

Team: **106**

WARGAMING LEGAL CHALLENGE 2018

Creative Development Interactive Ltd.

vs

Sparkle Entertainment Ltd.

Submission of the Respondent

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(a) LIST OF REFERENCES

TREATIES AND CONVENTIONS

1. Berne Convention for the Protection of Literary and Artistic Works (1886): **Berne Convention**
2. The Intellectual Property Act of the Republic of Nauland (1994): **IP Act of Nauland**
3. The Paris Convention for the Protection of Industrial Property (1883): **Paris Convention**

JUDICIAL DECISIONS

1. A. C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1992. Retrieved from <https://openjurist.org/960/f2d/1020/ac-aukerman-company-v-rl-chaides-construction-co>
2. Antonick v. Electronic Arts, Inc., No. 14-15298 (9th Cir. 2016)
3. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 334, 59 S.Ct. 191, 83 L.Ed. 195 (1938)
4. Atari Games Corp. v. Nintendo of America Inc., 975 F.2d 832 (Fed. Cir. 1992)
5. Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir. 1982)
6. Benay v. Warner Bros. Entertainment, Inc., 607 F. 3d 620 (9th Cir. 2010)
7. Capcom Co., Ltd, et al. v. The MKR Group, Inc., No. C 08-0904 RS
8. Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)
9. Crazy Ron 's Communications Pty Limited v Mobileworld Communications Pty Limited (2004) FCAFC 196 72-79
10. Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852, 862 (3d Cir.1992)
11. Ford Motor Co. v. Summit Motor Products, Inc., 930 F. 2d 277 - Court of Appeals, 3rd Circuit 1991
12. Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd (2013) SGCA 26 85
13. Hesmer Foods, Inc. v. Campbell Soup Co.,346 F.2d 356, 359 (CA7 1965)
14. Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 462 (3d Cir.1983); Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 291-93 (3d Cir.)

15. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n. 11, 102 S.Ct. 2182, 2187 n. 11, 72 L.Ed.2d 606 (1982)
16. Libman Co. v. Vining Indus., Inc., 69 F.3d 1360, 1361 (7th Cir.1995)
17. Masterpiece Inc. v. Alavida Lifestyles Inc. C 2011 2 S.C.R. 387 30-49
18. Micro Star v. FormGen Inc., 154 F.3d 1107 (1998)
19. New West Corp. v. NYM Co. of Cal., 595 F.2d 1194, 1200-01 (9th Cir.1979)
20. Petrella v. Metro-Goldwyn-Mayer, Inc. () 695 F. 3d 946, at p. 19
21. Polaroid Corporation v. Polarad Electronics Corporation, No. 162, Docket 26460, 287 F.2d 492 (1961)
22. Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F. 2d 154, Court of Appeals, 1st Circuit (1977)
23. Smith v. Chanel, Inc.,402 F.2d 562, 563 (CA9 1968)
24. Spangler Candy Co. v. Crystal Pure Candy Co., 235 F. Supp. 18, 27 (N.D. Ill. 1964), aff'd, 353 F.2d 641 (7th Cir. 1965)
25. Specsavers International Healthcare Ltd v Asda Stores Ltd (2012) EWCA Civ 24-52
26. Spry Fox LLC v. Lolapps, Inc., 2:12-cv-00147-RAJ (W.D. Wash. Sept. 18, 2012)
27. SquirtCo v. Seven-Up Co., 628 F. 2d 1086 - Court of Appeals, 8th Circuit 1980
28. Stryker Corp. v. Zimmer, Inc., 741 F. Supp. 509 (D.N.J. 1990)
29. Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1023 (11th Cir.1989)
30. Tetris Holding, Llc Et Al V. Xio Interactive, No. 3:2009cv06115 - Document 61 (D.N.J. 2012)
31. The Jif Lemon Case Reckitt & Colman Products Ltd v Borden Inc (1990)
32. Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.,909 F.2d 839, 842-43 (5th Cir.1990)

