Mailed: November 20, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Redbeet Interactive AB

v.

Alexander Novikov

Cancellation No. 92075698

Elizabeth G. Borland and Scott D. Woldow of Smith, Gambrell & Russell, LLP for Redbeet Interactive AB.

Alexander S. Lazouski of Lazouski IP LLC for Alexander Novikov.

Before Wellington, Larkin, and Stanley,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

This case involves two foreign parties who each claim to have been the first to develop rights in the United States in the trademark RAFT for computer games.

Alexander Novikov ("Respondent" or "Registrant"), a Russian citizen, owns Registration No. 5447897 (the "'897 Registration") of the standard-character mark

RAFT for "Computer game software for use on mobile and cellular phones, namely, survival mobile games" in International Class 9.[1]

Redbeet Interactive AB ("Petitioner"), a Swedish company, has petitioned to cancel the '897 Registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the sole ground that Petitioner is the prior user of the RAFT mark for computer games, and there is a likelihood of confusion.[2]

After several years of pre-trial skirmishing, the case is fully briefed,[3] and ready for decision. We grant the Second Amended Petition to Cancel.

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[1] The '897 Registration issued on April 17, 2018 from a use-based application filed on September 12, 2017. Respondent maintained his registration during the pendency of this proceeding through the filing on April 12, 2024 of a declaration of continuing use under Section 8 of the Trademark Act, 15 U.S.C. § 1058, which was accepted by the United States Patent and Trademark Office ("USPTO") on January 6, 2025.

[2] This case is not the only one between the parties. In Opposition No. 91273040, Petitioner opposes Respondent's registration of the marks RAFT SURVIVAL: OCEAN NOMAD and RAFT SURVIVAL: DESERT NOMAD for "Downloadable computer game software for use on mobile and cellular phones, personal computers, laptops, home video game consoles, smart TV sets, namely, survival games; Downloadable computer game software; Downloadable computer game software for personal computers and home video game consoles; Downloadable electronic game software for handheld electronic devices." That case has been suspended pending the outcome of this one. 49 TTABVUE 4 (Opp. No. 91273040).

[3] Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Petitioner's redacted main brief appears at 123 TTABVUE and its reply brief appears at 126 TTABVUE. Petitioner's unredacted main brief, filed under seal, appears at 124 TTABVUE. Respondent's brief appears at 125 TTABVUE.

Respondent also filed a "Sur-Reply Brief," 127 TTABVUE, which he admits cannot be considered by the Board on the merits of the case, but which he claims was filed to set the record straight regarding the conduct of his counsel and various arguments made by Respondent. *Id.* at 2 (citing Trademark Rules 2.127(a) and (e)(1), 37 C.F.R. §§ 2.127(a) and 2.127(e)(1)). "'There is no provision for filing a reply brief, rebuttal brief, rejoinder brief, etc. by a party in the position of defendant" and "[i]f a party in the position of defendant files such a brief, it may be stricken, or given no consideration, by the [Board].'" *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1370 (Fed. Cir. 2018) (citing TRADEMARK TRIAL AND APPEAL BOARD

I. The Record and Evidentiary Issues

The Record

The record in this case consists of more than 2,500 pages of testimony and documents. It includes the pleadings,[4] the file history of the '897 Registration, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and the following materials submitted by the parties:

Petitioner

- Testimony Declaration of Kacper Antoniszczak, the CEO of the publisher of Petitioner's RAFT computer game, and Exhibits 1-22 thereto ("Antoniszczak Declaration" or "Antoniszczak Decl."), 75 TTABVUE 1-107;[5]
- Testimony Declaration of Alva Hansson, a Swedish attorney, and Exhibits 23-46 thereto, 116 TTABVUE 1-155;[6]
- Testimony Declaration of André Bengtsson, one of the creators of Petitioner's RAFT computer game while a student at the University of

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MANUAL OF PROCEDURE ("TBMP") Section 801.02(d) (June 2017)). We have given Respondent's "Sur-Reply Brief" no consideration.

[4] The operative pleadings are Petitioner's Second Amended Petition to Cancel, 50 TTABVUE 2-85, and Respondent's Answer to Petitioner's Second Amended Petition to Cancel, 51 TTABVUE 2-18. Respondent denied most of the salient allegations in the Second Amended Petition to Cancel, but admitted several allegations relevant to the likelihood of confusion element of Petitioner's Section 2(d) claim, which we discuss below. Respondent also asserted three purported Affirmative Defenses: (1) priority, (2) Petitioner's alleged admission, in its response to an office action on its own application to register RAFT and design, that confusion is unlikely between the parties' marks, and (3) laches. Answ. Aff. Defs. ¶¶ 1-3 (51 TTABVUE 8-9). Respondent discussed priority and the other two purported defenses in his trial brief, and we address them below.

[5] Certain portions of the Antoniszczak Declaration and certain exhibits thereto were designated as confidential under the Board's Standard Protective Order and were filed under seal at 77 TTABVUE.

[6] Exhibits 43-46 to the Hansson Declaration were designated as confidential under the Board's Standard Protective Order and were filed under seal at 72 TTABVUE.

Uppsala in Sweden, and Exhibits 47-153 thereto ("Bengtsson Declaration" or "Bengtsson Decl."), 67 TTABVUE 1-331; 68 TTABVUE 1-197;[7]

- Testimony Declaration of Scott D. Woldow, one of Petitioner's counsel of record, and Exhibits 127-29 and 168-70 thereto ("Woldow Declaration" or "Woldow Decl."), 84 TTABVUE 1-90;[8]

- Testimony Declaration of Elizabeth G. Borland, one of Petitioner's counsel of record, and Exhibits 171-87 thereto, 88 TTABVUE 1-147;

- Declaration of Martin Laine, an investigative journalist in Estonia, and Exhibits 41-42 thereto, 86 TTABVUE 1-32;

- Rebuttal Declaration of Emily Apéll, a Swedish attorney, and Exhibits 199-200 thereto, submitted during Petitioner's rebuttal period, 119 TTABVUE 1-13;

- Rebuttal Declaration of André Bengtsson, and Exhibits 194-98 and 201 thereto ("Bengtsson Rebuttal Declaration" or "Bengtsson Rebut. Decl."), submitted during Petitioner's rebuttal period, 121 TTABVUE 1-53;

- Transcript of the Cross-Examination of Respondent, and Exhibits 188-93 thereto ("Novikov Cross Tr."), taken on written questions and submitted during Petitioner's rebuttal period, 118 TTABVUE 1-302;[9]

- First Notice of Reliance on USPTO electronic records regarding Petitioner's pending application Serial No. 79269576 (the "'576 Application") and the file history of Respondent's '897 Registration, 78 TTABVUE 1-176;[10]

[7] Certain portions of the Bengtsson Declaration and certain exhibits thereto were designated as confidential under the Board's Standard Protective Order and were filed under seal at 69-70 TTABVUE.

[8] Exhibits 127 and 129 to the Woldow Declaration were designated as confidential under the Board's Standard Protective Order and were filed under seal at 83 TTABVUE.

[9] We will cite the transcripts of depositions by page and line numbers as well as TTABVUE numbers.

[10] As noted above, the file history of Respondent's '897 Registration is automatically of record, and it was unnecessary for Petitioner to file it separately.

- Second Notice of Reliance on Petitioner's original and amended petitions to cancel, and Respondent's answers thereto, 79 TTABVUE 1-90;[11]

- Third Notice of Reliance on certain of Petitioner's discovery requests and Respondent's responses thereto, 80 TTABVUE 1-161; and

- Fourth Notice of Reliance on certain of Petitioner's interrogatories and Respondent's responses thereto, 82 TTABVUE 1-30.[12]

Respondent

- Declaration of Respondent Alexander Novikov, and Exhibits 1-3 thereto ("Novikov Declaration"), 106 TTABVUE 1-202;[13]

- Declaration of Alexander Lazouski, Respondent's counsel of record, and Exhibits A-J and L-M thereto ("Lazouski Declaration" or "Lazouski Decl."), 107 TTABVUE 1-413;

- Transcript of the discovery deposition of André Bengtsson ("Bengtsson Tr."), 109 TTABVUE 1-35;[14] and

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[11] "The pleadings are automatically of record," *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at *2 (TTAB 2023), and it was unnecessary for Petitioner to file them separately.

[12] Petitioner designated certain responses as confidential under the Board's Standard Protective Order and filed them under seal at 81 TTABVUE.

[13] The Novikov Declaration is the subject of an evidentiary objection asserted by Petitioner that we address below.

[14] The transcript of Mr. Bengtsson's discovery deposition submitted by Respondent violated Trademark Rule 2.123(g)(1), 37 C.F.R. § 2.123(g)(1), which requires that "[t]he deposition transcript must be submitted in full-sized format (one page per sheet), not condensed (multiple pages per sheet)." The submission of sheets containing multiple pages complicated our review of the transcript.

Portions of the transcript were designated as confidential under the Board's Standard Protective Order and were filed under seal at 108 TTABVUE. We are not bound by the parties' confidentiality designations. *See, e.g., Kohler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146, 2017 WL 6547628, at *5 (TTAB 2017). "'[T]he Board must be able to discuss the record evidence it its opinions, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions,'" *id.* (quoting *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, Canc. No. 92057394, 2016 WL 3357265, at *4 n.21 (TTAB 2016)), and we "may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party." Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g).

- Notice of Reliance on Respondent's '897 Registration, and Petitioner's pending '576 Application, 90 TTABVUE 1-178.[15]

Evidentiary Issues

Appendices to the parties' briefs contain various evidentiary objections and responses to such objections. 123 TTABVUE 58-67; 125 TTABVUE 50-61; 126 TTABVUE 27-35. As a general matter, "[b]ecause a cancellation proceeding is akin to a bench trial, the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence." *Peterson v. Awshucks SC, LLC*, Canc. No. 92066957, 2020 WL 7888976, at *4 (TTAB 2020). The Board normally does not consider objections to evidence that are not at least potentially outcome-determinative, *id.*, but some of the parties' objections require rulings because the admission or exclusion of the challenged evidence is important to our decision on Petitioner's sole claim for relief under Section 2(d) of the Trademark Act.

Petitioner's Objection to the Novikov Declaration on the Ground That He is Not Competent to Testify in English and His Testimony is Hearsay

Petitioner objects to the Novikov Declaration "in its entirety because Mr. Novikov was not competent to provide such Declaration and there is no reason to believe that [he] understood what he signed." 123 TTABVUE 58. Petitioner argues that the "Novikov Declaration is in English and was signed by Mr. Novikov," a Russian

[15] As noted above, the file history of Respondent's '897 Registration is automatically of record, and it was unnecessary for Respondent to file it separately. The file history of Petitioner's '576 Application was already of record, and it was unnecessary for Respondent to submit it again. Respondent also purported to make the Lazouski Declaration and exhibits thereto of record under notice of reliance, 92 TTABVUE 1-446, even though it was filed separately.

speaker, but that "during cross-examination, Mr. Novikov required a Russian translator in order to understand the questions asked of him, and he responded only in Russian throughout the deposition, requiring the translator to translate his responses back into English for the record." *Id.* at 58-59.[16]

Petitioner also points to Respondent's cross-examination testimony that he understands English "at a very low – low level," and that he required a translator at his cross-examination deposition "[i]n order to have a full understanding of the questions asked of me," Novikov Cross Tr. 14:23-15:6 (118 TTABVUE 16-17), and to Respondent's testimony that he had his English-language Declaration translated into Russian and that "I read it. I understood it." Novikov Cross Tr. 43:20-44:3 (118 TTABVUE 45-46).

Petitioner argues that

> [t]hus, Mr. Novikov has testified under oath that he does not understand English and needs an interpreter to understand it. He has also testified that he had some unidentified person translate his declaration for him and then he signed the English declaration. However, there is no ***evidence*** of this alleged translation or whether this alleged declaration was accurate. The English declaration that he signed could be something completely different from what an alleged translator told him. With no Russian version of the declaration entered into evidence and no testimony verifying the accuracy of such Russian version of the declaration, there is no way to verify that Mr. Novkov [sic] had ***any*** understanding of what he signed or any reason to believe that the English statements in the declaration are truthful. As a result, Mr. Novikov's signing

[16] Because Respondent is a Russian citizen, and Russia apparently does not permit the taking of depositions in Russia in cases pending in tribunals in other countries, Respondent's cross-examination was conducted in Cyprus based on written questions provided to Respondent and his counsel in advance.

> of a document after some unidentified translator told him what it says constitutes hearsay.

123 TTABVUE 59-60 (emphasis supplied by Petitioner). Petitioner concludes that "Mr. Novikov has no personal knowledge of the English statements in the declaration and is not competent to testify in English. Accordingly, the Novikov Declaration should be stricken in its entirety." *Id.* at 60.

Respondent's counsel argues that Petitioner "attempts to discredit Alexander Novikov's declaration . . . alleging he lacked sufficient English proficiency to understand the document he signed" and that "[t]his claim is not only unsupported by the record, it is contradicted by [Petitioner's] own conduct throughout this proceeding." 125 TTABVUE 50. Respondent's counsel notes that Petitioner's counsel requested that Respondent log off during portions of the remote discovery deposition testimony of Petitioner's CEO involving commercially sensitive information, and that this shows that Petitioner believed that Respondent could understand the testimony in English. *Id.* Respondent's counsel further argues that Respondent's testimony regarding his review of the English-language Novikov Declaration reflects that he "reviewed the declaration in English, understood it, and additionally relied on translation to confirm his understanding," doing "double the work: reading the document in English and translating it into Russian to ensure clarity." *Id.* at 50-51.

According to Respondent's counsel, Petitioner

> speculates that the translation may have been unreliable because no certified translator was named, but that objection is both speculative and strategically manufactured. If [Petitioner] had any real concern, they had every opportunity to ask simple follow-up questions during cross-examination. They did not. Instead, they now

> attempt to exploit ambiguity that they themselves left unaddressed. That is not a basis for striking sworn testimony, but an admission of a poor cross-examination strategy.

Id. at 51.

Respondent's counsel dismisses Mr. Novikov's testimony that he understands English at a "very low level" as "vague and subjective," *id.*, arguing that

> [w]hat the record clearly shows is that despite any self-deprecating language barrier, Mr. Novikov was able to read his English-language declaration, review its contents, and confirm under oath: "I read it. I understood it." That affirmative statement speaks louder than a general characterization of language skill. It shows that whatever "very low level" may mean in conversation, it did not impair his ability to comprehend and affirm the document at issue in this proceeding.

