Team: **106**

WARGAMING LEGAL CHALLENGE 2018

Creative Development Interactive Ltd.

vs

Sparkle Entertainment Ltd.

Submission of the Claimant

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3. The Paris Convention for the Protection of Industrial Property (1883) ("**Paris Convention**")

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20. Polaroid Corporation v. Polarad electronics corporation, No. 162, Docket 26460, 287 F.2d 492 (1961)

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23. Spry Fox LLC v. Lolapps, Inc., 2:12-cv-00147-RAJ (W.D. Wash. Sept. 18, 2012)

24. Star Industries v. Bacardi & Company Ltd., 412 F. 3d 373 - Court of Appeals, 2nd Circuit 2005

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(b) LIST OF ABBREVIATIONS

1. **CDI**: Creative Development Interactive Ltd.
2. **Crida**: Crimson Dawn
3. **FPS**: first-person shooter
4. **Games**: Crida and Crida2
5. **IP rights**: intellectual property rights
6. **MItU**: Mission Impossible: The Ultimate
7. **Mod Policy**: MItU Mod Policy
8. **SpEnt**: Sparkle Entertainment Ltd.

(b) SUMMARY OF THE MAIN ARGUMENTS

1. CDI owns a valid copyright to Crida and GameGenius had no right to transfer it to Spent according to the Mod Policy.

2. Crida2 released by SpEnt is substantially similar to Crida according to both extrinsic and intrinsic tests, and, therefore, constitutes a copyright infringement.

3. Crida is a well-known trademark of CDI and obtains protection regardless of registration.

4. Use of Crida trademark by SpEnt may cause a consumer confusion in regard to CDI, therefore trademark registration for Crida mark obtained in Feronica should be cancelled.

(c) LEGAL PLEADINGS

I. SpEnt violated copyright on Crida owned by CDI by releasing Crida2

1. Release of Crida2 constituted an infringement of CDI's copyright because CDI owns a copyright on Crida, while GameGenius owned no copyright or any rights to transfer it (A) and Crida2 released by GameGenius is substantially similar to Crida (B)

A. CDI owns a valid copyright on Crida and transfer of IP rights to Crida from GameGenius to SpEnt was illegal

(i) CDI owns a valid copyright on Crida

2. Crida is a modification of the game MItU and is the sole and exclusive intellectual property of CDI based on Clause 3 of the Mod Policy and Clause 22 (a) of MItU EULA.

3. Moreover, it is a long-standing practice that interactive authorship of players did not withdraw video games from copyright protection. As the court in the *Midway Mfg. v. Artic International* case stated, a player could only "choose one of the limited number of sequences the game allows him to choose".[1]

4. In *Micro Star v. FormGen Inc*., the court considered user-generated works as derivative content belonging to the copyright owner.[2] The same logic was followed in a more recent case in *MDY Industries, LLC v. Blizzard Entertainment, Inc*.[3]

(ii)Transfer of IP rights to Crida from GameGenius to SpEnt was illegal

5. GameGenius was not entitled to transfer IP rights to Crida to the SpEnt[4], since according to Art. 3 of the Mod Policy GameGenius assigned to CDI all of his rights, title and interest in and to all Mods.

6. The licence granted by CDI to GameGenius is non-assignable and non-sublicensable. Therefore, GameGenius was not entitled to assign his rights based on CDI license to SpEnt.[5]

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[1] Midway Mfg. v. Artic International, 704 F. 2d 1009, 1012 (1983).

[2] Micro Star v. FormGen Inc., 154 F.3d 1107 (1998).

[3] MDY Industries, LLC v. Blizzard Entertainment, Inc., 616 F.Supp.2d 958, 970 (D. Ariz. Loc. R. 2009).

[4] Wargaming case 2018, at para. 19.

[5] Mod Policy, at Art. 2.

B. Crida2 is substantially similar to Crida

7. In order to decide whether the artwork constitutes a copyright infringement, the "substantial" similarity of this and the original artworks should be established.[6] In deciding, whether the video games are "substantially" similar to constitute a copyright infringement, the widely used[7] two-part test should be applied:

> [A plaintiff] must prove *both* substantial similarity under the "extrinsic test" and substantial similarity under the "intrinsic test." The "extrinsic test" is an objective comparison of specific expressive elements. The "intrinsic test" is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.[8]

8. The intrinsic test focuses on general impression ("look and feel") of the game, while the extrinsic test focuses on the objective comparison of *copyrightable* elements.