ARTICLES, ESSAYS AND THESES

1. Graeme Dinwoodie & Mark Janis, Confusion over Use: Contextualism in Trademark Law, 92 IOWA L. REV. 1597 (2007)

2. Graeme W. Austin, Tolerating Confusion About Confusion: Trademark Policies and Fair Use, 50 ARIZ. L. REV. 157, 163 (2008)
3. Kramer, Adam. Contracts: Waiver. Practical Law. (n.d.). Retrieved March 30, 2018, from <https://uk.practicallaw.thomsonreuters.com/0-502-8838>
4. Mark P. McKenna, The Normative Foundations of Trademark Law, 82 NOTRE DAME L. REV. 1839, 1916 (2007)
5. Öhrström, F. ACQUIESCENCE AND LACHES AS DEFENCES TO INFRINGEMENT CLAIMS IN SWEDISH PATENT LAW
6. Practical Law. (n.d.). Retrieved March 30, 2018, from <https://uk.practicallaw.thomsonreuters.com/2-383-2183>
7. The difference between passing off and trade mark infringement, April 11, 2007, available at: <http://www.bowmanslaw.com/insights/technology-media-and-telecommunications/the-difference-between-passing-off-and-trade-mark-infringement/>
8. Vaquer, Antoni. (2009). Verwirkung versus Laches: A Tale of Two Legal Transplants. SSRN Electronic Journal. 10.2139/ssrn.1348400

MISCELLANEOUS

1. Commission Decision (Andean Community) No 486 Establishing the Common Industrial Property Regime (2000) 600 Gaceta Oficial del Acuerdo de Cartagena
2. 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)
3. 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>
4. WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (WIPO 2000).

(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.

(c) SUMMARY OF THE MAIN ARGUMENTS

1. The doctrine of estoppel is applicable in the present case and bars CDI from claiming its copyright infringement.
2. In any event, Crida2 is not substantially similar to Crida and, therefore, does not constitute copyright infringement.
3. CDI has no trademark rights on Crida, because CDI does not own trademark rights on the unregistered mark Crida.
4. There is no trademark infringement, because there is no likelihood of confusion between Crida mark associated with Crida Mod and Crida trademark registered by SpEnt.
5. The registration of the trademark Crida by SpEnt does not constitute an act of unfair competition, since CDI has no goodwill associated with Crida mark, because Crida mark is known in relation to Crimson Dawn developed by the GameGenius, not CDI.

(d) LEGAL PLEADINGS

I. CDI HAS NO RIGHT TO CLAIM INFRINGEMENT OF COPYRIGHT AND, IN ANY EVENT, CRIDA2 DOES NOT CONSTITUTE INFRINGEMENT OF CDI'S COPYRIGHT

1. We claim that the doctrine of estoppel is applicable in the present case and bars CDI from claiming its copyright infringement [A] and, in any event, Crida2 is not substantially similar to Crida and, therefore, does not constitute copyright infringement [B].

A. The doctrine of estoppel bars CDI from claiming its copyright infringement

2. The doctrine of estoppel applies to prevent a party to a lawsuit from asserting a right or fact that is contrary either to the party's past conduct or the party's previous allegations or denials.¹ Estoppel is a common law doctrine, however, the similar doctrines are used in civil law countries, e.g. the doctrine of *Verwirkung* in German² and Swiss law.³ The similar doctrines also exist in other European countries and apply to intellectual property infringement cases as well.⁴ Therefore, as it was confirmed by the General Advocate Warner at the European Court of Justice, estoppel in its substance is not only a rule of common law, but a general legal principle.⁵ Therefore, the doctrine of estoppel may be applied in the present case.
3. Despite the particular test for estoppel varies, the common elements may still be indicated. The estoppel exists where: (i) there is a misleading conduct indicating an intention to give up, or promise not to, enforce a right;⁶ and (ii) the alleged infringer detrimentally relies on

¹ Practical Law. (n.d.). Retrieved March 30, 2018, from <https://uk.practicallaw.thomsonreuters.com/2-383-2183>.