Id.[17]

Respondent's counsel concludes that

> [t]he Board does not require declarations to be submitted in the declarant's native language, nor does it demand a certified translator unless specific authentication is at issue. Novikov's declaration, like countless others from non-native speakers, was made in English with a statement of understanding. That satisfies the requirements. [Petitioner's] position would effectively bar every non-native English speaker from participating in TTAB proceedings unless they hired a court-certified translator for every document, a result the Board has never mandated and would never support. In the end, [Petitioner's] objections are not about accuracy, they are about legal strategy. [Petitioner] had a chance to explore these issues and declined. They now ask the Board to fill in

[17] Respondent's counsel also argues that Respondent personally curated English-language materials submitted under Respondent's Notice of Reliance. 125 TTABVUE 51. There is no evidence of any such involvement on the part of Respondent, and it is far more likely that consistent with standard practice, the exhibits to the Notice of Reliance were selected and prepared by Respondent's counsel.

> the blanks with speculation. But the record is clear: Novikov understood his declaration, affirmed it under oath, and answered every question posed to him. [Petitioner's] objections should be overruled in their entirety.

Id. at 52.

In its reply brief, Petitioner argues that it requested Respondent's exclusion from portions of Petitioner's CEO's deposition testimony because only counsel of record were allowed to hear commercially sensitive testimony, 126 TTABVUE 28, that Petitioner was precluded from asking follow-up questions regarding Respondent's competence in English because Respondent's cross-examination was conducted on written questions pursuant to the parties' stipulation,[18] *id.*, and that Respondent's counsel, not Respondent, prepared and filed his Notice of Reliance. *Id.* at 28-29. Petitioner concludes that Respondent "testified that he had a 'very low – low level' of English and that he had his declaration 'translated' when he signed it" and that "[w]ithout evidence of who made that translation and its accuracy, the Novikov Declaration is unreliable and should be stricken in its entirety." *Id.* at 29.

The parties did not cite any cases in support of their respective positions on the issue of Respondent's ability to testify in English, but *ARSA Distrib., Inc v. Salud Nat. Mexicana S.A. de C.V.*, Opp. No. 91240240, 2022 WL 4592443 (TTAB 2022), *rev'd on other grounds*, No. 1:22cv1367 (E.D. Va. Apr. 16, 2024), is instructive. In that case, the applicant sought to exclude the trial declaration of one of the opposer's witnesses on the ground that the witness was "a Spanish speaker and the trial declaration that

[18] Novikov Cross Tr. 8:2-12 (118 TTABVUE 10).

she signed was completely in English [so] she is not competent to know what she was signing in the trial declaration and if those statements and the evidence associated with them were true." *ARSA*, 2022 WL 4592443, at *1. The applicant also noted that the witness required a translator for her discovery deposition. *Id.*

The Board found that the "record supports that Ms. Arras is not an English speaker" and that "Opposer concedes [that] a certified and signed translation should have been, but 'was inadvertently not[,] filed with Arsa's Notice of Reliance.'" *Id.* at *2 (citing *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, Canc. No. 92025859, 2019 WL 2511906, at *1 n.1 (TTAB 2019) (noting that the petitioner in that case provided testimony declarations with translations from Spanish to English)). The Board sustained the applicant's objection and struck the declaration, as well as any exhibits thereto that were not otherwise admissible under a notice of reliance.

Like the witness in *ARSA*, Respondent is not an English speaker, and, by his own admission, understands English only "at a very low – low level." He required a translator at his cross-examination deposition "[i]n order to have a full understanding of the questions asked of me," Novikov Cross Tr. 14:23-15:6 (118 TTABVUE 16-17), even though he and his counsel received all of the questions in writing in advance.

As noted above, Respondent testified that he had the English-language Novikov Declaration translated into Russian and that "I read it. I understood it." Novikov Cross Tr. 43:20-44:3 (118 TTABVUE 45-46). There is nothing to suggest that the

Novikov Declaration was prepared by Respondent rather than by his counsel,[19] and given Respondent's admission of very limited ability to understand English, his testimony that "I read it. I understood it" can only reasonably be understood to refer to the claimed Russian translation of the Declaration, not the original English draft.

Respondent's testimony regarding his limited English skills belies his counsel's argument that Respondent "reviewed the declaration in English, understood it, and additionally relied on translation to confirm his understanding," doing "double the work: reading the document in English and translating it into Russian to ensure clarity." 125 TTABVUE 50-51. We find that rather than "reading the document in English," it is far more likely that Respondent reviewed the claimed Russian-language translation of the document, which is nowhere in the record.

We agree with Petitioner that we have no idea what the claimed translation said or who prepared it, and that the proper practice "would have been for Mr. Novikov to sign a declaration in Russian, have the signed Russian declaration translated into English by a qualified translator, and submit the English translation introduced into evidence under oath by the translator with the Russian original." 123 TTABVUE 59 n.2. *See Empresa Cubana*, 2019 WL 2511906, at *1 n.1. The purpose of requiring a neutral third party to translate witness testimony in a foreign language into English is to ensure that the translation is accurate, but we have no such assurances here. In

[19] It is no secret that declarations of lay witnesses are routinely prepared by counsel rather than by the witnesses themselves. There is nothing improper about this practice if the declarants read, understand, and adopt the testimony in their declarations, and attest to it under oath.

the absence of a Russian translation of the Novikov Declaration, his testimony in the English-language version of the Novikov Declaration fails to show that he has personal knowledge of its contents, as required under Rule 602 of the Federal Rules of Evidence, or that he can properly authenticate the exhibits thereto, as required under Rule 901 of the Federal Rules of Evidence. We sustain Petitioner's objection to the Novikov Declaration and strike it from the record in its entirety.

In *ARSA*, the Board also struck the exhibits attached to the subject declaration to the extent that they were not otherwise admissible under a notice of reliance, and considered those that "would have been admissible under a notice of reliance. . . ." *ARSA*, 2022 WL 4592443, at *2.[20] As noted above, neither party discusses *ARSA*, including whether the exhibits to the Novikov Declaration would be admissible under a notice of reliance, but instead discuss other issues going to the admissibility of the exhibits. Consistent with *ARSA*, we will focus on whether each exhibit is self-authenticating for purposes of possible submission under a notice of reliance because we have found that Mr. Novikov, the sponsoring witness, cannot authenticate them.

Exhibit 1

Exhibit 1 to the Novikov Declaration contains copies of English-language and foreign-language certificates of registration of the marks RAFT, RAFT SURVIVAL: DESERT NOMAD, and RAFT SURVIVAL: OCEAN NOMAD in various foreign

[20] As a general matter, "[t]he categories of materials that may be submitted under a notice of reliance are quite limited," *Hiraga v. Arena*, Canc. No. 92047976, 2009 WL 723334, at *2 (TTAB 2009), and are currently set forth in Trademark Rules 2.122(d)(2), (e)(1), (e)(2), and (g), and Trademark Rule 2.120(k), 37 C.F.R. §§ 2.122(d)(2), (e)(1), (e)(2), and (g), and 2.120(k).

countries. Novikov Decl. ¶ 15; Ex. 1 (106 TTABVUE 4, 6-106). We agree with Petitioner that "Exhibit 1 to the Declaration itself is a mess" because it "appears to contain duplicate copies of some of the ***same*** registrations (e.g., 106 TTABVUE 11 & 75)" and "translations of at least some of the registrations that are in a foreign language, but . . . are not matched with one another," 123 TTABVUE 60 (emphasis supplied by Petitioner), but we also agree with Respondent that "the certificates themselves are self-authenticating," 125 TTABVUE 53, because foreign registrations are "official records" within the meaning of Trademark Rule 2.122(e), and thus may be submitted under a notice of reliance. *See* TBMP Section 704.03(b)(1)(A) ("A foreign registration owned by a party to a Board inter partes proceeding may be made of record in the same manner as a state registration, but a foreign registration is not evidence of the use, registrability, or ownership of the subject mark in the United States.") (June 2025). Accordingly, we overrule Petitioner's objection to Exhibit 1 and will not strike the foreign registrations. We note, however, that they have no probative value regarding the continued registrability of Respondent's mark. *Cf. Sabhnani v. Mirage Brands, LLC*, Canc. No. 92068086, 2021 WL 6072822, at *4 (TTAB 2021) ("Petitioner's foreign registrations are 'immaterial to [his] right to register the mark in the United States,' or to challenge Respondent's registrations of its marks") (citing *Bureau National Interprofessionel Du Cognac v. Int'l Better Drinks Corp.*, Opp. No. 72088, 1988 WL 252488, at *10 (TTAB 1988) ("[A]n applicant's ownership of a foreign registration of its mark is immaterial to [the] applicant's right to register the mark in the United States; similarly, an opposer's right to object to the

registration of a mark in the United States is independent of whatever foreign trademark rights the parties may have.")).

Exhibit 2

Exhibit 2 purports to be "copies of extracts in connection with the downloads, marketing campaign and unsolicited emails [Respondent] received shortly after launching the game." Novikov Decl. ¶ 16; Ex. (106 TTABVUE 4, 107-91). Business records and business correspondence of this sort are not "official records" or "printed publications" within the meaning of Trademark Rule 2.122(e). *See*, *e.g.*, *Rsch. in Motion Ltd. v. NBOR Corp.*, Opp. No. 91179284, 2009 WL 4694941, at *3 (TTAB 2009) ("The term 'official records' as used in Trademark Rule 2.122(e) refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer."); *Hiraga*, 2009 WL 723334, at *2-3 (business records are not "printed publications" within the meaning of Trademark Rule 2.122(e)). We strike Exhibit 2 from the record.

Exhibit 3[21]

Exhibit 3 purports to be an English-language translation of what Respondent describes as "the Resolution of the Eighth Arbitration Court Of Appeals of Russian Federation of January 12, 2023 in case No. A70-6606/2021." Novikov Decl. ¶ 17; Ex. 3 (106 TTABVUE 4, 192-202). Exhibit 3 appears to be some sort of decision by a Russian court, although Respondent provides no explanation of it and we cannot glean its significance from Exhibit 3 itself. The exact source of Exhibit 3 is unclear,

[21] The parties do not discuss Exhibit 3.

but it is clear that it did not come from the files of the Russian court because the court's ruling was obviously in Russian, not English. We find that Exhibit 3 is not an "official record" within the meaning of Trademark Rule 2.122(e), and we strike it from the record.

Petitioner's Objections to Certain Statements in the Lazouski Declaration

Petitioner objects to certain statements in paragraph 2 of the Lazouski Declaration on the ground that "[i]n each 'bullet' of Paragraph 2 of the Declaration, Mr. Lazouski makes several statements about alleged facts of the case, what certain documents allegedly show, and how such documents are allegedly relevant to the issues of this case." 123 TTABVUE 63. Petitioner argues that these "statements about alleged 'facts' about Petitioner's RAFT game, what the specified documents allegedly show, and how such documents are allegedly relevant made by Mr. Lazouski in his declaration do not constitute ***evidence***" because "Mr. Lazouski is Registrant's ***counsel***" and "has no personal knowledge of any of these alleged 'facts' about Petitioner's RAFT game or Registrant's RAFT game." *Id.* at 64 (emphasis supplied by Petitioner).[22]

Respondent responds that Petitioner's objection is "not only meritless but borders on procedural gamesmanship." 125 TTABVUE 55. Respondent argues that the Board rejected similar objections in denying Petitioner's cross-motion for summary judgment, *id.* (citing 49 TTABVUE 7-9), and that the Board "already held that Mr.

[22] In its reply brief, Petitioner argues that the objected-to statements "belong in a legal brief – not in a declaration." 126 TTABVUE 30.

Lazouski's exhibits—such as online articles and screenshots—are admissible for what they show on their face, and that Mr. Lazouski is qualified to authenticate them based on personal access and firsthand knowledge." *Id.* at 56. Respondent concludes that the Lazouski Declaration "is properly submitted, factually grounded, and already deemed admissible by this Board based on its prior ruling." *Id.*

As discussed above, we are "capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence," *Peterson*, 2020 WL 7888976, at *4, and we overrule Petitioner's objections based on the argumentative nature of the testimony in paragraph 2 of the Lazouski Declaration. We will, of course, make an independent judgment regarding the relevance and probative value (if any) of the referenced exhibits.

Petitioner's Hearsay Objections to Certain Exhibits to the Lazouski Declaration

Petitioner objects to Exhibit 1 to the Lazouski Declaration, which he describes as "extracts from various websites and online publications," Lazouski Decl. ¶ 2 (107 TTABVUE 2), and Exhibits F-G, which he describes respectively as a "true and correct copy of an online article discussing differences between software 'prototype' and 'beta'," Lazouski Decl. ¶ 12 (107 TTABVUE 4), and "true and correct copies of an [sic] online articles in connection with software prototype and prototyping process," Lazouski Decl. ¶ 13 (107 TTABVUE 4), on the grounds that "these articles are statements by a third party and constitute hearsay," 123 TTABVUE 65, and that Mr. Lazouski is incompetent to testify to the contents of these materials. *Id.* According to

Petitioner, "Exhibits F and G and the documents identified above in Exhibit 1 to the Lazouski Declaration are inadmissible hearsay, cannot be used to prove the truth of their contents, and should be excluded from evidence." *Id.* at 67.

Respondent responds that

> TBMP 704.08(b) and many TTAB precedents, including *Safer, Inc. v. OMS Investments, Inc.*, [Opp. No. 91176445, 2010 WL 985355] (TTAB 2010), permits [sic] the introduction of internet-based evidence with proper source identification. Mr. Lazouski accessed the exhibits himself, translated them himself where necessary, and provided a sworn declaration explaining his role in each step. This is precisely what TBMP requires.

125 TTABVUE 56.

In its reply brief, Petitioner argues that

> [t]he articles at issue ***are*** admissible for what they show ***on their face*** – that on certain dates, some third parties wrote articles and said certain things about prototypes, software development, itch.io, or Stranded Deep. However, as the Board noted in its May 31, 2022 Order, "We do not consider the materials for the truth of any matter asserted therein. [. . .] The materials are competent evidence of exposure of their content to the public and we consider them only to that extent."
>
> As shown by Registrant's Brief, Registrant is not using these articles to show that the public was exposed at certain times to these statements about prototypes, software development, itch.io, or Stranded Deep. Instead, Registrant is relying on these articles to try to prove certain ***facts*** about prototypes, software development, itch.io, and Stranded Deep. For example, Registrant relies upon several of the articles at issue to prove that the gaming industry operates in a certain way and that Petitioner's launch of its RAFT game was not "typical" of the way the industry operates. 125 TTABVUE 35-36 & n.3. These articles are the ***only*** evidence introduced by Registrant about software development and the gaming

> industry. Because they are hearsay, they are not admissible for this purpose.