9. To determine and compare the elements, which are copyrightable, the "abstraction-filtration-comparison" method, elaborated by the US Courts,[9] may be applied. At the first step, the both games must be "broke[n] down into its constituent structural parts"[10], or in other words, the court should understand "the principles or ideas driving the program and the essential processes and functions by which it achieves those purposes".[11]

10. After that, the unprotectable elements should be filtered. As it was stated by the US court at *Capcom Co., Ltd, et al. v. The MKR Group, Inc.*:

11. Among the elements which the Court must filter out as unprotectable are: (1) "ideas" as opposed to the "expression" of those ideas; (2) facts, historical events, or other information

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[6] Practical Law. (n.d.). Retrieved February 28, 2018, from https://uk.practicallaw.thomsonreuters.com/5-524-1501?transitionType=Default&contextData=%28sc.Default%29.

[7] See Antonick v. Electronic Arts, Inc., No. 14-15298 (9th Cir. 2016) [*Antonick*]; Benay v. Warner Bros. Entertainment, Inc., 607 F. 3d 620 (9th Cir. 2010).

[8] Antonick, *supra* 7 at 7.

[9] See Tetris Holding, Llc Et Al V. Xio Interactive, No. 3:2009cv06115 - Document 61 (D.N.J. 2012) at 11 [*Tetris*]; Atari Games Corp. v. Nintendo of America Inc., 975 F.2d 832 (Fed. Cir. 1992) [*Atari*].

[10] Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) at 12.

[11] Tetris, *supra* 9 at 12.

over which no party is entitled to claim a monopoly; (3) elements borrowed from another creator or from the "public domain"; (4) instances in which a particular "expression" at issue "merges" with the "idea" being expressed; and (5) a similar instance in which the form of the "expression" is so standard in the treatment of a given "idea" that it constitutes scènes à faire.[12]

12. The primary focus of this stage is to filter the ideas which are unprotectable according to the general rule of copyright law fixed, inter alia, in Article 16 (b) of the IP Act of Nauland.[13]

13. What is left after such filtration, that is the protectable elements standing alone, should be objectively compared with a view to decide, whether they are similar enough for the game to be regarded as "substantially" similar.

14. In proving the violation of CDI's copyright, CDI will follow the above steps. First, the protectable elements of Crida and Crida2 will be identified (i). Second, the respective elements will be compared (ii). Third, the CDI will prove that both games "look and feel" similarly and, therefore, that the intrinsic test is satisfied as well (iii).

(i) Identification of the protectable and unprotectable elements of the Games

15. From the general point, the Games relate to the same genre: the first-person shooter about fighting against mutated creatures in a post-apocalyptic world. However, most often the programs (including games) do not have only one underlying idea.[14] Therefore, in more specific terms, both games also embrace other ideas, such as: (1) the idea that the creatures a combated by the armed forces and the player acts as a member of such armed forces; (2) the idea that there are different type of creatures to fight with; (3) the idea that the players may have different functions depending on their role in the game.

16. Further, as it is widely established that the "game mechanics and the rules are not entitled to protection".[15] The rules of the FPS game may be described as the task the player has to perform in order to win. From this point, the game types such as *Killing All*, *Combat Mission*, *Overkill*, *Invasion* constitute the elements of the Games' mechanics and rules, and thus lie out of the scope of legal protection. Therefore, the extension of game types in Crida2 does

[12] Capcom Co., Ltd, et al. v. The MKR Group, Inc., No. C 08-0904 RS [*Capcom*].

[13] IP Act of Nauland.

[14] Tetris, *supra* 9 at 13.

[15] *Ibid* at 15-16.

not in any way support the idea that the Games were not substantially similar: the game types are unprotectable elements in both Games and should not be considered at all.

17. Similarly of the game types, the classes of the players' characters lie out of the scope of the protection. It is the most usual thing for the multiplayer games to involve different types of characters with their special features. The particular types of features are caused by the objective reason to create a well-balanced team. The types of the characters in the Games are described in very general terms and are not distinct from the "stock" characters: most of the character types in both Games can be found in *Team Fortress 2*[16] and some of them – in *Star Wars Battlefront II*.[17] Because "the less developed the characters [are], the less they can be copyrighted",[18] the game classes as they are described in the Games are not copyrightable at all.

18. Some elements of the Games are not protectable, because they constitute scènes à faire (or the scene which must be done). The Claimant acknowledges that the wide variety of the Games' elements constitute the scènes à faire, such as: (1) darkness of both games; (2) weapon types, which resemble the real weapon; (3) game currency; (4) life indicators; (5) using the sign of biohazard etc.