² Öhrström, F. ACQUIESCENCE AND LACHES AS DEFENCES TO INFRINGEMENT CLAIMS IN SWEDISH PATENT LAW at p. 24 – 26.

³ Ibid, at 30 – 31.

⁴ Ibid, at 34 – 35.

⁵ Vaquer, Antoni. (2009). *Verwirkung versus Laches: A Tale of Two Legal Transplants*. SSRN Electronic Journal. 10.2139/ssrn.1348400, at p. 13 – 14.

⁶ Kramer, Adam. *Contracts: Waiver*. Practical Law. (n.d.). Retrieved March 30, 2018, from <https://uk.practicallaw.thomsonreuters.com/0-502-8838>.

such conduct.⁷ Such conduct may include specific statements, action, inaction, or silence where there was an obligation to speak.⁸ The detrimental reliance means that the party changed its position as a result of the statement or conduct of the other party, such as by not doing something it should have done or vice versa.⁹ These elements are satisfied in the present case for the following reasons.

4. First, the conduct of CDI indicated that CDI waived its copyright to Crida. It was done through an express statement made by its CEO that CDI "did not want to be associated with Crida"¹⁰ and "is unwilling to take any risk with regard to Crida".¹¹ Considering that the copyright owner usually bears all the risks associated with copyright, the refusal to take any risk may reasonably be construed as a copyright waiver.
5. Second, the abstention of CDI from claiming infringement of its copyright from 2013 when Crida2 was released up to 2018 when this claim was filed further confirmed that CDI had no claims against SpEnt with respect to the foregoing. In the law and court practice of states, there are usually no fixed periods required to establish estoppel.¹² However, for instance, in US *Stryker Corp. v. Zimmer, Inc* case it was ruled that the period of more than four years was sufficient for the equitable defense to apply.¹³ In this case the court noted that:

[a] patentee who, with knowledge of the alleged infringing activity, does nothing over a period of years [...] lying in wait until [...] it has become "commercially and economically worthwhile" to do something [...] has engaged in affirmatively misleading silence of the worst order and should not be insulated.¹⁴

⁷ See *Petrella v. Metro-Goldwyn-Mayer, Inc.* () 695 F. 3d 946, at p. 19; *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1992. Retrieved from <https://openjurist.org/960/f2d/1020/ac-aukerman-company-v-rl-chaides-construction-co>, at para. 19 – 21.

⁸ *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1992. Retrieved from <https://openjurist.org/960/f2d/1020/ac-aukerman-company-v-rl-chaides-construction-co>, at para. 19.

⁹ *Supra* 6.

¹⁰ Wargaming case 2018, at para. 18.

¹¹ *Ibid.*

¹² See *supra* 5 at 7.

¹³ *Stryker Corp. v. Zimmer, Inc.*, 741 F. Supp. 509 (D.N.J. 1990).

¹⁴ *Ibid.*

6. Such statement matches the circumstances of the present case as well as CDI was waiting for the period of five years to file the infringement claim, apparently, because CDI was aimed to discover whether Crida2 becomes commercially successful. Such behavior contradicts the principle of equity and good faith and should be estopped.
7. Thirdly, as it is directly stated from the facts of the case, GameGenius relied on the position of CDI¹⁵ and, despite the initial attempt to cooperate with CDI, invested its time and effort to create Crida2. It evidently demonstrates that the third element of estoppel test, namely the detrimental reliance, is satisfied.
8. Therefore, relying on the doctrine of estoppel, CDI waived its copyright to Crida and shall be precluded from claiming it.