126 TTABVUE 30 (emphasis supplied by Petitioner).

We agree with Petitioner. In the absence of testimony regarding the substance of Internet materials submitted through a sponsoring witness with personal knowledge of the contents of the materials, the Board considers such materials only for what is shown on their faces, not for the truth of their contents. *Sawstop, LLC v. Felder KG*, Opp. No. 91255905, 2025 WL 2400134, at *9 n.44 (TTAB 2025); *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, Opp. No. 91224000, 2020 WL 636467, at *4 (TTAB 2020); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 WL 1326374, at *6 n. 18 (TTAB 2018). This limitation applies to all Internet materials "whether there is an objection or not." *Id.* We will not consider Exhibits 1 and F-G to the Lazouski Declaration for the truth of their contents.[23]

II. Factual Background

As noted above, this case involves dueling claimants to the RAFT mark for computer games in the United States. Although the parties raise some other issues that we discuss below, at bottom "[t]his is a priority dispute." *JNF LLC v. Harwood Int'l Inc.*, Canc. No. 92070634, 2022 WL 4379238, at *1 (TTAB 2022).

[23] Respondent also objects to videos submitted through the Bengtsson Rebuttal Declaration that are referred to and shown in screenshots in the Antoniszczak Declaration filed in Petitioner's case-in-chief, to which Respondent does not object, Antoniszczak Declaration ¶¶ 31-35; Exs. 10-12 (75 TTABVUE 8-9, 66-81), on the ground that the videos themselves are improper rebuttal evidence, 125 TTABVUE 57-59, and to certain testimony in the Laine Declaration on hearsay grounds. *Id.* at 60-61. We need not address these objections because we need not rely on the specific challenged evidence to decide this case. *Flame & Wax, Inc. v. Laguna Candles, LLC*, Canc. No. 92072343, 2022 WL 3083070, at *7 (TTAB 2022).

The parties agree that the critical date in that dispute is April 28, 2017, the date on which Respondent's RAFT game was published on the Google Play Store and made available to consumers in the United States. 123 TTABVUE 32 ("There is ***no*** dispute as to when Registrant first used the RAFT mark – April 28, 2017") (emphasis supplied by Petitioner); 125 TTABVUE 6 n.1 (noting that "Petitioner does not dispute that Registrant first used the RAFT mark in commerce on April 28, 2017" and that "this date is thus properly treated as a stipulated fact in this proceeding"). Accordingly, under the law regarding priority discussed below, Petitioner must prove that its claimed RAFT mark was "previously used in the United States" in some manner that created cognizable rights in the mark in the United States before April 28, 2017. *JNF*, 2022 WL 4379238, at *3.

In this section, we set forth in detail the facts relevant to Petitioner's claim that it had developed cognizable rights in the RAFT mark in the United States prior to April 28, 2017, including through activities that began before that date and continued after it. Very few of these facts are actually disputed by Respondent.[24]

[24] As discussed below, Respondent devotes most of his arguments to the legal significance of the facts, characterizing Petitioner's activities as "pre-commercial hype—a scattered mix of blog posts, sporadic social media mentions, and uploads of an early-stage prototype game to Itch.io, a platform better known for experimental releases than formal product launches." 125 TTABVUE 5. Respondent argues that Petitioner "made no serious effort to commercialize the game, protect the mark, or establish a marketplace presence before Registrant's priority date. At best, its efforts amounted to student-level development activity paired with attempts to generate buzz. But 'buzz' is not use." *Id.* We will include a number of Respondent's specific critiques of Petitioner's evidence in footnotes in our discussion of that evidence below.

The Developers of Petitioner's RAFT Computer Game

In the fall of 2014, André Bengtsson entered Uppsala University in Gotland, Sweden to pursue a Bachelor's degree in game design and graphics. Bengtsson Decl. ¶ 3 (67 TTABVUE 3). He soon met fellow students Ellen Mellåker and Semih Parlayan, who were enrolled in the same degree program. Bengtsson Decl. ¶ 4 (67 TTABVUE 3).

In early 2015, Mr. Bengtsson, Mr. Parlayan, and a few other classmates began developing a computer game called "Frog Climbers" as their First Year Project and the game was ultimately released in October 2016 on Steam, a platform on which game developers can upload their games for gamers to download and play. Bengtsson Decl. ¶¶ 5-17; Exs. 47-56 (67 TTABVUE 3-6, 31-60). Prior to its release, the Frog Climbers game was shown in a trailer on YouTube, Bengtsson Decl. ¶ 6; Ex. 47 (67 TTABVUE 3-4, 31-34), and on pages on Facebook (now Meta) and Twitter (now X), Bengtsson Decl. ¶¶ 7, 11; Exs. 48, 51 (67 TTABVUE 4, 35-36, 41-42), and won several awards. Bengtsson Decl. ¶¶ 9-10; Exs. 49-50 (67 TTABVUE 4, 37-40).

In the fall of 2015, Mr. Bengtsson, Mr. Parlayan, and a few other classmates began developing a computer game called "Anchored" as their Second Year Project. Bengtsson Decl. ¶ 19 (67 TTABVUE 6). The Anchored game was ultimately released on January 15, 2017 on itch.io, a platform for independent or "indie" game developers to release their games. Bengtsson Decl. ¶¶ 20-25; Exs. 57-61 (67 TTABVUE 6-7, 61-86). Prior to its release, the Anchored game was shown in a trailer on YouTube, Bengtsson Decl. ¶ 21; Ex. 58 (67 TTABVUE 6, 63-66), and on a Facebook page,

Bengtsson Decl. ¶ 20; Ex. 57 (67 TTABVUE 6, 61-62), and won awards. Bengtsson Decl. ¶ 22; Ex. 59 (67 TTABVUE 6, 67-68).

Initial Development of the RAFT Game

In the fall of 2016, Mr. Bengtsson, Mr. Parlayan, and Ms. Mellåker (collectively the "Developers") began developing a survival game for a game development and marketing course that they were taking. Bengtsson Decl. ¶ 27 (67 TTABVUE 7).[25] The purpose of the course was to create a game product for a target audience and to market the game to that audience. Bengtsson Decl. ¶ 27 (67 TTABVUE 7). The Developers selected the name "Raft" for their game shortly after they began its development. Bengtsson Decl. ¶ 28 (67 TTABVUE 7). They were unaware at the time of any other "Raft" games on the market. Bengtsson Decl. ¶ 28 (67 TTABVUE 7).

The Developers' Development Blog and the Initial Releases of the RAFT Game for Downloading

The Developers created a "development blog" for the RAFT game in October 2016 on blog.raft-game.com, and began publishing entries regarding the game on October 13, 2016. Bengtsson Decl. ¶¶ 29-30; Exs. 62-63 (67 TTABVUE 7-8, 87-97). The purpose of the blog was to raise awareness of the game, market it, and attract players. Bengtsson Tr. 15:3-10 (93 TTABVUE 7). During the fall of 2016, Mr. Bengtsson was personally responsible for writing and publishing blog entries. Bengtsson Tr. 15:11-17 (93 TTABVUE 7).

[25] Mr. Bengtsson believed that the course was called "something like Game Design in Practice." Bengtsson Tr. 16:13-23 (93 TTABVUE 7).

The Developers' first blog entry, which we reproduce below, all of their subsequent entries, many of which we reproduce below, and most of the responses to the Developers' entries, are in English.[26] We reproduce below a portion of the Developers' first blog entry:

(https://www.instagram.com/RaftSurvivalGame/) (https://blog.raft-game.com/feed/

RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

First week of production

ON 13 OCTOBER, 2016 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi!

We are a group of three people who have just started development on a survival game where the player is stranded on a raft in the middle of the ocean. The player has survived a shipwreck and needs to gather supplies that is floating around in the ocean. The long term goal for the player is to expand the raft and craft items that will help them survive. Exactly how this is done is still not decided and we want a community of testers to help us with developing this game!

This week we have been working on a MVP which includes implementation of a raft which the player can expand by adding tiles, and a hook system the player uses to catch drifting pieces of wood which are used to expand the raft.

This Monday we plan to send out a prototype that anyone can test and give feedback on. It will be VERY simple, but hopefully it will give an idea on what the game could be.

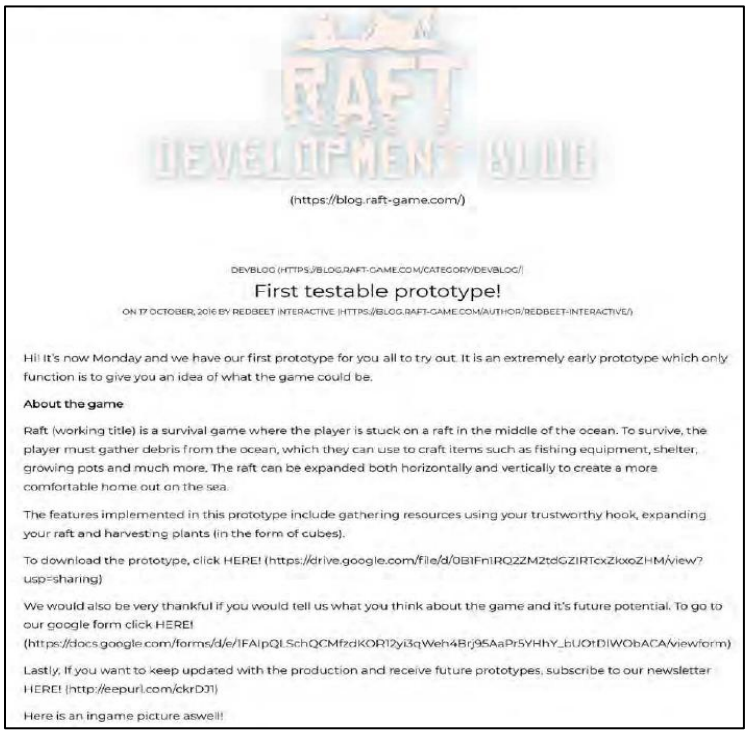
We will update this blog every week to tell you who what we are doing.

Until next week!

[26] The unsolicited media coverage of the RAFT game discussed below is also in English. As discussed below, when the Developers made prototypes of the RAFT game available for downloading though the Itch.io platform, the largest group of gamers downloading the game was reported to consist of Americans.

Bengtsson Decl. Ex. 62 (67 TTABVUE 88).[27] The Developers referred to themselves on their blog as "Redbeet Interactive," and, as shown below, continued to do so up to and after the formation of their company Redbeet Interactive AB in February 2017.[28]

Four days later, the Developers published their second blog entry and made a first prototype of the RAFT game available to the general public for downloading. Bengtsson Decl. ¶ 30; Ex. 63 (67 TTABVUE 8, 93-94). We reproduce that entry below:



RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

First testable prototype!

ON 17 OCTOBER, 2016 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi! It's now Monday and we have our first prototype for you all to try out. It is an extremely early prototype which only function is to give you an idea of what the game could be.

About the game

Raft (working title) is a survival game where the player is stuck on a raft in the middle of the ocean. To survive, the player must gather debris from the ocean, which they can use to craft items such as fishing equipment, shelter, growing pots and much more. The raft can be expanded both horizontally and vertically to create a more comfortable home out on the sea.

The features implemented in this prototype include gathering resources using your trustworthy hook, expanding your raft and harvesting plants (in the form of cubes).

To download the prototype, click HERE! (https://drive.google.com/file/d/0B1Fn1RQ2ZM2tdGZIRTcxZkxoZHM/view?usp=sharing)

We would also be very thankful if you would tell us what you think about the game and it's future potential. To go to our google form click HERE! (https://docs.google.com/forms/d/e/1FAIpQLSchQCMfzdKOR12yi3qWeh4Brj95AaPr5YHhY_bUOrDlWObACA/viewform)

Lastly, if you want to keep updated with the production and receive future prototypes, subscribe to our newsletter HERE! (http://eepurl.com/ckrD31)

Here is an ingame picture aswell!

[27] Respondent focuses on the introductory language "[w]e are a group of three people who have just started development on a survival game where the player is stranded on a raft in the middle of the ocean." 125 TTABVUE 9. Respondent argues that "[l]ater that day, they further clarified their initial vision by declaring, 'the long term goal for the player is to expand the raft and craft items that will help them survive. Exactly how this is done is still not decided and we want a community of testers to help us with developing this game!'." *Id.* at 9-10. According to Respondent, "[t]his remark makes clear that, at this point, RAFT was little more than a concept. The developers had not yet settled on core mechanics and were relying heavily on outside feedback and 'testers' to figure out what the game might eventually become." *Id.* at 10.

[28] In his brief, Respondent also repeatedly refers to the Developers as "Redbeet" or "Redbeet Interactive" prior to the formation of their company. 125 TTABVUE 10-13.

Bengtsson Decl. Ex. 63 (67 TTABVUE 94). The purpose of the release was primarily to test the concept and viability of the game, and to gather feedback from users or potential users. Bengtsson Tr. 19:2-8 (93 TTABVUE 8). Although the first RAFT game in October 2016 was a prototype, it was a playable and functioning computer game, Bengtsson Decl. ¶ 30 (67 TTABVUE 8), and it was available for downloading through Google Drive or Dropbox by anyone with Internet access. Bengtsson Tr. 19:17-20 (93 TTABVUE 8). As Mr. Bengtsson put it, the RAFT game was "developed enough to be released to the general public." Bengtsson Tr. 62:22-23 (93 TTABVUE 19).[29]

A second prototype was released on October 27, 2016. Bengtsson Tr. 21:11-22:10 (93 TTABVUE 8-9). The purpose of its release was to get more players to play the game and to get more feedback. Bengtsson Tr. 23:6-22 (93 TTABVUE 8). Mr. Bengtsson did not consider the second prototype to be a finished game. Bengtsson Tr. 23:9-11 (93 TTABVUE 8).[30]

The Developers made another new prototype of the RAFT game available for downloading on their blog in November 2016 and promoted its availability on their social media pages. Bengtsson Decl. ¶ 36; Ex. 67 (67 TTABVUE 9, 104-05). The

[29] Respondent argues that "[o]n the same day, they added, 'Raft (working title) is a survival game where the player is stuck on a raft in the middle of the ocean.' . . . . By explicitly labeling 'RAFT' as a working title, the team made it clear that the product was in its embryonic stage designed solely for testing out the concept. A survey was also provided alongside a download link, asking, 'Based on the prototype and description of the game, is this something you would be interested in?'." 125 TTABVUE 10.

[30] Respondent argues that "[t]he prototype was distributed via a Google Drive link—an informal and non-commercial method of sharing—further underscoring that the build was a rough, experimental version intended solely for community testing and input." *Id.*

purpose of releasing this prototype was again to draw attention to the game, attract new players, and get feedback. Bengtsson Tr. 25:21-26:1 (93 TTABVUE 9-10). Mr. Bengtsson did not consider this prototype to be a finished game. Bengtsson Tr. 26:2-5 (93 TTABVUE 10).[31]

On December 5, 2016, the Developers posted an entry on their blog that contained the following text:

> Since the last blog post we have look [sic] at how much we can do with the game within our time frame. Since we are students, in a couple of weeks we will have new courses that will allocate a lot of our time, which means we will not have enough time to work on the game. Therefore we decided to not add any new features into the prototype for now. Instead we have focused to polish the features we have and make the game as playable as possible. Our goal is to give you, the player, a sense of what the game could be like if we were to, at some point, continue production and make it a finished product.
>
> Our current plan is to release the last prototype for this production period late next week. We will also send out feedback forms, as we have done previously. With the feedback, we hope to be able to see if continuing production of the game is something that the community wants. So if you want this to be continued upon, please tell us!