19. The elements left after the above "filtration" are those which should be compared.

(ii) Comparison of the protectable elements of the Games

20. While considering the expressive protectable elements, the courts usually focus on comparing the elements like plot, theme, dialogue, mood, setting, pace, characters, and sequence of events.[19] Both Games lack the dialogs, save for the phrases ordinary for the genre ("*cover me*, *I'm reloading*") phrases which are not entitled to the copyright protection.[20] CDI further admits that the mood, theme and pace of the Games is also similar, which, however, is largely due to the similarity of the Games' genre.

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[16] Main Page. (n.d.). Retrieved February 28, 2018, from https://wiki.teamfortress.com/wiki/Main_Page.

[17] Star Wars Battlefront 2 classes guide. (2017, November 14). Retrieved February 28, 2018, from https://www.pcgamesn.com/star-wars-battlefront-ii/star-wars-battlefront-2-class-guide.

[18] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[19] See Spry Fox LLC v. Lolapps, Inc., 2:12-cv-00147-RAJ (W.D. Wash. Sept. 18, 2012) at 8 [*Spry Fox*]; Capcom, *supra* 12 at 9.

[20] Capcom, *supra* 12 at 14.

21. What is left to be compared, is the Games' characters (1); setting (2); plot and sequence of events (3).

(1) Characters

22. The Games has two types of characters: players and REXs. As it was stated in paragraph 17 above, the players' classes are not protectable and should not be compared. On the other hand, all the REXs (save for the *Zombie*), are well-elaborated characters in Crida with a distinct design and style. As it was confirmed by the court in *Tetris Holding, LLC et al v. Xio Interactive*, "[t]he style, design, shape ... are expression; they are not part of the ideas, rules, or functions of the game nor are they essential or inseparable from the ideas, rules, or functions of the game".[21]

23. All the special REXs types in both Games bear remarkable similarities: all their main features are identical. For example, the *Ravager* has, similarly to the *Berserker*, hands–maces, similar lamp in the middle of its body, and eyes closed with a bandage. It is apparent to a lay person that the *Spider*, *Ravager*, *Skinner* and *Executioner* in Crida2 are *Creeper*, *Berserker*, *Butcher* and *Leviathan* in Crida respectively. The only slightly different features of the creatures, are colors and names. However, even the less apparent similarities of the characters were disregarded by the courts, like in *Spry Fox LLC v. Lolapps, Inc.* where the court found that "a snowfield is not so different from a meadow, bears and yetis are both wild creatures, and the construction of a "plain" is not plausibly similar to the construction of a "patch," at least as the two games depict those terms".[22]

24. Moreover, REXs are similar in their names (they are called "REXs" in both Games). While it is true, that some concepts "cannot be expressed in a wide variety of ways",[23] (like the word "coin" for in-game rewards[24] that is not true for the REXs. The creatures may be called "zombies", "mutants" or with another ordinary name. The term "REX", however, is a unique copyrightable name used only in Crida.

25. For the above reasons, all the copyrightable characters of both Games are substantially similar.

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[21] Tetris, *supra* 9 at 28.

[22] Spry Fox, *supra* 19 at 10 – 11.

[23] Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984).

[24] Spry Fox, *supra* 19 at 9.

(2) Setting

26. The action of both Games takes place on the streets of a city. Therefore, some elements of the setting may constitute scènes à faire, such as streetlights and burning cars. However, the streets of a city may be expressed in a wide variety of ways. However, as it can be seen from the videos,[25] the streets in the both Games, are identical: with a bridge to the right, two-storeyed building to the left, and the building with the gates in front of the player. Moreover, even such elements as graffiti on the building, red telephone box in the middle of the street and the burning car behind the gates turned upside down and lying in exactly the same position are similar in both Games.

27. Therefore, the design of the setting of Crida (which is copyrightable) was copied in detail in Crida2.

(3) Plot and sequence of events

28. The Respondent may claim that the plot in both Games is different: in Crida action takes place in 2200, while in Crida2 – in 2100; in Crida the attack of REXs is caused by radiation as a result of attempts to cure cancer,[26] while in Crida – attempts to create super-soldiers.[27] However, this facts are only the background of the Games and do not substantially influence the gameplay: the player's task is killing REXs, no matter how they emerged.