B. Crida2 does not constitute CDI's copyright infringement

9. In any event, even if this court allows CDI to claim its copyright to Crida, SpEnt does not infringes CDI's alleged copyright.
10. On this matter, we agree with the test for the infringing copying outlined in the paragraph 3.1 of the Claimant's pleadings, namely that the infringer should have access to the original work and that the original work and the infringer's one should be substantially similar.¹⁶ We admit that SpEnt had access to Crida, however, we disagree that Crida2 is substantially similar to Crida2, and, therefore, constitutes its infringing copy.
11. We further disagree with the Claimant¹⁷ that Crida2 is a derivative work of Crida. As it was pointed out by the US courts (e. g. in *Micro Star v. FormGen Inc.* case referred to by the Claimant¹⁸), "a derivative work [...] must substantially incorporate protected material from the preexisting work".¹⁹ It was clarified that to prove infringement the party must show that the works are substantially similar.²⁰ In this respect we disagree with the Claimant in its statement that "a video game, which created as a sequel [*sic*] without copyright holder permission, do infringe copyright even in the case if the alleged game do not contain any

¹⁵ Wargaming case 2018, at para. 19.

¹⁶ Memorandum for Claimant at para. 3.1, p. 6.

¹⁷ Memorandum for Claimant at para. 3.1, paras. 4.1 – 4.5, p. 9 – 10.

¹⁸ Memorandum for Claimant at para. 4.3, p. 10.

¹⁹ *Micro Star v. FormGen Inc.*, 154 F.3d 1107 (1998).

²⁰ *Ibid.*

part of the protected work"²¹ as the contrary appears from the case the Claimant is referring to supporting its statement.²² Thus, considering that Crida and Crida2 are not substantially similar as it will be proved below, Crida2 is not *de jure* derivative from Crida even despite it was announced as "a stand-alone sequel of Crimson Dawn".²³

12. In deciding, whether the video games are "substantially" similar to constitute a copyright infringement, the widely used²⁴ two-part test should be applied: existence of substantial similarity under *both* the "extrinsic test" and the "intrinsic test" should be established. 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.²⁵
13. To determine and compare the elements, which are copyrightable, the "abstraction-filtration-comparison" method,²⁶ may be applied. At the first step, the both games must be "broke[n] down into its constituent structural parts".²⁷ After that, the unprotectable elements should be filtered. The unprotectable elements include: (1) ideas; (2) facts; (3) elements from the "public domain"; (4) instances where an expression "merges" with the "idea"; (5) instance where the expression is so standard in the treatment of a given "idea" that it constitutes *scènes à faire*.²⁸
14. 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.²⁹
15. 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.

²¹ Memorandum for Claimant at para. 4.3, p. 10.

²² *Supra* note 19.

²³ Wargaming case 2018, at para. 21.

²⁴ 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).

²⁵ *Antonick*, *supra* 24 at 7.

²⁶ 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*].

²⁷ *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) at 12.

²⁸ *Capcom Co., Ltd, et al. v. The MKR Group, Inc.*, No. C 08-0904 RS [*Capcom*].

²⁹ IP Act of Nauland.

16. In proving that Crida and Crida2 are not substantially similar, we 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 do not "look and feel" similarly and, therefore, that the intrinsic test is not satisfied as well (iii).

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

17. Attempting to prove that the Games are substantially similar, the Claimant, inter alia, refers to: the similarity of the Games' genre;³⁰ similar style and colors used in the Games;³¹ the same location of the toolbars on the screen;³² and similarity in game mechanics.³³ However, all these elements of the Games are unprotectable.

18. The Games' genre (FPS) is a general idea, thus, is not protected by copyright. The same refers to the game mechanics and rules as it was confirmed in court practice.³⁴ Moreover, the expression "that is so associated with a particular genre [...] that one is compelled to use such expression"³⁵ is not protected as well. As it was stated by the plaintiff in *Capcom Co., Ltd, et al. v. The MKR Group, Inc.* case: "the survival horror genre of video games [...] are typically dark, violent, and supernatural".³⁶ This statement appears to be correct if we compare the Games with other zombie-FPSs like *Left 4 Dead*. All these games use the same dark colors, including black, red and grey. Therefore, the resembling style and colors used in the Games are the necessary elements of their genre and constitute unprotected *scènes à faire*.