Bengtsson Decl. ¶ 37; Ex. 68 (67 TTABVUE 9-10, 106-11). This post also told gamers what to expect from the upcoming prototype. Bengtsson Decl. Ex. 68 (67 TTABVUE 107). Mr. Bengtsson did not consider the game to be finished at this point. Bengtsson Tr. 28:9-12 (93 TTABVUE 10).[32]

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[31] Respondent notes that in November 2016, Petitioner referred to the game as a "prototype" and to persons playing it as "testers." *Id.* at 10-11.

[32] Respondent describes this post as "an even more candid look at where things stood with RAFT, and it was not anywhere near commercial readiness," *id.* at 11, and focuses on the

The Release of the RAFT Game on the Itch.io Platform

On December 14, 2016, the Developers announced on Instagram that they were about to release the RAFT game on the itch.io platform. Bengtsson Decl. ¶ 40; Ex. 70 (67 TTABVUE 10, 113-14). Mr. Bengtsson described the itch.io platform as follows:

> Itch.io is a platform for indie developers to release their games. Itch.io does not charge a fee for a developer to release a game on their platform, and developers can decide how much they want to charge users to download a game. Developers can also offer a game on itch.io for download for free. Anyone with Internet access can download a game that has been released on itch.io.

Bengtsson Decl. ¶ 24 (67 TTABVUE 7).[33] In their December 14, 2016 announcement, the Developers stated that "[t]he final version of this game will be available for free, on itch.io this Friday," and requested feedback. Bengtsson Ex. 70 (67 TTABVUE 114).

Mr. Bengtsson acknowledged that at this point

> we did not have any real plans to further develop the RAFT game, but instead intended to concentrate on our course work to get our degrees from University. We simply planned to release the RAFT game "as is" to the public, as we had done with our FROGCLIMBERS and ANCHORED games, for the public to enjoy and review the feedback that

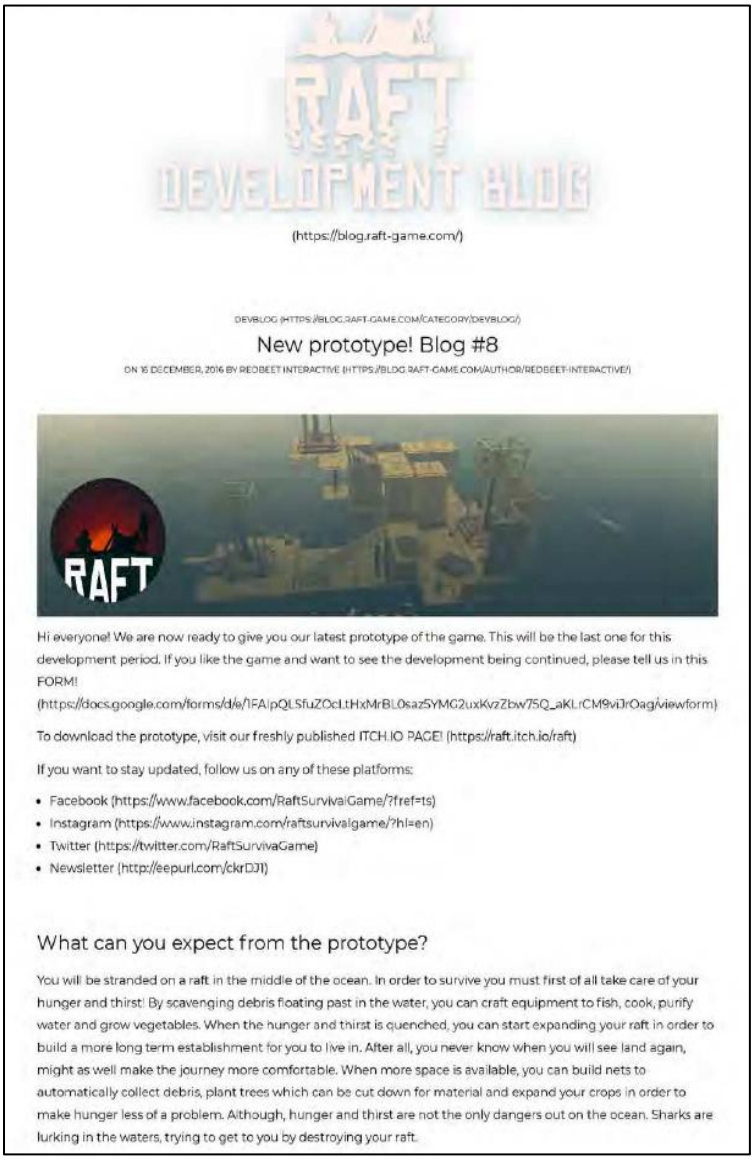
language in the text that the Developers intended to make the existing version of the game "as playable as possible." *Id.* Respondent argues that the post "was not framed as a step toward release," *id.*, and that the Developers "were counting on the community not just for playtesting, but for deciding whether the game should move forward at all." *Id.*

[33] Kacper Antoniszczak, a former editor of several computer game publications and the CEO of Axolot Games AB ("Axolot"), which publishes Petitioner's RAFT game, Antoniszczak Decl. ¶¶ 3-4 (75 TTABVUE 3), testified that it is "[i]t is common practice for an indie developer to release a game that is in development on itch.io." Antoniszczak Decl. ¶ 29 (75 TTABVUE 7). Respondent stated in his brief that "Itch.io is widely recognized as a platform that supports independent developers in sharing early-stage or experimental projects. Its flexible structure and community-driven approach make it an ideal environment for testing game concepts and engaging with players during the development process." 125 TTABVUE 11.

> we would get to determine whether further development was warranted.

Bengtsson Decl. ¶ 41 (67 TTABVUE 10).

The Developers released the game on itch.io on December 16, 2016. Bengtsson Decl. ¶ 42; Ex. 71 (67 TTABVUE 10, 115-18). We reproduce below a portion of the Developers' announcement of the release on their blog:



RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

New prototype! Blog #8

ON 16 DECEMBER, 2016 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi everyone! We are now ready to give you our latest prototype of the game. This will be the last one for this development period. If you like the game and want to see the development being continued, please tell us in this FORM!
(https://docs.google.com/forms/d/e/1FAIpQLSfuZOcLtHxMrBL0sazSYMG2uxKvzZbw75Q_aKLrCM9viJrOag/viewform)

To download the prototype, visit our freshly published ITCH.IO PAGE! (https://raft.itch.io/raft)

If you want to stay updated, follow us on any of these platforms:

- Facebook (https://www.facebook.com/RaftSurvivalGame/?fref=ts)
- Instagram (https://www.instagram.com/raftsurvivalgame/?hl=en)
- Twitter (https://twitter.com/RaftSurvivaGame)
- Newsletter (http://eepurl.com/ckrDJ1)

What can you expect from the prototype?

You will be stranded on a raft in the middle of the ocean. In order to survive you must first of all take care of your hunger and thirst! By scavenging debris floating past in the water, you can craft equipment to fish, cook, purify water and grow vegetables. When the hunger and thirst is quenched, you can start expanding your raft in order to build a more long term establishment for you to live in. After all, you never know when you will see land again, might as well make the journey more comfortable. When more space is available, you can build nets to automatically collect debris, plant trees which can be cut down for material and expand your crops in order to make hunger less of a problem. Although, hunger and thirst are not the only dangers out on the ocean. Sharks are lurking in the waters, trying to get to you by destroying your raft.

Bengtsson Decl. Ex. 71 (67 TTABVUE 116).[34] The Developers also promoted the release on their social media pages, including in a trailer on YouTube. Bengtsson Decl. ¶ 44; Exs. 72-74 (67 TTABVUE 11, 119-28); Bengtsson Tr. 30:18-31:14 (93 TTABVUE 11). Mr. Bengtsson did not consider the game that was launched on itch.io to be a finished one, but it was functional and fully playable. Bengtsson Tr. 29:16-21 (93 TTABVUE 10).[35]

The purpose of publishing the prototype on itch.io was to attract more players, to test the commercial viability of the game, and to get more feedback from players. Bengtsson Tr. 29:12-15 (93 TTABVUE 10). As Mr. Bengtsson put it, "by launching on Itch, we wanted to see if there was a market and if there was a -- an interest from the players for a -- for a paid version of the game or a larger version of the game." Bengtsson Tr. 49:21-25 (93 TTABVUE 15). He testified that "[i]t is quite common in indie development to use this method to make sure that you don't put a lot of time and money to producing something that no one wants," and that "by doing the Itch version, we quickly realized this is something people would pay money for and would like more of." Bengtsson Tr. 50:1-6 (93 TTABVUE 16).

[34] In October 2016, the Developers adopted the composite RAFT word-and-design mark shown in this blog post. Bengtsson Decl. ¶ 33 (67 TTABVUE 8-9).

[35] Respondent cites a June 9, 2017 blog entry in which Respondent claims "Redbeet did not sugarcoat the state of their early release. Reflecting on the first version they uploaded to Itch.io, they admitted, ' . . . when we first made the prototype available on Itch, the UI was kind of thrown together in a haste . . .'" 125 TTABVUE 13.

The Response to the Release of the RAFT Game on Itch.io

Mr. Bengtsson testified about the response to the Developers' release of the RAFT game on itch.io as follows:

> The response that our RAFT game received from the itch.io release was beyond anything we could have imagined. Within days, more than 100,000 people had downloaded the RAFT game. During December 2016 and January 2017, popular YouTube game influencers posted videos on YouTube of themselves playing the RAFT game. It was insane.

Bengtsson Decl. ¶ 45 (67 TTABVUE 11). Mr. Bengtsson testified that the Developers "quickly realized this is something people would pay money for and would like more of." Bengtsson Tr. 50:4-6 (93 TTABVUE 16).

The Developers' belief appears to have been well-founded. By the end of December 2016, the RAFT game was being downloaded from itch.io more than 100,000 times per day. Bengtsson Decl. ¶ 46; Ex. 75 (67 TTABVUE 11; 69 TTABVUE 129-30). As of December 19, 2016, the RAFT game was a Top 3 game on itch.io, Bengtsson Decl. ¶ 47; Ex. 76 (67 TTABVUE 11, 130-32), and a few days later, the game was the most popular one on itch.io. Bengtsson Decl. ¶ 48 (67 TTABVUE 11).

On December 23, 2016, the Developers released a new updated prototype on itch.io that fixed some bugs and added a "Save Support" feature, which allowed a user to save their progress when playing a game across different sessions. Bengtsson Decl. ¶ 49 (67 TTABVUE 12). The Developers also activated a "Name Your Own Price" option, which allowed gamers to make a donation when they downloaded the game to help support its further development. Bengtsson Decl. ¶ 49; Ex. 78 (67 TTABVUE 12,

139-43).[36] The Developers stated in their listing on itch.io that "Raft is currently in very early production. This is a prototype which purpose is to show the player what the game could be. If this is a game you would like to see being finished, please tell us so in this form!"[37]

On December 31, 2016, the Developers set up a community forum on itch.io with their listing for the RAFT game through which users could make suggestions for the game, provide screen shots and videos of themselves playing the game, notify the Developers of bugs, and post topics relating to the game for discussion. Bengtsson Decl. ¶ 84 (67 TTABVUE 18). Between December 31, 2016 and April 17, 2017, gamers posted hundreds of topics on the RAFT forum. Bengtsson Decl. ¶ 84; Ex. 106 (67 TTABVUE 18-19, 241-73).

On January 7, 2017, the Developers posted the blog entry shown below:

[36] Mr. Bengtsson testified that about 25,000 gamers donated more than $60,000 to the future development of the RAFT game. Bengtsson Decl. ¶ 78 (69 TTABVUE 17).

[37] Mr. Bengtsson testified that during the fall of 2016, the Developers received suggestions for the RAFT game from gamers on the feedback forms, which the Developers were required to destroy under European privacy laws. Bengtsson Decl. ¶ 38 (67 TTABVUE 10).

RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

Happy New Years!

ON 7 JANUARY, 2017 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi everyone!

We thought it was time to tell you all how things are going! But first, we want to thank you for the amazing support you all continue to show! We are super grateful and wish we could add all the cool ideas you people are coming up with. Unfortunately, we don't have the time for that.

As you might or might not know, we're three students from Sweden working on the game. We're in our third and final year of studying, and the prototype you have been playing was developed for a course during the past half year. Now we will be starting new courses, which means we will have less time to work on the game. We will continue and do our best to find time and create new stuff for you all to try out, and we hope you understand our situation. We will graduate this summer, and would love to be able to work full time on the game after that, but we don't know at this point how our situation will look at that time.

So, that's a little bit about our situation. Right now we're working on fixing some bugs. Apart from that we are looking at what the best thing to add to the game would be. We're trying to consider all of your opinions in order to give you the most value for each update. We can't say for sure yet what you will be able to see in the next update or when it will be out, but keep your eyes open, and we'll tell you as soon as we can!

Again, thanks to everyone who has played the game! Please keep showing us your screenshots and videos and give us feedback! It keeps us motivated!

Until next time!

Bengtsson Decl. ¶ 52; Ex. 81 (67 TTABVUE 12-13, 154).[38]

[38] Respondent quotes a January 5, 2017 blog entry in which the Developers again stated that RAFT "**is currently in very early production. This is a prototype which purpose is to show the player what the game could be. If this is a game you would like to see being finished, please tell us in this form**!." Respondent argues that this "reflects Redbeet's own public characterization of RAFT at the time as a prototype in early development, intended to gauge player interest to show 'what the game could be'." 125 TTABVUE 12 (emphasis in bold here in italics in the original). Respondent also notes that the post instructed gamers to save games because "RAFT lacked backward compatibility between versions, suggesting that the game was still undergoing substantial structural changes typical of early-stage development rather than stable commercial release." *Id.*

Initial Media Coverage of the RAFT Game

The RAFT game was featured in January 2017 in the Hinterland Forums and the rockpapershotgun.com website. Bengtsson Decl. ¶¶ 53-54; Exs. 82-83 (67 TTABVUE 13, 160-70). The Hinterland Forums website entry contained what appears to be a link to a YouTube video regarding the game. Bengtsson Decl. Ex. 82 (67 TTABVUE 162). The rockpapershotgun.com website displayed the following:

The best free PC games of the week | Rock Paper Shotgun

Adrift-at-sea survival game. I try to avoid posting about self-described "prototypes" because many of them will start as a freebie but eventually become paid-for. But Raft is some good vidgams. You start out on a tiny piece of wood with nothing but a rope with a hook on the end. Luckily, all types of flotsam is coming toward you on the current – wood, thatch, aluminium scrap, a barrel containing a piece of rope and a single raw potato. Throw your hook into the ocean and grab things, then forge them into useful gear. A net to automatically catch things, a fishing rod to get some mackerel, a cooking station to boil water. You can even start expanding your raft, turning it into a floating home away from home. You know what? Being adrift on the open ocean isn't so bad. Wait. What's that. Oh no. *Oh no*. There's a shark circling your raft. Gliding, weaving, probing. It is going to munch on your floor and when it does it will take whole chunks of your hard work with it. Better get to work on that makeshift spear, bub.