29. As it was stated by the court at *Spry Fox LLC v. Lolapps, Inc.*, "a writer who appropriates the plot of Gone with the Wind cannot avoid copyright infringement by naming its male protagonist "Brett Cutler" and making him an Alaskan gold miner instead of a southern gentleman".[28] Applying this logic in the present case, changing the history of the REXs outbreak resembles rather changing the background of the protagonist, than the substantial change of plot. Therefore, the Respondent may not refer to this fact to refute the copyright infringement.

30. Therefore, as clearly proved in the above analysis, almost all the copyrightable elements of both Games are similar. Some negligeable features (like the plot, REXs' colors, design of "trading" windows) are slightly different. However, as it was noted in *Spry Fox LLC v.*

[25] The videos can be found at https://gameslawsummit.org/wargaming-legal-challenge-2018/.

[26] Wargaming case 2018, at para. 12.

[27] Wargaming case 2018, at para. 12.

[28] Spry Fox, *supra* 19 at 11.

Lolapps, Inc: "a court must focus on what is similar, not what is different, when comparing two works"[29] and "[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate".[30] Therefore, because almost all essential copyrightable elements of Crida (like setting and characters) were copied in Crida2, the extrinsic case in the present case is satisfied.

(iii) The Intrinsic Test

31. The intrinsic test relates to a "response of the ordinary reasonable person"[31] while comparing both Games. Because this test is subjective in nature, it is quite difficult to satisfy this test "beyond any doubt". For this reason, CDI claims that it is only necessary to show that it is "at least plausible" to satisfy the test. The court in *Spry Fox LLC v. Lolapps, Inc* used "at least plausible" standard, stating that with the objective similarities of the protected expression (which is true in the present case), it is at least plausible that the [plaintiff] can pass the extrinsic test for substantial similarity.[32]

32. Moreover, in its analysis the court may apply the reports of video game bloggers as ordinary observers of video games.[33] In the present case, the game journalists confirm that "Crida2 successfully builds on the strengths of its predecessor [Crida]", admitting, however, that the game also introduce new features.[34] That means that the fundamental features of Crida were copied in Crida2 with adding some new features. These features, however, as discussed in para. 30 above, are unimportant considering the game from the broad perspective.

33. Therefore, it is at least plausible that CDI satisfies the intrinsic test merely because it satisfies the extrinsic test, but also considering the opinions of the ordinary persons, such as the game journalists.

34. Consequently, because both extrinsic and intrinsic tests are satisfied, Crida2 constitutes an infringement of CDI's copyright.

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[29] *Ibid* at 11.

[30] *Ibid*.

[31] Rodger R. Cole, Substantial Similarity in the Ninth Circuit, 11 Santa Clara High Tech. L.J. 417 (1995) at 422. Available at: http://digitalcommons.law.scu.edu/chtlj/vol11/iss2/10.

[32] Spry Fox, *supra* 19 at 11.

[33] *Ibid* at 12.

[34] Wargaming case 2018, at para. 26.

II. Trademark registration and use of Crida by SpEnt constitute a trademark infringement in respect to trademark Crida owned by CDI, therefore the infringing trademark registration should be cancelled and SpEnt should cease any illegal use of Crida mark and any other designations confusingly similar with trademark Crida owned by CDI.

A. Crida is a well-known trademark of CDI and obtains protection regardless of registration.

35. Even though CDI has never registered trademark Crida[35], CDI claims that Crida is a well-known trademark and obtains protection regardless of registration according to the Art. 6 bis of the Paris Convention.

36. While there is no commonly agreed detailed definition of what constitutes a well-known mark, Article 2 (1) of WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks[36] offers a list of factors for consideration to determine whether a mark is a well-known, namely (1) the degree of knowledge or recognition of the mark in the relevant sector of the public; (2) the duration, extent and geographical area of any use of the mark; (3) the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies; (4) the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark; (5) the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities; (6) the value associated with the mark.

37. Based on the listed factors for consideration Crida should be considered a well-known trademark, since it is highly recognised all over the world and was named "the most popular free, non-supported game mod in the world in 2007"[37] and since then Crida mark was used in relation to FPS games almost for 11 years. Moreover, due to the fame of CDI as a producer

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35 Clarifications, para 6

36 WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, World Intellectual Property Organization Geneva 2000. Available at: http://www.wipo.int/edocs/pubdocs/en/marks/833/pub833.pdf

37 Wargaming case 2018, para. 16.

of AAA quality games[38], the mark Crida is associated with high value products of CDI, which is also proved by the successful enforcement of rights in the mark by CDI in 2008, when CDI prevailed in litigation and the adverse party was prohibited to use Crida mark.[39]

B. Use of Crida trademark by SpEnt may cause a consumer confusion in regard to CDI, therefore trademark registration for Crida mark obtained in Feronica should be cancelled.