19. Further, the copyright does not protect those elements which are only functional.³⁷ In *Spry Fox LLC v. Lolapps, Inc.* the court pointed out that the choice of six-by-six grid is not likely an expressive choice because it is one of a few functionally appropriate choices and "it would extend copyright protection beyond its proper scope to afford protection to a functionally-dictated choice like this one".³⁸ The location of toolbars in the bottom side of the screen is

³⁰ Memorandum for Claimant at para. 3.4.2.2, p. 8.

³¹ Ibid.

³² Ibid.

³³ Memorandum for Claimant at para. 3.4.3, p. 8.

³⁴ Tetris, *supra* 26.

³⁵ Ibid.

³⁶ Capcom *supra* 28.

³⁷ See *Spry Fox LLC v. Lolapps, Inc.*, 2:12-cv-00147-RAJ (W.D. Wash. Sept. 18, 2012) [*Spry Fox*].

³⁸ Ibid.

one of the two functionally-dictated choices (bottom or top) as otherwise it shall hinder the game. Thus, the location of toolbars is not protectable.

20. For the same reason, the mechanics of the Games' processes referred to by the Claimant³⁹ are not protected either. The way of weapon changing and shooting are similar in the Games as they are similar to the same processes in any other FPS and in reality. The way of disappearing of the killed enemies is not expressive: the enemies just disappear, which is caused by the functional necessity.

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

(ii) *Comparison of the protectable elements of the Games*

22. 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.⁴⁰ The Claimant in its submission refers to the similarity in the Games' display;⁴¹ and game characters.⁴² We believe that the Games' setting and plot should also be compared.

(1) *Display and setting*

23. The elements of the display the Claimant alleges to be substantially similar are *scènes à faire*, as it was proven in paragraph 18. The other elements of the display and setting are either *scènes à faire* or are not similar in their expression. For example, the standard depiction of city streets during zombie (REXs) outbreak: buildings, burning cars etc. are inherent to the general idea of the Games. In its expression, however, the setting is not similar: the appearance of the game field is clearer and generally looks different in Crida2, the graphic in Crida2 is ahead of Crida, the background sounds, the "trading menu" are different etc.

(2) *Characters*

24. The Games' characters bear some similarities. However, these similarities are due to their stereotypical nature. Zombie character in both Games is a wholly stock character and resembles a zombie character in other games and movies which leaves the room only for

³⁹ Memorandum for Claimant at para. 3.4.3, p. 8.

⁴⁰ See *Spry Fox supra* 37 at 8 [*Spry Fox*]; *Capcom, supra* 28 at 9.

⁴¹ Memorandum for Claimant at para. 3.4.2, p. 8.

⁴² Memorandum for Claimant at para. 3.4.1, p. 7.

"thin" protection. In this respect Zombies are not identical. Other creatures like Leviathan and Executioner, Butcher and Skinner bear *some* similar features like a machine-gun or a petrol-powered saw (both of which are stock arms) but are also much different (hair, horn, mask etc.) Thus, such characters should not be recognized as substantially similar.

25. In any event, even if the contrary is established by this court, the zombie characters are only a small part of all the copyrighted material in the Games, thus, it should not give rise to the copyright infringement of the whole game.

(3) Plot

26. The plot in both games is different because its only elements, namely the year when the action takes place and the history of REXs outbreak, are different in both Games.
27. Therefore, as clearly proved in the above analysis, all the copyrightable elements are different in both Games and the extrinsic case is not satisfied.

(iii) The Intrinsic Test

28. In its analysis whether the Games "look and feel" similarly, the court should compare both Games only in their protected parts,⁴³ and may rely on the reports of video game bloggers as ordinary observers of video games.⁴⁴ In this case there is no indication that the game journalists believed both Games to be identical or substantially similar. The reference to the "strengths of its predecessor" is largely due to the ideas introduced in Crida for the first time (the co-op zombie FPS with various game characters). While "*many new features*", as it was pointed out by the journalists⁴⁵ are those copyrightable elements which make the Games not substantially similar.
29. Consequently, because both extrinsic and intrinsic tests are not satisfied, Crida2 does not constitute an infringement of CDI's copyright.