I like this because the gameiness of it is immediately apparent, and survival mechanics suit this setting so well. You do reach the end-point, in terms of things to build, within a very short time but there's some creativity and fun to be had building your floating *casa* along the way. Hold down the right mouse button with the hammer out and you can choose from stairs, pillars, walls and some other basic bits and pieces. Enough to make a weird, bobbing driftwood factory, lined with nets - a terrible floating creature in itself. An excellent start to something that's likely to be a popular with all the rugged and bedraggled suitors on the survival circuit.

Bengtsson Decl. Ex. 83 (67 TTABVUE 167).

Axolot's Interest in the RAFT Game

Axolot's CEO Mr. Antoniszczak testified that in January 2017, he "became familiar with the game RAFT, which had been released on the itch.io platform by a group of students at Upland [sic] University in Gotland, Sweden." Antoniszczak Decl. ¶ 27 (75 TTABVUE 7). He "downloaded the game from itch.io in early 2017 and played the game multiple times," and "[a]lthough I understood that the RAFT game was a prototype at that time, it was a playable and functional game in early 2017 that I enjoyed playing." Antoniszczak Decl. ¶ 27 (75 TTABVUE 7).

Mr. Antoniszczak testified that as best he could recall, he "first learned about the RAFT game in January 2017 from YouTube." Antoniszczak Decl. ¶ 31 (75 TTABVUE 8). He explained that "[t]here are game influencers on YouTube who record themselves playing games and post those videos on YouTube. Some of these influencers have millions of followers, so that a positive review from one of them can turn a new game into an overnight sensation," and he explained that he had "played several games that became popular immediately after game influencers posted videos of themselves playing the games on YouTube." Antoniszczak Decl. ¶ 31 (75 TTABVUE 8).

Mr. Antoniszczak identified three such influencers who had played and reviewed the RAFT game, "Jacksepticeye," "Markiplier," and "Blitz." Antoniszczak Decl. ¶¶ 32-35; Exs. 9-12 (75 TTABVUE 8-9, 55-81).[39] On December 23, 2016, the influencer

[39] In his brief, Respondent described these influencers as "well-known creators." 125 TTABVUE 57.

named "Blitz" posted on YouTube a 27-minute video of himself playing the RAFT game. Antoniszczak Decl. ¶ 35; Ex. 12 (75 TTABVUE 9, 76-81). The YouTube page stated that the video had more than 1,000,000 views. Antoniszczak Decl. Ex. 12 (75 TTABVUE 81).

Mr. Antoniszczak was following the influencer named "Jacksepticeye" in 2016 to learn about new potential games, Antoniszczak Decl. ¶ 32 (75 TTABVUE 8), and on December 30, 2016, Jacksepticeye posted on his YouTube channel a nearly 15-minute video of himself playing the RAFT game. Antoniszczak Decl. ¶ 33; Ex. 10 (75 TTABVUE 8, 66-70). According to the YouTube page, the video had more than 4,000,000 views. Antoniszczak Decl. Ex. 10 (75 TTABVUE 70).

On February 3, 2017, the influencer named "Markiplier" posted a nearly 23-minute video on YouTube showing himself playing the RAFT game. Antoniszczak Decl. ¶ 34; Ex. 11 (75 TTABVUE 8-9, 71-75). According to the YouTube page, the video had more than 4,000,000 views. Antoniszczak Decl. Ex. 11 (75 TTABVUE 75).

Mr. Antoniszczak testified that

> [t]his type of reception by gamers to a new game that is still in its prototype phase is unusual. By January 2017, the RAFT game had been released to the public on itch.io and downloaded by thousands of users. Although the game was in a prototype version, the RAFT game was a functional, playable game that was being enjoyed by thousands and had a huge following. As a result, I thought the RAFT game had a lot of potential and was a good candidate for Axolot to pursue as a possible investment. I visited the social media that the RAFT students were using to promote their RAFT game, as well as their development blog, and decided to reach out to them on Twitter.

Antoniszczak Decl. ¶ 36 (75 TTABVUE 9).

On January 7, 2017, the Developers "posted an entry on our blog thanking all of our customers for their amazing support and updating everyone on our plans." Bengtsson Decl. ¶ 52; Ex. 81 (67 TTABVUE 12, 153-59). We reproduce the entry below:

(https://www.facebook.com/RaftSurvivalGame/) (https://www.twitter.com/RaftSurvivaGame/)

(https://www.instagram.com/RaftSurvivalGame/) (https://blog.raft-game.com/feed/)

RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

Happy New Years!

ON 7 JANUARY, 2017 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi everyone!

We thought it was time to tell you all how things are going! But first, we want to thank you for the amazing support you all continue to show! We are super grateful and wish we could add all the cool ideas you people are coming up with. Unfortunately, we don't have the time for that.

As you might or might not know, we're three students from Sweden working on the game. We're in our third and final year of studying, and the prototype you have been playing was developed for a course during the past half year. Now we will be starting new courses, which means we will have less time to work on the game. We will continue and do our best to find time and create new stuff for you all to try out, and we hope you understand our situation. We will graduate this summer, and would love to be able to work full time on the game after that, but we don't know at this point how our situation will look at that time.

So, that's a little bit about our situation. Right now we're working on fixing some bugs. Apart from that we are looking at what the best thing to add to the game would be. We're trying to consider all of your opinions in order to give you the most value for each update. We can't say for sure yet what you will be able to see in the next update or when it will be out, but keep your eyes open, and we'll tell you as soon as we can!

Again, thanks to everyone who has played the game! Please keep showing us your screenshots and videos and give us feedback! It keeps us motivated!

Until next time!

Bengtsson Decl. Ex. 81 (67 TTABVUE 154).

On January 19, 2017, Mr. Antoniszczak contacted the Developers and expressed interest in possibly providing financing for further development of the RAFT game. Bengtsson Decl. ¶ 55 (67 TTABVUE 13). The Developers were very excited by the

contact, Bengtsson Decl. ¶ 55 (67 TTABVUE 13), and had a Skype meeting with Mr. Antoniszczak on January 23, 2017 to discuss possible cooperation with Axolot to further develop the game. Bengtsson Decl. ¶ 59 (67 TTABVUE 14).

The Developers issued a new version of the RAFT game on itch.io on January 22, 2017 and publicized it through their blog and social media accounts. Bengtsson Decl. ¶¶ 56-57; Exs. 84-85 (67 TTABVUE 13, 171-79).

The Developers' Decision to Make Further Development of the RAFT Game Their Full-Time Job

Mr. Bengtsson testified that based on the success of the RAFT game to date, and its future potential, the Developers decided to make further development of the game their full-time job:

> Because of the huge support and recognition that our RAFT game received after its release on itch.io and because of the interest from Axolot, Mr. Parlayan, Ms. Melläker and I made the decision to form a company to develop the RAFT game. We also decided that we would drop out of University after we completed the classes that we were then taking to work full-time on further development of the RAFT game.

Bengtsson Decl. ¶ 60 (67 TTABVUE 14). In early February 2017, the Developers met with Mr. Antoniszczak in person and began negotiating with Axolot about investing in and publishing the RAFT game. Bengtsson Decl. ¶ 63 (67 TTABVUE 14). Redbeet Interactive AB was formed in February 2017,[40] and the Developers assigned all their rights to the RAFT game to the company. Bengtsson Decl. ¶¶ 68-69; Ex. 94 (67 TTABVUE 15; 69 TTABVUE 220-23).

[40] Mr. Bengtsson has been Petitioner's CEO since its formation. Bengtsson Tr. 11:8-23 (109 TTABVUE 6).

In February 2017, the RAFT game was the subject of articles in Yahoo! News and on rockpapershotgun.com. Bengtsson Decl. ¶¶ 62, 64 Exs. 88-89 (67 TTABVUE 14-15, 186-96). On February 9, 2017, the developers posted the following entry on their blog:

(https://www.facebook.com/RaftSurvivalGame/)

(https://www.twitter.com/RaftSurvivaGame/)

(https://www.instagram.com/RaftSurvivalGame/) (https://blog.raft-game.com/feed/)

RAFT DEVELOPMENT BLOG

(https://blog.raft-game.com/)

DEVBLOG (HTTPS://BLOG.RAFT-GAME.COM/CATEGORY/DEVBLOG/)

Hi again!

ON 9 FEBRUARY, 2017 BY REDBEET INTERACTIVE (HTTPS://BLOG.RAFT-GAME.COM/AUTHOR/REDBEET-INTERACTIVE/)

Hi everyone! We've received very nice feedback for the last update which we're very happy about! So thank you all for that!

We've been quiet for a while now and felt we need to tell you all what's going on! We've had some people asking us if we're continuing development or if we've given up. We have definitely **not** given up and we are continuing to work. We want to be able to bring all our players the best game possible, and right now we're looking into how we can best manage that. There's a lot of planning going on and at the moment we can't say exactly how the future will look, but we're excited! We're sorry we can't tell you more right now, but keep your eyes open and we'll tell you all as soon as we can!

Bengtsson Decl. ¶ 65; Ex. 90 (67 TTABVUE 15, 198).[41] The developers also announced their plans on their social media accounts. Bengtsson Decl. ¶ 65; Ex. 91 (67 TTABVUE 15; 69 TTABVUE 206-12).

[41] Respondent argues that "the fact that Redbeet needed to clarify this at all underscored just how loosely organized the development still was." 125 TTABVUE 12.

Downloads of the RAFT Game From Itch.io and Exposure of the Game

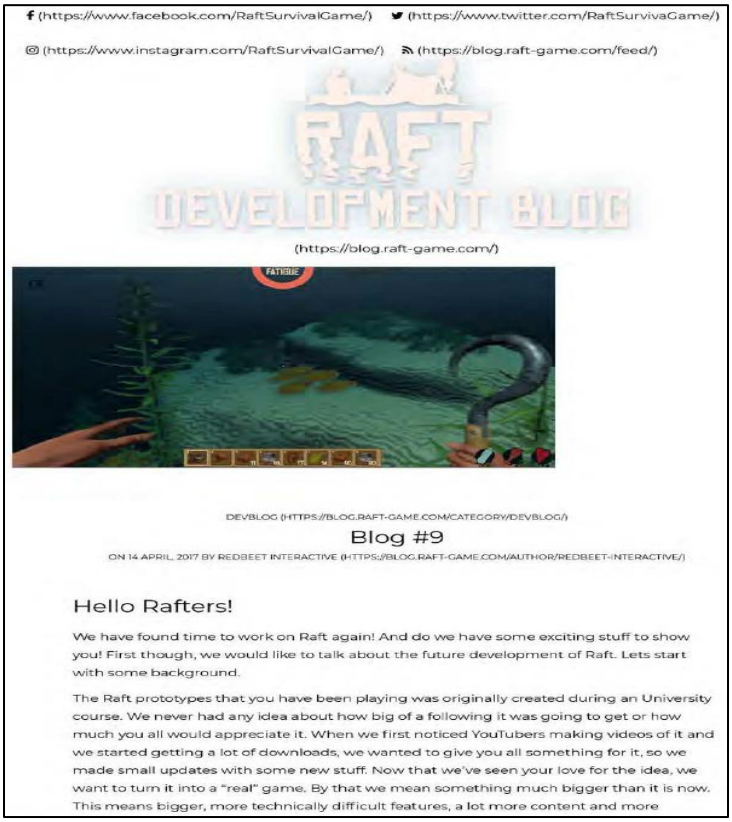
During early 2017, the RAFT game was downloaded from itch.io more than 100,000 times a day in January, Bengtsson Decl. ¶ 61; Ex. 87 (67 TTABVUE 14; 69 TTABVUE 188-89), around 50,000 times a day in February, Bengtsson Decl. ¶ 70; Ex. 95 (67 TTABVUE 15-16; 69 TTABUE 224-25), and more than 10,000 times a day in March. Bengtsson Decl. ¶ 74; Ex. 99 (67 TTABVUE 16; 69 TTABVUE 244-45). Between December 16, 2016 and March 30, 2021, the RAFT game listing on itch.io had approximately 13,000,000 views and 9,500,000 million downloads. Bengtsson Decl. ¶ 80; Ex. 105 (67 TTABVUE 19; 69 TTABVUE 266-67). Mr. Bengtsson testified that between December 16, 2016, and April 21, 2017, the Developers' RAFT listing on itch.io had nearly 14,000,000 page views, and nearly 3,500,000 users, and that according to itch.io's data, the largest portion of users during this time period (13.11%) were from the United States. Bengtsson Decl. ¶ 79; Ex. 104 (67 TTABVUE 17; 69 TTABVUE 264-65). On April 7, 2017, pcworld.com published an article about 12 of the best games on itch.io and included the RAFT game. Bengtsson Decl. ¶ 75; Ex. 100 (67 TTABVUE 16, 222-23).[42]

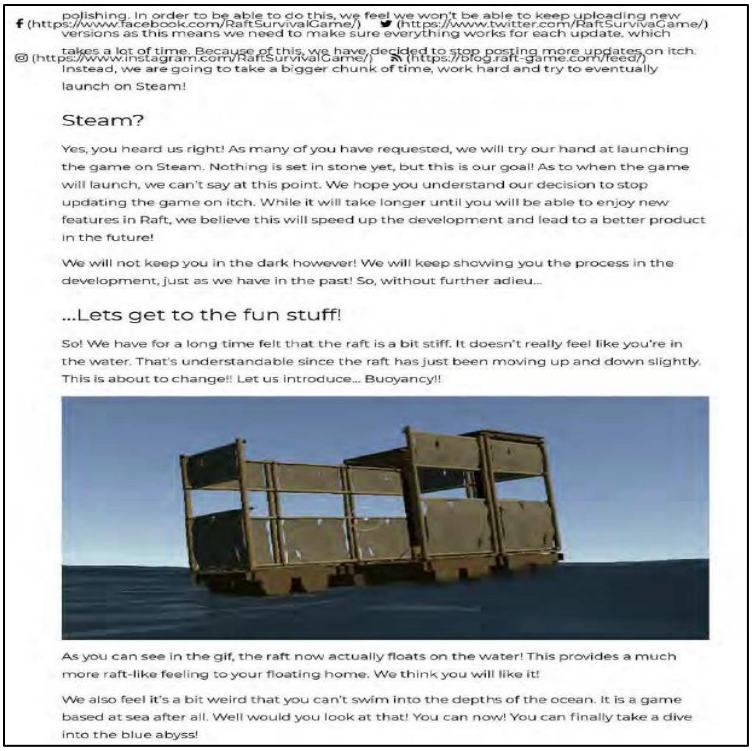
In late March 2017, the Developers completed their course work at Uppsala University, and dropped out of the University. Bengtsson Decl. ¶ 72 (67 TTABVUE 16). They announced their intentions in a blog entry dated March 29, 2017, which we reproduce below:

[42] During the first months of 2017, the Developers began noticing unauthorized third-party copies of the RAFT game and took various steps against them. Bengtsson Decl. ¶¶ 66-67; Exs. 92-93, 96 (67 TTABVUE 15-16, 203-09; 69 TTABVUE 213-19).