38. There is a "likelihood of confusion" between Crida trademark owned by CDI and Crida trademark registered by SpEnt (i); registration of trademark Crida in Feronica constitute a trademark violation and its registration should be cancelled based on the Art. 6 bis of the Paris Convention and the IP Act of Nauland Art 28 (a) 1(ii).

(i) There is a likelihood of confusion between Crida trademark owned by CDI and Crida trademark registered by SpEnt.

39. The likelihood of confusion must be assessed taking account *factors relevant to likelihood of confusion.* [40] An internationally recognized list of factors is set out in the US case of *Polariod v Polarad*:[41]

(1) the strength of the plaintiff's mark;

(2) the degree of similarity between the two marks;

(3) the proximity of the products;

(4) the likelihood that the owner will bridge the gap;

(5) evidence of actual confusion;

[38] Wargaming case 2018, para. 1.

[39] Wargaming case 2018, para. 20.

[40] These principles were adopted by and set out in a number of cases: Specsavers International Healthcare Ltd v Asda Stores Ltd [2012] EWCA Civ 24-52. A very similar approach is adopted internationally, see Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd (2013) SGCA 26 85; Crazy Ron 's Communications Pty Limited v Mobileworld Communications Pty Limited (2004) FCAFC 196 72-79; Masterpiece Inc. v. Alavida Lifestyles Inc. C 2011 2 S.C.R. 387 30-49;

[41] Polaroid Corporation v. Polarad Electronics Corporation, No. 162, Docket 26460, 287 F.2d 492 (1961)

(6) Respondent's good faith in adopting the mark;

(7) the quality of Respondent's product; and

(8) the sophistication of the consumers in the relevant market.

Crida is a strong mark, which is inherently distinctive in regard to the computer games and related goods and services

40. Trademark strength is usually assessed by reference to five categories: arbitrary, fanciful, suggestive, descriptive, and generic.[42] Whereas, arbitrary or fanciful marks receive the greatest protection. Arbitrary marks are well-known words that are used to identify goods or services to which they have no relation and fanciful marks are invented words, such marks are considered inherently distinctive because their only association with the marked goods or services is the association gained in the marketplace.[43]

41. Therefore, Crida is a strong mark, since it is an arbitrary and a fanciful trademark, and it is an invented and a well-known word which has been used for a long time in the gaming industry.

Similarity of marks, proximity of the product and the likelihood of "bridging the gap"

42. Both trademarks are completely identical and easily pass the "sight, sound, and meaning" test[44].

43. As for the proximity of the goods, the danger presented is that the public will mistakenly assume there is an association between the producers of the related goods, though no such association exists and the risk is not diminished even though SpEnt and CDI have different key markets. In *Stork Restaurant, Inc. v. Sahati* case the court found that mere geographical distance does not obviate danger of confusion.[45]

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[42] National Lead Co. v. Wolfe, 223 F.2d 195, 199 (CA 9), cert. denied, 350 U.S. 883, 76 S.Ct. 135, 100 L.Ed. 778 (1955).

[43] Dan L. Burk, Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks, 1 Rich. J.L. & Tech 1 (1995). Available at: https://scholarship.richmond.edu/jolt/vol1/iss1/4.

[44] Plough, Inc. v. Kreis Laboratories, 314 F. 2d 635, 638 (CA 9 1963).

[45] Stork Restaurant v. Sahati, 166 F. 2d 348 - Circuit Court of Appeals, 9th Circuit 1948, at 356.

44. Moreover, "bridging the gap" possibility is not applicable in the current case, because the Respondent already uses the trademark for the competing goods, so SpEnt cannot extend its use of Crida trademark from non-competing goods to competing[46].

Respondent's bad faith in adopting the mark

45. Bodenhausen, the first Director-General of the World Intellectual Property Organization, defined that bad faith normally exist when the person who registers the conflicting mark knew of the (prior foreign) mark and presumably intended to profit from the possible confusion between that mark and the one he has registered.[47]

46. In current case, SpEnt founded by GameGenius new about prior well-known mark owned by CDI and commenced to register Crida after failed negotiations on cooperation[48], what proves the bad faith registration of Crida by SpEnt.