II. CDI HAS NO GROUNDS FOR THE TRADEMARK INFRINGEMENT CLAIM

To prove trademark infringement, the Claimant must show that: the mark is legally protectable and owned by the plaintiff [A]; and the defendant's use of the mark is likely to create confusion concerning

⁴³ Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir. 1982).

⁴⁴ *Ibid* at 12.

⁴⁵ Wargaming case 2018, at para. 26.

the origin of the goods or services [B].⁴⁶ In any event we registration of Crida trademark does not constitute an act of unfair competition [C].

A. CDI has no trademark rights on Crida

(i) Trademark rights on Crida cannot arise from EULA provisions

30. The Claimant substantiates its trademark infringement claim based on the EULA infringement, claiming that CDI owns copyright on Crida title according to the Art. 18(b(2,3)) and Art. 22(a, b (vi, viii) of the EULA.⁴⁷

31. However, even if it can be inferred from EULA provisions that game title is protected by copyright, it cannot give rise to any trademark rights neither on the game title Crimson Dawn, nor on Crida. Unlike the copyright, trademark rights cannot arise from the EULA provisions, and, under the general rule are subject to registration. Whereas, CDI has never registered trademark Crida⁴⁸.

(ii) CDI does not own trademark rights on the unregistered mark Crida

32. The Claimant based on the European Union trademark system claims its rights on the non-registered trademark⁴⁹. Although, the Claimant strongly relies on the EU law and common law defenses, nothing in the current case provides that Nauland is a member state of the EU, or a common law country.

33. In this regard, we cannot agree that the Claimant is entitled to any trademark rights in regard to Crida mark. We claim that Crida did not obtain legal protection neither as a common law trademark, nor did it obtain a status of a well-known mark in regard to CDI.

34. To obtain the common law rights on the trademark the Claimant must be deemed the "senior" user of the mark in the geographic area where such prior use occurs and such mark should be used as a trademark,⁵⁰ i.e. in such a manner that consumers regard it as indicative of the

⁴⁶ Ford Motor Co. v. Summit Motor Products, Inc., 930 F. 2d 277 - Court of Appeals, 3rd Circuit 1991 at 291.

⁴⁷ Memorandum for Claimant at para. 1.8., p. 12.

⁴⁸ Clarifications at para. 6.

⁴⁹ Memorandum for Claimant at para. 2.1., p. 12.

⁵⁰ Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex., 909 F.2d 839, 842-43 (5th Cir.1990); Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1023 (11th Cir.1989).

source of goods or services.⁵¹ A mark cannot serve a source-identifying function if the public has never seen the mark and thus is not meritorious of trademark protection until it is used in public in a manner that creates an association among consumers between the mark and the mark's owner.⁵²

35. Whereas, CDI did not make any use sufficient to establish rights on Crida mark neither in Nauland nor in Feronica. CDI did not sell goods bearing the mark Crida and did not advertise its goods in association with the mark. And, the Claimant did not show that, in the minds of the public, Crida mark serves as a designation to identify the source of the product rather than the product itself.⁵³
36. Therefore, Crida has never functioned as a trademark, indicating the source of the Claimant's goods or services and cannot obtain protection as an unregistered trademark.
37. As for the well-known mark defense, the Claimant presumes a well-known status of Crida trademark.⁵⁴ However, as there is no commonly agreed detailed definition of what constitutes a well-known mark, we rely on Article 2 (1) of WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks⁵⁵ to argue that Crida mark is not a well-known mark based on the following factors: (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) promotion of the mark; (4) the registrations, and/or any applications for registration, of the mark; (5) the record of successful enforcement of rights in the mark; (6) the value associated with the mark.

⁵¹ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1916 (2007), at 1892–93. Graeme Dinwoodie & Mark Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597 (2007), at p. 1610.

⁵² *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 334, 59 S.Ct. 191, 83 L.Ed. 195 (1938); *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1200-01 (9th Cir.1979) [*New West Corp.*].

⁵³ *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n. 11, 102 S.Ct. 2182, 2187 n. 11, 72 L.Ed.2d 606 (1982).