Bengtsson Decl. Ex. 90 (67 TTABVUE 211).

On April 14, 2017, the Developers posted the following entry on their blog addressed to "Rafters":





polishing. In order to be able to do this, we feel we won't be able to keep uploading new versions as this means we need to make sure everything works for each update, which takes a lot of time. Because of this, we have decided to stop posting more updates on itch. Instead, we are going to take a bigger chunk of time, work hard and try to eventually launch on Steam!

(https://www.facebook.com/RaftSurvivalGame/) (https://www.twitter.com/RaftSurvivaGame/)

(https://www.instagram.com/RaftSurvivalGame/) (https://blog.raft-game.com/feed/)

Steam?

Yes, you heard us right! As many of you have requested, we will try our hand at launching the game on Steam. Nothing is set in stone yet, but this is our goal! As to when the game will launch, we can't say at this point. We hope you understand our decision to stop updating the game on itch. While it will take longer until you will be able to enjoy new features in Raft, we believe this will speed up the development and lead to a better product in the future!

We will not keep you in the dark however! We will keep showing you the process in the development, just as we have in the past! So, without further adieu...

...Lets get to the fun stuff!

So! We have for a long time felt that the raft is a bit stiff. It doesn't really feel like you're in the water. That's understandable since the raft has just been moving up and down slightly. This is about to change!! Let us introduce... Buoyancy!!

As you can see in the gif, the raft now actually floats on the water! This provides a much more raft-like feeling to your floating home. We think you will like it!

We also feel it's a bit weird that you can't swim into the depths of the ocean. It is a game based at sea after all. Well would you look at that! You can now! You can finally take a dive into the blue abyss!

don't like you invading their home!

(https://www.facebook.com/RaftSurvivalGame/) (https://www.twitter.com/RaftSurvivaGame/)

(https://blog.raft-game.com/feed/)

We hope you like the stuff we've shown and we would like to wish you happy Easter! As always, we love to hear your feedback on what we show here, so let us have it! Until next time!

Bengtsson Decl. Ex. 101 (67 TTABVUE 225-27).

Mr. Bengtsson explained this entry as follows:

> At this stage, our RAFT game was a fully functional and playable game that had already been downloaded and enjoyed by millions of our fans. It was not a fake game. By "real" game, as we explained in our blog, we meant that we

> intended to transform the game into "something much bigger than it is now," with "more technically difficult features, a lot more content and more polishing." Up to this point, we had made our game available for download for free. We wanted to turn the game into a version that we would feel comfortable selling on Steam.

Bengtsson Decl. ¶ 77 (67 TTABVUE 17).[43] In April 2017, the Developers stopped offering any updates or otherwise supporting the RAFT game on itch.io. Bengtsson Decl. ¶ 80 (67 TTABVUE 19).

Petitioner's Agreements With Axolot and Subsequent Marketing of the Game, and the Announcement of Its Release on Steam Early Access

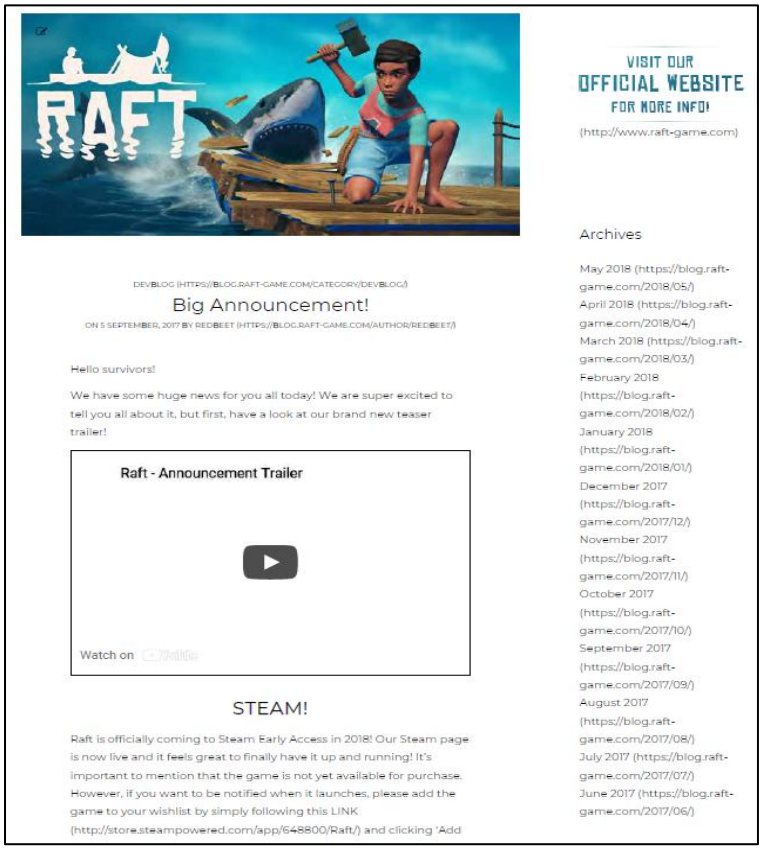
On May 17, 2017, Axolot and Redbeet Interactive AB signed a Shareholders Agreement, an Investment Agreement, and a Publishing Agreement, under which agreements Axolot invested in Redbeet and agreed to publish the RAFT game when it was released on Steam. Bengtsson Decl. ¶ 85 (67 TTABVUE 19); Antoniszczak Decl. ¶¶ 46-49; Exs. 15-17 (75 TTABVUE 11; 77 TTABVUE 90-122).

During the summer of 2017, the Developers continued to post entries on their blog and on social media with information about the RAFT game and new features that were being added to the game to keep fans and users interested in the game and to

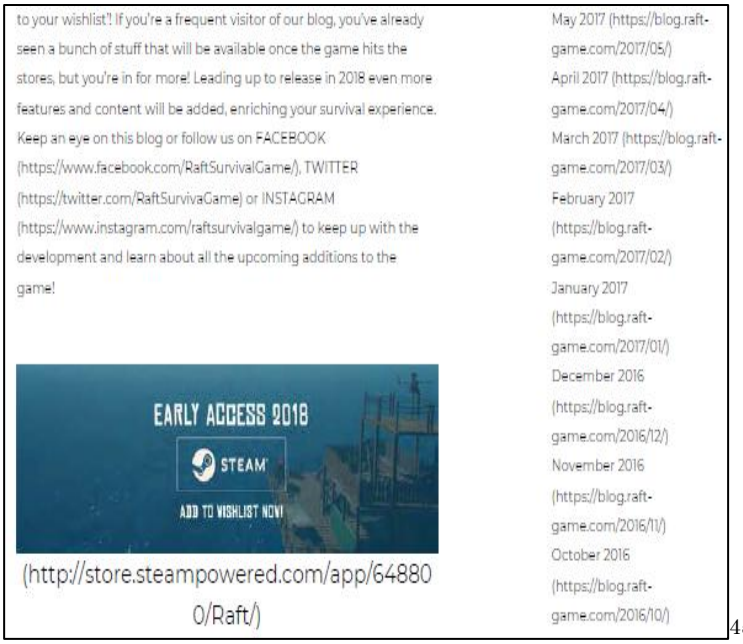
[43] Respondent argues that this entry showed that "RAFT hadn't been a constant focus," and that the Developers were "just carving out time to get back to it was considered blog-worthy." 125 TTABVUE 12. According to Respondent, "[u]p to that point, development had been sporadic at best. But in this entry, the team laid out a new direction: they wanted to turn what had been a string of rough, feedback-fueled prototypes with an attempt to turn it into a 'real' game," *id.*, and "[f]or the first time, they were talking seriously about content depth, polish, and technical upgrades. They also admitted that this next phase would be slower, noting, 'we need to make sure everything works for each update, which takes a lot of time.'" *Id.* at 13. Respondent further argues that "this post was the first time Redbeet publicly revealed plans to launch the game on a digital game distribution platform Steam . . ." *Id.*

get feedback. Bengtsson Decl. ¶ 86; Exs. 107-08 (67 TTABVUE 19, 274-97).[44] In August 2017 the Developers set up an office for their company in Skövde, Sweden. Bengtsson Decl. ¶ 87 (67 TTABVUE 17).

On September 5, 2017, the Developers announced on their blog and on Instagram that the RAFT game would be coming to Steam Early Access in 2018. Bengtsson Decl. ¶ 88; Ex. 110 (67 TTABVUE 19, 309-18). We reproduce pertinent portions of their blog entry below:



[44] Respondent cites and quotes an August 4, 2017 blog entry in which the Developers "provided another development update that made it clear the game was still far from complete. They noted that 'some of the stuff we've worked on is still in the production phase which means it's not really ready for the blog.' The choice of words—'production phase'—is telling. It signals that many parts of the game were still being actively built, not tested, polished, or finalized." 125 TTABVUE 13.


[45]

From the fall of 2017 through the spring of 2018, the Developers continued to develop the RAFT game for release on Steam and posted entries on their blog about new features and their development efforts, and they promoted the game through

[45] Respondent cites and quotes a September 17, 2017 blog entry and argues as follows: "Redbeet responded to the growing buzz around RAFT's Steam release with a message that was equal parts cautious and revealing. They acknowledged the question—'When in 2018 will Raft release on Steam?'—but made it clear they weren't ready to commit. Why? Because, in their own words, their priority was to 'release a game that works,' not one riddled with 'endless bugs and crashes.'" 125 TTABVUE 13-14 (quoting 92 TTABVUE 100, 107 TTABVUE 321). According to Respondent, "[m]ore importantly, this post marked a significant shift: for the first time, Redbeet signaled their move away from free, feedback-driven prototypes and toward a commercial product. 'Raft will not be free,' they stated. 'We haven't decided yet on exactly how much the game will cost. However, once the price is set in stone, we'll tell you right away.'" *Id.* at 14. Respondent argues that "[t]hat announcement was a turning point—it made clear that RAFT was evolving from a loosely shaped, community-guided experiment into a product they expected people to buy." *Id.* Respondent also argues that "[t]he Steam launch triggered highly emotional responses from early supporters, further confirming that the Itch.io version had never been seen as a commercial product . . . ." *Id.* at 32 (citing September 16 and 17, 2017 responses (92 TTABVUE 109, 112, 107 TTABVUE 330, 333)).

their social media pages. Bengtsson Decl. ¶¶ 90-91; Exs. 112-16 (67 TTABVUE 20, 321-31; 68 TTABVUE 3-24).[46]

The Release of the RAFT Game on the Steam Early Access Platform

On May 23, 2018, the Developers released the RAFT game on Steam Early Access. Bengtsson Decl. ¶¶ 93-94; Exs. 118-19 (67 TTABVUE 20; 68 TTABVUE 28-35).[47] Mr. Bengtsson testified that the game was released on Steam Early Access because the Developers "knew that there would be new 'chapters' and major updates in the future, so that the game was not yet finished." Bengtsson Decl. ¶ 92 (67 TTABVUE 20). Mr. Antoniszczak explained that "Steam Early Access is a platform that allows a game developer to sell its game while the game is still being developed," that to be listed on Steam Early Access, the game "must be playable and functional," but that "customers who purchase a game on Steam Early Access understand that games on Steam Early Access are considered to be 'unfinished' by the developer and still contain bugs" and "will usually receive major updates while in the 'Early Access' stage." Antoniszczak Decl. ¶ 21 (75 TTABVUE 6). The Developers "released the RAFT game on Steam Early Access because we had plans to add more features to the game in the future,

[46] Respondent cites and quotes a November 10, 2017 blog entry that he argues shows "just how far RAFT had come from its early, prototype roots." 125 TTABVUE 14. According to Respondent, the Developers' reference to "a version 'stable enough to play for a longer time'," *id.* (quoting 92 TTABVUE 122, 107 TTABVUE 343), "speaks volumes—it wasn't about being feature-complete or polished for release, just stable enough to hold together during extended play. And what did they do with it? They 'brought in some friends to play' to test the game." *Id.*

[47] Respondent quotes a portion of the Developers' blog entry that states that "the commercial release of the game on Steam is . . . 'miles better than the prototype in every aspect . . . .'" 125 TTABVUE 14 (quoting 92 TTABVUE 128). The rest of the quoted portion states that "development has not stopped" and the entry goes on to say that "Raft will continue to grow during the Early Access." 92 TTABVUE 128.

and Early Access was the best vehicle for that." Antoniszczak Decl. ¶ 55 (75 TTABVUE 11).[48] According to Mr. Antoniszczak, Axolot

> supported Redbeet's decision not to release any more updates of the RAFT game from April 2017 until the game was ready for its subsequent release on Steam in May 2018. Although Axolot was an approved developer on Steam at this time and could have immediately released the RAFT game on Steam, we believed that adding more content to the RAFT game and improving the game before the game was released on Steam would build up more excitement over the RAFT game and create a better product. This delay in releasing the RAFT game on Steam would also create a boom effect when the announcement of the planned Steam release was made at a later date.

Antoniszczak Decl. ¶ 43 (75 TTABVUE 10).

Full Listing of the RAFT Game on Steam

Mr. Bengtsson testified that "[w]e were not sure what to expect with the release of the RAFT game on Steam, but it has exceeded all expectations." Bengtsson Decl. ¶ 96 (67 TTABVUE 20). Prior to moving the "Final Chapter" RAFT game from Steam Early Access to a full release listing on Steam in June 2022, Bengtsson Decl. ¶ 104

[48] Respondent notes that the Developers twice acknowledged that the Steam version of the RAFT game was materially different from the version of the game that had been made available on itch.io. Respondent quotes from a tweet on October 1, 2018 in which the Developers stated that "'[w]e have the itch prototype, but that's quite old and doesn't really represents [sic] the current version. . . .'" 125 TTABVUE 15 (quoting (92 TTABVUE 173). Respondent also quotes from a tweet on September 13, 2021 in which the Developers stated that "'playing or donating to the itch prototype will not grant access to the Steam version of Raft,'" *id.* at 14 (quoting 92 TTABVUE 129), and that "the itch game is simply a prototype, not a beta nor an alpha. We did at no point promise anything to donators. The game is now in Early Access on Steam, and BUYING this version will give you full access to the game. I hope that helps.'" *Id.* (quoting 92 TTABVUE 129).

