I Regulation (recast), is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the court of either of those places.
44. Thus it has been held in unfair competition cases that “Article 5(3) of Council Regulation

(EC) No 44/2001 [now Article 7(2) of Brussels I Regulation (recast)] must be interpreted, for the purpose of conferring the jurisdiction given by that provision to hear an action to establish liability for infringement of the prohibition on resale outside a selective distribution network resulting from offers, on websites operated in various Member States, of products covered by that network, as meaning that the place where the damage occurred is to be regarded as the territory of the Member State which protects the prohibition on resale by means of the action at issue, a territory on which the appellant alleges to have suffered a reduction in its sales.” (CJEU 21 December 2016 *Concurrence* C618/15)

45. The Court of Justice of the European Union (CJEU) has also ruled in a case concerning a claim for compensation for damages allegedly suffered by a Lithuanian airline brought against a Latvian airline and a Latvian airport as a result, inter alia, of an abuse of a dominant position (CJEU 5 July 2018 *FlyLAL* C-27/17), that “*Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 [now Article 7(2) of Brussels I Regulation (recast)] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, must be interpreted as meaning that, in the context of an action-seeking compensation for damage caused by anticompetitive conduct, the place where the harmful event occurred covers, in a situation such as that at issue in the main proceedings, inter alia, the place where loss of income consisting in loss of sales occurred, that is to say, the place of the market which is affected by that conduct on which the victim claims to have suffered those losses.*”
46. The CJEU finds in this judgment that where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying Article 5(3) of Regulation EC 44/2001. (paragraph 40).
47. Finally, in a cartel case within the meaning of Article 101 TFEU (CJEU 29 July 2019 *Tibor-Trans* C-451/18), the CJEU confirms this connecting criterion and finds that the alleged damage consisting of additional costs incurred because of artificially high prices occurs at the place where the market is affected by that infringement, that is to say the place where market prices were distorted and in which the victim claims to have suffered that damage.
48. In the present case, the appellant companies challenge that the harmful event may have occurred in France, arguing that the dispute relates to conducts committed in the United States, namely the revision of the software program in California, and concerns products essentially distributed in the United States. It arises from the proceedings, however, that the facts incriminated by the Enigma companies are those established by the bailiff's report in Paris, which states that when a user in France who has downloaded and installed the Spyhunter 4 or 5 software launches an analysis of his computer with the MBAM software, their software is identified as a threat and qualified as a "Potentially Unwanted Program" (PUP) automatically quarantined by the MBAM software, as it appears from the bailiff's reports drawn up in Paris on 17 November 2017 and 26 September 2018.
49. The Enigma companies consider in their summons that these are anticompetitive practices constituting disparagement, customer poaching in that they prevent them from fulfilling their obligations to French users who have complained about it and to newcomers to install and use their software in France.
50. According to them, this behaviour results in operating loss on the French market with eviction and disparagement effects on that territory, causing a fall in sales in France which can be identified in its accounts and harms its image and reputation.

51. In this case, the Enigma companies claims are limited to the compensation of the damage suffered in France and to compensating and preventing adequately any further damage on this territory only.
52. Furthermore, it is not disputed that the Malwarebytes software at issue, which can be downloaded online from the Malwarebytes website, is marketed not only in the United States but also, and specifically, in France through the intermediary of the Irish company Malwarebytes Ltd, which is a competitor of Enigma on that market and is indeed a serious defendant.
53. It is further established by the exhibits filed that Malwarebytes is targeting the French market and provides users with a French-language website "fr.malwarebytes.com" from which they can download and install a French version of the software and obtain information in French with the help of instructions in French so that it is a site intended for the French public.
54. The American company Malwarebytes Inc. cannot seriously claim that it is not involved in the marketing of the product in France, since it appears at the foot of the home page on the French-language webpage of the site "fr.malwarebytes.com" as interlocutor so that its presence in the case is justified.
55. Consequently, if it is true that the revision of the Malwarebytes software designed in Santa Clara is one of the harmful event located in the United States, that contributed to the damage alleged by the Enigma companies, the damage they have suffered is characterized by the loss suffered on the French market due to the marketing in France of the Malwarebytes software, which allows the Enigma companies to choose the French jurisdiction internationally competent under Article 46 of the Code of Civil Procedure and 7.2 of Regulation (EU) No. 1215/2012 known as Brussels I Regulation (recast).
56. This decision shall therefore be upheld on this count.

### **On the defence of international lis pendens**

57. Article 100 of the Code of Civil Procedure provides that where the same dispute is pending before two courts of the same degree equally competent to hear it, the court second seized shall decline jurisdiction in favour of the other one if one of the parties so requests. Failing this, it may do so of its own motion.
58. The defence of lis pendens may be raised on account of proceedings brought before a foreign court that is also competent and implies the demonstration of identical disputes; that is to say a triple identity of parties, subject-matter and cause of action.
59. It arises from the proceedings that the parties in the two proceedings initiated in the United States and then in France are not the same since EnigmaSoft Ltd and Malwarebytes Limited are not in the American proceedings and that, contrary to what the appellants claim, their presence in the French proceedings for the reasons given above is neither fictitious nor artificial.
60. In addition, the appellants acknowledge that the legal bases of the two proceedings are distinct and argue only on assumptions that in the US proceedings the Californian court will rule on the worldwide damage, including unambiguously the one suffered in France, which is insufficient to meet the requirements of identity of cause of action and subject-matter



necessary for the success of their claim.

61. The plea of lis pendens shall therefore be rejected and the court's decision upheld on this count.

**Costs and expenses**

62. The Malwarebytes companies as losing parties, should be ordered to pay the costs of the appeal.

63. In addition, they shall be ordered in solidum to pay the Enigma companies which have had to incur irrecoverable costs in order to assert their rights, compensation under Article 700 of the Code of Civil Procedure, which it is fair to set at the sum of EUR 20,000.

**ON THOSE GROUNDS, THE COURT HEREBY**

UPHOLDS the judgment of the Paris Commercial Court handed down on 19 September 2019 in all its provisions ;

And ruling in addition

ORDERS in solidum Malwarebytes Inc and Malwarebytes Limited to pay Enigma Software Group USA LLC and EnigmaSoft Limited the lump sum of EUR 20,000 under Article 700 of the Code of Civil Procedure ;

ORDERS in solidum Malwarebytes Inc and Malwarebytes Limited to pay the costs of the proceedings.

*Clerk*  
**G. GLEMET**

*President*  
**F. ANCEL**