⁵⁴ Memorandum for Claimant at para. 3.2. p 15.

⁵⁵ 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>.

38. None of the aforementioned criteria were fully satisfied in current case. Crida was not used by CDI and was not known in relation to CDI. It is widely known among gamers that Crida was a Mod developed by the user, not by CDI.⁵⁶ Moreover, marks were used in different geographic areas, because Crida Mod has its main market in Nauland, while the main market for Crida2 is Feronica.⁵⁷ As for the record of successful enforcement by CDI in 2008, ⁵⁸ nothing in the case materials shed the light to the fact in which country/geographic area T-shirts marked with the word 'Crida' was sold, since in Feronica Crida mark might not be capable of misleading consumers, due to the popularity of Crida2 game and the fame of SpEnt.

39. Consequently, the Claimant has no rights on the unregistered mark Crida and has no ground for the trademark infringement claim.

B. There is no likelihood of confusion between Crida mark associated with Crida Mod and Crida trademark registered by SpEnt

40. Even if the court finds that CDI has trademark rights on Crida mark, we claim that there is no "likelihood of confusion" between Crida mark allegedly owned by CDI and Crida trademark registered by SpEnt.

41. In order to prove trademark infringement, the owner of the trademark must show that there is a "likelihood of confusion" between his or her trademark and the allegedly infringing mark.⁵⁹

42. The likelihood of confusion exists "when consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark."⁶⁰ To establish whether the likelihood exists the factors relevant to likelihood of confusion must be assessed,⁶¹ such internationally

⁵⁶ Wargaming case 2018 at para. 11.

⁵⁷ Clarifications at para. 1.

⁵⁸ Wargaming case 2018 at para. 20.

⁵⁹ *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 462 (3d Cir.1983); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 291-93 (3d Cir.).

⁶⁰ *Dranoff-Perlstein Assoc. v. Sklar*, 967 F.2d 852, 862 (3d Cir.1992).

⁶¹ 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*

recognized list of factors was set out in the US case of *Polaroid v Polarad*⁶²: (1) the strength of the plaintiffs 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; (6) defendant's good faith in adopting the mark; (7) the quality of defendant's product; and (8) the sophistication of the consumers in the relevant market.

43. Whereas, the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks.⁶³ Even presuming the strength of Crida mark and even the similarity of marks, the likelihood of confusion will not be triggered by the use of Crida mark by SpEnt. In the current case, there would be a likelihood of confusion if similar marks would cause gamers to play Crida2 by mistake, instead of playing Crimpson Dawn. However, such outcome is highly improbable first of all, because the games have different titles and the gamers are highly sophisticated consumers and exercise significant care in their purchasing decisions, while choosing the game with which they are going to spend the next year.
44. And the other important factor, which can prevent confusion is the type of products and the conditions of purchase.⁶⁴ Both games are co-op FPS and are strongly dependent on the choices of community, so that individual gamers chose the game based on which one is played by their friends, rather than based on CDI or SpEnt fame.
45. The other strong evidence proving the absence of the likelihood of confusion is the long coexistence of both marks. As it was stated in *Libman Co. v. Vining Indus., Inc.* case⁶⁵ the fact that both marks have been simultaneously used without causing any consumers to be confused as to who produced the games is the most persuasive evidence that there is no likelihood of confusion between these two marks. SpEnt applied for registration of

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.

⁶² Polaroid Corporation v. Polarad Electronics Corporation, No. 162, Docket 26460, 287 F.2d 492 (1961).

⁶³ Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F. 2d 154, Court of Appeals, 1st Circuit (1977); Smith v. Chanel, Inc., 402 F.2d 562, 563 (CA9 1968); Hesmer Foods, Inc. v. Campbell Soup Co., 346 F.2d 356, 359 (CA7 1965).

⁶⁴ SquirtCo v. Seven-Up Co., 628 F. 2d 1086 - Court of Appeals, 8th Circuit 1980 at 1091.