(67 TTABVUE 21),[49] the RAFT game was regularly listed on Steam as a top game. Bengtsson Decl. ¶¶ 96-100; Exs. 120-24 (67 TTABVUE 20-21; 68 TTABVUE 36-71). Since the release of the RAFT game on Steam, sales from the game through October 1, 2023 were in the low nine figures worldwide, and about one-third of those sales have been to customers in the United States. Bengtsson Decl. ¶ 101 (69 TTABVUE 21). Nearly 3,000,000 units of the game have been sold during that period to customers in the United States. Bengtsson Decl. ¶ 101 (69 TTABVUE 21).

III. Petitioner's Entitlement to a Statutory Cause of Action

"Entitlement to a statutory cause of action is an element of the plaintiff's case in every inter partes proceeding." *El Roblar Inv. Prop. LLC v. Roe*, Opp. No. 91272200, 2025 WL 2718983, at *18 (TTAB 2025) (internal quotation and quotation marks omitted) (citing *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). "Under Trademark Act Section 14, 15 U.S.C. § 1064, 'any person who believes that he is or will be damaged . . . by the registration of a mark on the principal register' may petition to cancel that registration," and a "party in the position of plaintiff may petition to cancel registration of a mark when such cancellation is within the zone of interests protected

[49] Mr. Antoniszczak explained that a "developer decides when a game is ready for 'full release, and, at that point, the developer moves the game from the Steam Early Access platform to the full release platform on Steam." Antoniszczak Decl. ¶ 21 (75 TTABVUE 6). According to Mr. Antoniszczak, "[u]sually customers who have purchased a game from Steam Early Access will get all updates and the full release version of the game without having to pay more to the developer." Antoniszczak Decl. ¶ 23 (75 TTABVUE 6).

by the statute . . . and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark." *JNF*, 2022 WL 4379238, at *1 (citing *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1072 (Fed. Cir. 2022) (citing *Lexmark*, 572 U.S. at 132; *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-04 (Fed. Cir. 2020)).

Petitioner's '576 Application to register the mark RAFT and design for "Providing on-line computer games; providing information on-line relating to computer games and computer enhancements for games; electronic games services provided by means of the internet" in Class 41 has been refused based on a citation of Respondent's '897 Registration. Woldow Decl. ¶¶ 4, 14; Exs. 168, 170 (84 TTABVUE 3, 5, 7-23, 40-90).[50] "There is no question that Petitioner, whose application has been blocked by Respondent's registration, is entitled to be heard on the question of cancellation of that registration." *JNF*, 2022 WL 4379238, at *2 (citation omitted). "Further, '[t]o establish a reasonable basis for a belief that one is damaged by the registration sought to be cancelled, a petition may assert a likelihood of confusion which is not wholly without merit . . .'" *Id.* (citation omitted). "Accordingly, Petitioner may seek to cancel Respondent's registration, as its claim is within the zone of interests protected by statute and Petitioner has a reasonable belief in damage proximately caused by the continued registration of Respondent's mark." *Id.* (citations omitted).

[50] Respondent admitted in his Answer to Petitioner's Second Amended Petition to Cancel that "the USPTO has refused Petitioner's Application Serial No. 79/269,576 to register the RAFT & Design mark based on a finding that there is a likelihood of confusion between Petitioner's RAFT & Design mark and Registrant's RAFT mark." Answ. ¶ 59 (51 TTABVUE 8).

IV. Petitioner's Section 2(d) Claim

"Section 2(d) of the Trademark Act provides a ground for cancellation of a registered mark based on likelihood of confusion with a petitioner's mark or trade name previously used in the United States and not abandoned." *JNF*, 2022 WL 4379238, at *3. There are two elements to a Section 2(d) claim based on an unregistered mark, priority and likelihood of confusion. We begin with priority.

A. Priority[51]

Under Section 2(d), "[t]o establish priority, the petitioner must show proprietary rights in the mark that produce a likelihood of confusion." *JNF*, 2022 WL 4379238, at *3 (quoting *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320 (CCPA 1981)). "These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights." *Id.* (quoting *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002)).

[51] As noted above, the parties filed extensive cross-motions for summary judgment regarding priority that were based on much of the same evidence and arguments that they presented at trial. 20-21 TTABVUE; 22 TTABVUE; 28 TTABVUE. Administrative Trademark Judges Zervas, Taylor, and Wolfson sat on the panel that denied the cross-motions on May 31, 2022. 49 TTABVUE 1-21. They have all since retired, and the current panel has been appointed to decide the case at final hearing.

In denying the parties' cross-motions, the summary judgment panel held, *inter alia*, that "genuine disputes remain as to whether . . . Petitioner can claim the benefit of any premarket use of its mark, in a manner analogous to trademark use, to establish its priority of use through tacking," *id.* at 16, and that "Petitioner has not demonstrated that its alleged prior use with respect to either [goods or services] constitutes typical commercial use as typified within the computer gaming industry." *Id.* at 17. The summary judgment panel's conclusions on these matters and others do not bind the trial panel because the law of the case doctrine "does not apply to a denial of summary judgment." *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1356 (Fed. Cir. 2009) (citation omitted).

As discussed above, the parties agree that the critical date for priority purposes is April 28, 2017, and "Petitioner thus bears the burden of proving that its mark was 'previously used in the United States'" before that date by a preponderance of the evidence. *Id.*

Petitioner states that its "priority claim is based on its common law rights in the ***word mark*** RAFT" for computer games. 123 TTABVUE 50 (emphasis supplied by Petitioner).[52] Petitioner argues that "the overwhelming evidence shows that [it] continuously used the RAFT mark for its Computer Games and Computer Game Services for six months ***before*** Registrant's claimed priority date, whether such use is characterized as use of RAFT as an actual trademark or service mark or as use of RAFT in a manner analogous to trademark or service mark use." *Id.* at 32 (emphasis supplied by Petitioner). In its main brief, Petitioner argues that it made technical trademark or service mark use of RAFT in commerce prior to April 28, 2017, *id.* at 32-40, as well as use analogous to trademark use prior to that date. *Id.* at 40-46.[53]

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[52] Petitioner's common-law RAFT word mark "must be distinctive, inherently or otherwise, and [Petitioner] must show priority of use." *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 WL 16646840, at *16 (TTAB 2022) (citation omitted). Respondent's identical RAFT word mark was registered on the Principal Register for "survival mobile games" without a requirement of a showing of acquired distinctiveness, and it is thus presumed to be inherently distinctive, *Heil Co. v. Tripleye GmbH*, Opp. No. 91277359, 2024 WL 4925901, at *18 (TTAB 2024) (citing 15 U.S.C. § 1057(b)), and the USPTO did not require a disclaimer of the word RAFT during prosecution of Petitioner's '576 Application to register its composite mark. Respondent does not argue that the word mark RAFT is not inherently distinctive for computer games when used by Petitioner. We find that Petitioner showed that its RAFT mark is inherently distinctive, and, accordingly, Petitioner is only required to show that it used its claimed common-law RAFT mark in the United States prior to April 28, 2017.

[53] As discussed above, Petitioner was formed in February 2017, and the Developers assigned all of their rights to the RAFT game to Petitioner. Bengtsson Decl. ¶¶ 68-69; Ex. 94 (67

Respondent denies that Petitioner has shown either prior technical trademark or service mark use in commerce, or prior analogous use. 125 TTABVUE 18-38. Respondent summarizes his position as follows:

> At its core, this proceeding stands on a fundamental principle of U.S. trademark law: who first used the RAFT mark in a way that creates enforceable legal rights? Petitioner . . . attempts to obscure this core issue with a flurry of pre-commercial hype—a scattered mix of blog posts, sporadic social media mentions, and uploads of an early-stage prototype game to Itch.io, a platform better known for experimental releases than formal product launches. [Petitioner] made no serious effort to commercialize the game, protect the mark, or establish a marketplace presence before [Respondent's] priority date. At best, its efforts amounted to student-level development activity paired with attempts to generate buzz. But "buzz" is not use. And under the Lanham Act, legal rights arise from bona fide commercial use, not excitement, experimental downloads, or vague intentions to "maybe" develop the game further someday. Petitioner's patchwork narrative fails to meet this legal standard and cannot support a claim to priority. Even [Petitioner's] fallback argument of "analogous use" is fundamentally flawed. To claim priority based on use analogous to trademark use, a party must demonstrate activities that create a strong public association of the mark with the user's goods or services. [Petitioner's] activities lacked this critical continuity and commercial intent. In short, [Petitioner's] early actions amounted to preliminary development efforts, not the establishment of trademark rights. Without demonstrable public association and a trajectory toward commercial use, their claim to priority fails both legally and factually.

Id. at 5.

TTABVUE 15; 69 TTABVUE 220-23). "[A]n assignee stands in the shoes of its assignor[s]," *Karsten Mfg. Corp. v. Editoy AG*, Opp. No. 91101408, 2006 WL 1258869, at *7 n.9 (TTAB 2006), and Respondent does not contest the assignment or argue that Petitioner cannot rely on the Developers' pre-assignment use of the RAFT mark.

Elsewhere in his brief, Respondent characterizes Petitioner's position as "All Games Are Essentially Prototypes," *id.* at 33, and argues that

> Redbeet did not engage in structured test marketing, did not sell units, and did not operate under regulatory or institutional oversight. Instead, they uploaded an unfinished game to itch.io—a platform specifically designed to host experimental, noncommercial indie projects for free. Even more telling, Redbeet themselves described the release as "a prototype, not a beta nor an alpha," clearly signaling a lack of any commercial intent.

Id. at 35. Respondent specifically argues that

> [i]n the gaming industry, commercial use of a mark generally begins when a game enters Early Access, beta testing under pre-order, or full release on commercial platforms like Steam or consoles with pricing, licensing, and marketing infrastructure. Prototypes and alpha testing usually means an incomplete, unstable version of a game full of bugs. Redbeet's free, no-strings-attached prototype distribution was not typical of a commercial launch, it was a visibility exercise, consistent with open development culture, not bona fide market activity. . . . Redbeet's prototype distribution was not a legitimate commercial act, but a pre-commercial test release, which is insufficient to support trademark rights.

Id. at 35-36.[54]

In its reply brief, Petitioner responds that

> Registrant contends throughout his Brief that because Petitioner's RAFT game was initially released as a ***prototype*** rather than a "finished" game, ***none*** of (a) Petitioner's extensive and regular marketing of the RAFT game on social media, (b) Petitioner's frequent and regular updates about the development of the RAFT game on Petitioner's blog, (c) the favorable publicity received by Petitioner's RAFT game in the media, (d) the attention

[54] Respondent quotes a LinkedIn article discussing software game development, 125 TTABVUE 36 n.3 (quoting 92 TTABVUE 194), but as discussed in our evidentiary ruling above, we cannot consider the article for the truth of its contents.

> given to Petitioner's RAFT game by major gaming influencers on YouTube, and/or (e) the millions of downloads and uses of the RAFT game by users worldwide ***prior*** to Registrant's first use of RAFT for his knockoff game count or have any bearing upon Petitioner's priority in the RAFT mark. . . . This contention is absurd. . . . Petitioner used the RAFT mark for its computer games and computer game services in commerce ***months*** before Registrant copied Petitioner's RAFT game and mark. Moreover, to the extent that Petitioner's use of the RAFT mark for a prototype game somehow does not constitute use in commerce as a trademark or service mark, Petitioner meets the requirements of analogous use to establish priority in the RAFT mark . . . .

126 TTABVUE 6-7 (emphasis supplied by Petitioner; record citations omitted).

Petitioner further argues in its reply brief that Respondent's "obsession with 'prototype' versus 'finished' game really goes to a question about the ***quality*** of Petitioner's game when it was first offered for download to the public – not to whether Petitioner's game ***was*** a computer game offered to the public for download." *Id.* at 8 (emphasis supplied by Petitioner). According to Petitioner, the fact that

> early prototype versions of Petitioner's RAFT game were of lower quality and contained less features than the version that was released on Steam in May 2018 does not change the fact that Petitioner offered its RAFT game prototypes to the general public, without restriction, at least as early as October 2016, and that millions of users downloaded Petitioner's prototypes ***before*** Registrant released his knock-off "completed" RAFT mobile game in late April 2017.

Id. (emphasis supplied by Petitioner).

The parties' positions on the characteristics that a computer game must have before trademark rights can attach to it differ dramatically. According to Respondent, it must be a "completed" game; according to Petitioner, an "uncompleted" game with

bugs and future modifications on the horizon will do if it can be played as a game. Petitioner has the better of the argument.

Respondent's vision of a "completed" or "final" version of computer game software is an illusion. Software, a good that is ubiquitous in modern society, is not a static one, but instead evolves by its very nature; as anyone who owns a mobile phone or uses a personal computer can attest, software is routinely updated.[55] The record suggests that computer game software may be the paradigm of such dynamism.[56] The relevant issue with respect to when trademark rights attach to computer game software is not when it is "final" or "completed," but rather when consumers recognize computer game software as a game that can be played and the involved mark is associated by purchasers in the United States with a particular source for the goods.

[55] The TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") recognizes the evolutionary nature of software, as it provides that "[s]pecimens for downloadable or recorded software may also indicate that the software is a 'beta' version. This term is commonly used in the software field to identify a preliminary version of a product. Although some beta products may not be made available to consumers, others are. Thus, the appearance of this term on a specimen for downloadable or recorded software does not, by itself, necessarily mean that the relevant goods are not in actual use in commerce or that the specimen is unacceptable." TMEP Section 903.04(e) (June 2025) (citing 15 U.S.C. §§ 1051, 1127).

[56] Indeed, Respondent testified on cross-examination that changes were made to what he described as the "final" version of his own RAFT game that was released on April 28, 2017, Novikov Cross Tr. 35:7-13; 36:1-4 (118 TTABVUE 37-38), and that "computer games are being constantly improved to meet the challenges of the competition." Novikov Cross Tr. 36:7-9 (118 TTABVUE 38). He could not recall exactly how many changes had been made to his RAFT game, but he testified that "[t]he game is being constantly improved, updated so the bugs are removed, and additions are made" and that "the changes are made nonstop every year and are still being made right now. The game keeps being improved and updated." Novikov Cross Tr. 37:13-16, 20-23 (118 TTABVUE 39). He identified multiple specific changes, including the addition of new features and improvements to the graphics. Novikov Cross Tr. 37:24-38:15 (118 TTABVUE 39-40).

The record shows that the RAFT game was downloaded and played hundreds of thousands of times throughout its development, including very early on, in late 2016 and early 2017, when the game lacked features that were contained in later versions and contained bugs that were fixed in later versions. As Mr. Antoniszczak put it, the "RAFT game has gone through many different versions, and later versions of the game function better, have many more graphics and features, and are more polished than the earlier versions," but it has always "been a playable and functional real game since I first learned about it in January 2017." Antoniszczak Decl. ¶ 42 (75 TTABVUE 10). From the standpoint of consumers, the RAFT game was a playable computer game in its most rudimentary version and continued to be one throughout its development, and all versions of that game came from the source identified as "Redbeet."