Evidence of actual confusion; the quality of Respondent's product; and the sophistication of the consumers in the relevant market

47. Consumer sophistication may be proved by direct evidence such as expert opinions or surveys. However, evidence of actual confusion is not a prerequisite and the only prof used to establish the likelihood of confusion. In some cases, a court is entitled to reach a conclusion about consumer sophistication based solely on the nature of the product or its price.

48. In McGregor-Doniger Inc. v. Drizzle Inc. case the court held that "in some cases, of course, as where the products are identical and the marks are identical, the sophistication of buyers cannot be relied on to prevent confusion".[49]

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[46] Sports Authority, Inc. v. Prime Hospitality Corp., 89 F. 3d 955 - Court of Appeals, 2nd Circuit 1996.

[47] GHC Bodenhausen, Guide to the Application of the Paris Convention for the Protection of Industrial Property - As Revised at Stockholm in 1967 (WIPO Publication 1968) 93. See also the grounds for cancellation on the basis of bad faith provided for in the: Commission Decision (Andean Community) No 486 Establishing the Common Industrial Property Regime (2000) 600 Gaceta Oficial del Acuerdo de Cartagena 63, art 172(d), and WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (WIPO 2000) art 4.

[48] Wargaming case 2018, para. 18.

[49] McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1137-38 (2d Cir.1979).

49. In *Omega Importing Corp. v. Petri-Kine Camera Co.* case the court found that "even though the ordinary purchaser would be expected to make "more than a casual inspection" before buying an expensive camera, such inspection would be of doubtful value because the cameras from each of two different sources were both labelled identically".[50]

50. The instant case is similar to *Omega Importing Corp. v. Petri-Kine Camera Co.* because it involves identical goods and identical trademarks, and therefore, the sophistication of buyers cannot be relied on to prevent confusion.

51. As for the relevant market of both games, although, the main market for Crida is Nauland, and the main market for Crida 2 is Feronica[51], it does not preclude "likelihood of confusion". Even if CDI does not directly use Crida in Feronica, it does not make legal the trademark registration of Crida by SpEnt in Feronica.

52. The facts of this case present a clear "reputation-without-use" case scenario in international trade mark law terms. These cases are well documented internationally.[52] These cases, as here, involve trademarks which have gained a reputation in one country which then typically extend to a neighboring country. Even though these trademarks are not in use in such a neighboring country, they nonetheless have a sufficient reputation which entitles them to protection. This important principle of international trade mark law is eloquently described in the landmark decision of Judge Morden in the *Orkin* in Canada: "the public are entitled to be protected from such deliberate deception and Orkin, which has labored long and hard and made substantial expenditures to create the reputation which it now is entitled to the protection of its name from misappropriation".[53]

(ii) Registration of trademark Crida in Feronica constitute a trademark violation and such registration should be cancelled based on the Art. 6 bis of the Paris Convention and SpEnt should be liable for trademark infringement under Art 28 (a) 1 of IP Act of Nauland.

53. Based on Art. 6 bis of the Paris Convention registration of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion in relation to an earlier well-known trademark (whether registered or not) should be cancelled. Therefore, since

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[50] Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1195 (2d Cir. 1971).

[51] Clarifications para 1.

[52] Frederick Mostert, Famous and Well-Known Marks -An International Analysis (International Trade Mark Association 2015) at 47 –74.

[53] Orkin Exterminating Co. Inc v Pestco Co. of Canada Ltd, (1985) 50 OR (2d) 726, 19, DLR (4) 90, 5 CPR (3d) 433 (Ont CA), 448.

Crida trademark registered by SpEnt cause the likelihood of confusion with a well-known trademark Crida known in relation to CDI, Crida trademark registration in Feronica should be cancelled and based on Article 28 (a) 1 of IP Act of Nauland SpEnt shall be liable in a civil action due to the use of Crida in connection with any goods or services related to these rendered by CDI, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of SpEnt with CDI, and mislead as to the origin of the game Crida2.

54. Moreover, despite CDI had not filed an opposition against registration of Crida mark in Feronica[54] in due time, CDI is not devoid of the right to require cancellation of the registration of the mark confusingly similar to the well-known mark Crida owned by CDI based on Art. 6 bis Part 3 of the Paris Convention, which stipulates that no time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

[54] Clarifications, para 6.

(d) REQUEST FOR FINDINGS

CDI respectfully requests the court to adjudge and declare that:

1. SpEnt infringed CDI's copyright on Crida by releasing Crida2;

2. Crida trademark registration and use by SpEnt constitute a trademark infringement, and the infringing trademark registration should be cancelled.