⁶⁵ Libman Co. v. Vining Indus., Inc., 69 F.3d 1360, 1361 (7th Cir.1995).

trademarks 'Crida' in the beginning of 2010, and the only evidence of confusion the Claimant recalled of was back in 2008 and was not related to the Respondent.⁶⁶

46. As for the good faith of the Respondent in registering Crida trademark, GameGenious, the owner of SpEnt, commenced to register Crida only after CDI reaffirmed him in regard to their intentions not "to be associated with Crida".⁶⁷ Moreover, where the bad faith normally exist when the person who registers the conflicting mark presumably intended to profit from the possible confusion between that mark and the one he has registered.⁶⁸ But, SpEnt cannot profit in any way from the possible confusion, because no value of CDI games is associated with Crida mark. The Crida Mod was not developed by CDI and cannot be associated with the quality of CDI games.

47. Therefore, despite both trademarks are similar, there is no likelihood of confusion between Crida mark allegedly owned by CDI and Crida trademark registered by SpEnt.

C. The registration of the trademark Crida by SpEnt does not constitute an act of unfair competition.

48. The Claimant strongly relies on the passing off doctrine and Article 10-bis of Paris convention to substantiate its trademark infringement claims.⁶⁹ Although, passing off is often claimed in conjunction with a trade mark infringement claim, passing off is a type of unfair competition claim and exists to protect a person's products, services or business from the misrepresentations of other people, but not the trademark rights.

49. However, even if this court finds that unfair competition defense is within the scope of the Claimant's trademark infringement claim, we claim that the registration of Crida trademark may not be considered an act of unfair competition.

⁶⁶ Wargaming case 2018 at para. 20.

⁶⁷ Wargaming case 2018 at para. 18.

⁶⁸ 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.

⁶⁹ Memorandum for Claimant at para. 2.2., p. 12 and para 3.3., p. 15.

50. As it was established in famous *Jif Lemon* case, to bring a passing off action, the claimant must be able to show the fulfillment of the "Classic Trinity": goodwill, misrepresentation, damage to goodwill; and the claimant has the burden of proof to show false representation to the public and the likelihood of confusion.⁷⁰ Moreover, whether we call the infringement, unfair competition or false designation of origin, the test is identical – the likelihood of confusion.⁷¹
51. Therefore, if there is no likelihood of confusion, as it is claimed by the Respondent, there cannot be any misrepresentation and damage to the goodwill.
52. As to the goodwill itself, we draw attention of the court to the fact that CDI has no goodwill in regard to Crida mark, since Crida mark is known in relation to Crimson Dawn developed by the GameGenius, not CDI. Because of this fact, gamers cannot associate AAA quality of CDI's games neither to Crida Mod, nor to Crida2. Besides, SpEnt had never been attempting to pass off Crida2 game as the one produced by CDI, because Crida2 was released as "a stand-alone sequel of Crimson Dawn".⁷²
53. Lastly, it is important to stress that the remedy of passing off relates to a particular geographical area in which a reputation can be said to exist.⁷³ In other words, if Crida Mod was not famous in Feronica, the Claimant cannot argue that SpEnt used CDI's goodwill.
54. Based on the aforementioned, SpEnt registration and use of Crida trademark cannot be deemed an act of unfair competition and is not subject to Article 28 of IP Act of Nauland.

⁷⁰ The *Jif Lemon Case* Reckitt & Colman Products Ltd v Borden Inc (1990).

⁷¹ *New West Corp.* supra at 8.

⁷² *Wargaming case* 2018 at para. 21.

⁷³ The difference between passing off and trade mark infringement, April 11, 2007, available at: <http://www.bowmanslaw.com/insights/technology-media-and-telecommunications/the-difference-between-passing-off-and-trade-mark-infringement/>.

(e) REQUEST FOR FINDINGS

The Respondent respectfully requests the court to adjudge and declare that:

1. CDI has no right to claim infringement of copyright and, in any event, Crida2 does not constitute infringement of CDI's copyright;
2. CDI has no grounds for the trademark infringement claim.