1. Prior Trademark Use

Both parties argue at some length about whether and when Petitioner used its RAFT mark "in commerce," 123 TTABVUE 29-40; 125 TTABVUE 15-16; 126 TTABVUE 7-12, but as Petitioner correctly states in a footnote in its reply brief, "[i]t is well established that prior use necessary for establishing priority in an opposition or cancellation does ***not*** have to meet the stringent requirements needed to obtain registration of a trademark. Instead, the plaintiff merely needs to show 'prior use' of the mark at issue to establish priority." 126 TTABVUE 10 n.2 (emphasis supplied by Petitioner; citation omitted). Section 2(d) of the Trademark Act permits a cancellation claim based on a mark "previously used in the United States . . . and not abandoned," 15 U.S.C. § 1052(d), and "'Section 14 [through Section 2(d)] requires only prior use;

'in commerce' is noticeably absent.'" *First Niagara Ins. Brokers, Inc. v. First Niagara Fin. Grp., Inc.*, 476 F.3d 867, 870 (Fed. Cir. 2007) (quoting *Nat'l Cable Television Ass'n v. Am. Cinema Eds., Inc.*, 937 F.2d 1572, 1578 n.4 (Fed. Cir. 1991)).

Accordingly, for purposes of priority, Petitioner is not required to show that its use of RAFT prior to April 28, 2017 would entitle it to registration of its mark based on use of the mark "in commerce." Rather, Petitioner need only prove that the RAFT mark was "previously used in the United States" prior to that date. As explained below, we find that Petitioner has priority because its RAFT mark was in fact used "in commerce" before April 28, 2017, and such prior use necessarily means that the mark was "previously used in the United States."[57]

Petitioner cites the Eleventh Circuit's decision in *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188 (11th Cir. 2001), "in which the Eleventh Circuit held that posting COOLMAIL software on a website for free download in exchange for a user license was sufficient to establish use of the COOLMAIL mark in commerce." 123 TTABVUE 36. We are not bound by this regional circuit court decision, but in *Lens.com, Inc. v. 1-800 Contacts, Inc.*, 686 F.3d 1376 (Fed. Cir. 2012),

[57] In its May 31, 2022 order denying the parties' cross-motions for summary judgment on priority, the summary judgment panel held that "genuine disputes remain as to whether Petitioner's first use in commerce of the mark RAFT was on goods or in association with services," 49 TTABVUE 16, and that "[d]epending on industry practice, certain promotional activities, such as distributing samples, may qualify as use in commerce." *Id.* at 17 (citing *Automedx, Inc. v. Artivent Corp.*, Opp. No. 91182429, 2010 WL 3441114, at *6 (TTAB 2010)). The summary judgment panel concluded that "Petitioner has not demonstrated that its alleged prior use with respect to either [trademark or service mark use] constitutes typical commercial use as typified within the computer gaming industry." *Id.* As noted above, the summary judgment panel's conclusions do not preclude us from reaching different conclusions at trial, or from making different factual findings based on the trial record.

the Federal Circuit "agree[d] with the Eleventh Circuit that the distribution of Software over the internet **can** satisfy the jurisdictional predicate for 'use in commerce'—such as in *Planetary Motion* where consumers consciously downloaded the Coolmail software. . . ." *Id.* at 1381 (emphasis in bold here in italics in *Lens.com*).[58] Because (1) the Federal Circuit has agreed with the Eleventh Circuit's holding in *Planetary Motion* that distribution of software over the Internet can constitute "use in commerce," (2) Respondent never discusses, much less refutes, the analysis in *Planetary Motion*, and (3) we find that analysis to be persuasive and not in conflict with any contrary binding Federal Circuit authority of which we are aware, we will apply the Eleventh Circuit's analysis to the facts here.

In *Planetary Motion*, the Eleventh Circuit affirmed the grant of summary judgment to the plaintiff in a suit for unfair competition under Section 43(a) of the Trademark Act, 15 U.S.C. § 1125(a), based on use of the claimed common-law trademark COOLMAIL for what the court described as software that "provides e-mail users with notice of new e-mail and serves as a gateway to the users' e-mail application." *Planetary Motion*, 261 F.3d at 1191. The plaintiff had acquired the claimed COOLMAIL mark by assignment from its original user, an individual who

[58] In *Lens.com*, the Federal Circuit distinguished *Planetary Motion* factually because in *Planetary Motion*, the software itself "was the primary product in commerce," while in *Lens.com*, "the LENS mark is used only in connection with the sale and transportation of **contact lenses** via the Internet" and "[a]lthough the ordering service is facilitated through software, the record does not indicate that consumers have any reason to be aware of any connection between the LENS mark and Lens.com's software." *Lens.com*, 686 F.3d at 1381 (emphasis in bold here in italics in *Lens.com*). Here, as in *Planetary Motion*, the computer game software that must be downloaded to play the RAFT game is the only relevant product.

had "distributed the Software over the Internet by posting it on a UNIX user site called 'Sunsite,' from which it could be downloaded for free." *Id.*[59] The Eleventh Circuit noted that "after the release of the Software, [the assignor] received correspondence from users referencing the 'Coolmail' mark and in some cases suggesting improvements" and "released two subsequent versions of the Software under the same mark . . . ." *Id.*

The District Court had found that "wide distribution of the Coolmail software over the Internet, even absent any sales thereof, was sufficient to establish ownership rights in the 'CoolMail mark," *id.* at 1194, and the Eleventh Circuit upheld that finding because the assignor's "activities under the 'Coolmail' mark constitute a 'use in commerce' sufficiently public to create ownership rights in the mark." *Id.* at 1196.

The Eleventh Circuit held that although the distribution of the Coolmail software over the Internet was a "use in commerce," "the use of a mark in commerce also must be sufficient to establish **ownership rights** for a plaintiff to recover against subsequent users under section 43(a)." *Id.* at 1195 (emphasis in bold here in italics in *Planetary Motion*; citation omitted). The Eleventh Circuit held that the "sufficiency of use should be determined according to the customary practices of a particular industry." *Id.* at 1198 (citing S. Rep. 100–515 at 44 (1988) ("The committee intends that the revised definition of 'use in commerce' . . . be interpreted to mean commercial use **which is typical in a particular industry**.") (emphasis in bold here in italics

[59] In *Planetary Motion*, as here, the defendant did not "contest the validity of the assignment" or "dispute that in purchasing rights to [the assignor's] software, [the plaintiff] succeeded to all rights possessed by [the assignor]." *Planetary Motion*, 261 F.3d at 1192 n.1.

in *Planetary Motion*)).[60] The Eleventh Circuit held that the assignor's "activities under the 'Coolmail' mark constitute a 'use in commerce' sufficiently public to create ownership rights in the mark," *id.* at 1196, for several reasons, including that the software's "distribution was widespread, and there is evidence that members of the targeted public actually associated the mark Coolmail with the Software to which it was affixed;" the software was "available not merely to a discrete or select group (such as friends and acquaintances, or at a trade show with limited attendance), but to numerous end-users via the Internet;" the software "was posted under a filename bearing the 'Coolmail' mark on a site accessible to anyone who had access to the Internet;" "[e]nd-users communicated with [the assignor] regarding the Software by referencing the 'Coolmail' mark in their e-mails;" and "the mark served to identify the source of the Software." *Id.* at 1196-97. The Eleventh Circuit concluded that "the use of the mark in connection with the Software constitutes significant and substantial public exposure of a mark sufficient to have created an association in the mind of [the] public." *Id.* at 1200.

The Developers' and Petitioner's pre-April 28, 2017 use of the RAFT mark closely resembles the use of the Coolmail mark in *Planetary Motion* in nature, but on a much larger scale. In October 2016, the Developers made a playable and functioning first prototype of the RAFT game available for downloading through Google Drive or Dropbox. Bengtsson Decl. ¶ 30; Ex. 63 (67 TTABVUE 8, 93-94); Bengtsson Tr. 19:17-

[60] In *Automedx*, the Board echoed this portion of the Eleventh Circuit's analysis in holding that "[u]se in commerce should be interpreted with flexibility to account for different industry practices." *Automedx*, 2010 WL 3441114, at *6.

20 (93 TTABVUE 8). A second prototype was released on October 27, 2016, Bengtsson Tr. 21:11-22:10 (93 TTABVUE 8-9), and a third prototype was released for downloading on the Developers' blog in November 2016, Bengtsson Decl. ¶ 36; Ex. 67 (67 TTABVUE 9, 104-05), which, as shown above, prominently displayed the RAFT mark, and identified the source of the game as "Redbeet Interactive" even before a company with that name existed.

The Developers released the RAFT game on itch.io on December 16, 2016. Bengtsson Decl. ¶ 42; Ex. 71 (67 TTABVUE 10, 115-18). This version of the game was also a functional and fully playable prototype, Bengtsson Tr. 29:16-21 (93 TTABVUE 10), and could be downloaded and played by anyone with Internet access. Bengtsson Decl. ¶ 24 (67 TTABVUE 7). By the end of December 2016, the RAFT game was being downloaded from itch.io more than 100,000 times per day. Bengtsson Decl. ¶ 46; Ex. 75 (67 TTABVUE 11; 69 TTABVUE 129-30).

On December 31, 2016, the Developers set up a community forum on itch.io with their listing for the RAFT game through which users could make suggestions for the game, notify the Developers of bugs, provide screen shots and videos of themselves playing the game, and post topics relating to the game for discussion. Bengtsson Decl. ¶ 84 (67 TTABVUE 18).[61] Between December 31, 2016 and April 17, 2017, gamers posted hundreds of topics on the RAFT community forum. Bengtsson Decl. ¶ 84; Ex. 106 (67 TTABVUE 18-19, 241-73).

[61] As with the Developers' blog itself, the community forum and most of the posts were in English. Bengtsson Decl. ¶ 84; Ex. 106 (67 TTABVUE 18-19, 241-73).

During early 2017, the RAFT game was downloaded from itch.io more than 100,000 times a day in January, Bengtsson Decl. ¶ 61; Ex. 87 (67 TTABVUE 14; 69 TTABVUE 188-89), around 50,000 times a day in February, Bengtsson Decl. ¶ 70; Ex. 95 (67 TTABVUE 15-16; 69 TTABUE 224-25), and more than 10,000 times a day in March. Bengtsson Decl. ¶ 74; Ex. 99 (67 TTABVUE 16; 69 TTABVUE 244-45). Between December 16, 2016, the date of the release of the RAFT game on itch.io, and April 21, 2017, the Developers' RAFT listing on itch.io had nearly 14,000,000 page views, and nearly 3,500,000 users, and the largest portion of users during this time period (13.11%) were from the United States. Bengtsson Decl. ¶ 79; Ex. 104 (67 TTABVUE 17; 69 TTABVUE 264-65). That is, there were approximately 450,000 U.S. players of the RAFT game before April 21, 2017.

These activities establish that the RAFT game was "transported" in commerce in the same manner as the email software in *Planetary Motion*. Like the plaintiff's assignor in *Planetary Motion*, the Developers and Petitioner made the RAFT game available for downloading by anyone who had access to the Internet, and it was downloaded many hundreds of thousands of times before April 28, 2017. Like the plaintiff's assignor in *Planetary Motion*, the Developers and Petitioner released multiple versions of the RAFT game software after its initial release in October 2016. Like the email software users in *Planetary Motion*, the gamers who downloaded and played the RAFT game communicated with the Developers about it and offered suggestions for its improvement, and some even voluntarily contributed money towards its further development. Bengtsson Decl. ¶ 78 (69 TTABVUE 17).

As discussed above, Respondent belittles these activities, claiming that the Developers "made no serious effort to commercialize the game, protect the mark, or establish a marketplace presence before Registrant's priority date," and "[a]t best, [their] efforts amounted to student-level development activity paired with attempts to generate buzz." 125 TTABVUE 5. The defendant in *Planetary Motion* made a similar argument that the plaintiff's assignor "was a 'hobbyist' unworthy of common law trademark protection," *Planetary Motion*, 261 F.3d at 1198, but the Eleventh Circuit held that the assignor "did not attempt to 'warehouse' the mark by promoting a product he merely **intended** to develop and distribute at a later date" and that his "use of the mark to designate the distributed Software and each subsequent version thereof indicates that his use was not mere sporadic or token use." *Id.* (emphasis in bold here in italics in *Planetary Motion*).

The Eleventh Circuit also held that the assignor's "activities pertained to his chosen profession" as a computer systems administrator. *Id.* at 1198-99. The court concluded that the assignor's

> activities bear elements of competition, notwithstanding his lack of an immediate profit-motive. By developing and distributing software under a particular mark, and taking steps to avoid ceding the Software to the public domain, [he] made efforts to retain ownership rights in his Software and to ensure that his Software would be distinguishable from other developers who may have distributed similar or related Software. . . . Competitive activity need not be fueled solely by a desire for direct monetary gain. [The assignor] derived value from the distribution because he was able to improve his Software based on suggestions sent by end-users. Just as any other consumers, these end-users discriminate among and share information on available software. It is logical that as the Software improved, more

> end-users used his Software, thereby increasing [his] recognition in his profession and the likelihood that the Software would be improved even further.

Id. at 1200.

As discussed above, the Developers' "chosen profession," as reflected in their university major subject, was game design and, like the assignor in *Planetary Motion*, the Developers incorporated suggestions from gamers regarding improvement of the RAFT game. While the Developers may have lacked "an immediate profit-motive," *id.*, when the RAFT game was in its infancy in 2016 as a university course project, by early 2017, they had turned toward commercialization of the game "[b]ecause of the huge support and recognition that our RAFT game received after its release on itch.io and because of the interest from Axolot." Bengtsson Decl. ¶ 60 (67 TTABVUE 14). Prior to April 28, 2017, they formed Redbeet Interactive AB, began negotiating with Axolot, and decided to "drop out of University after we completed the classes that we were then taking to work full-time on further development of the RAFT game." Bengtsson Decl. ¶ 60 (67 TTABVUE 14).

"[N]ot every transport of a good is sufficient to establish ownership rights in a mark," *Lens.com*, 686 F.3d at 1380 (quoting *Planetary Motion*, 261 F.3d at 1196), but the Developers' and Petitioner's pre-April 28, 2017 "transport" of the RAFT game via the Internet is sufficient to show use in commerce prior to that date.[62] We find that

[62] Because we find that Petitioner made prior trademark use of the RAFT mark, we need not consider its claim that it used RAFT as a service mark prior to April 28, 2017.

Petitioner established its priority based on the Developers' and Petitioner's use of the RAFT mark in commerce in connection with computer games.

2. Analogous Use

Although Petitioner's proof of use in commerce is sufficient to establish its priority, we will also consider Petitioner's analogous use claim in the event that a reviewing court finds that the Developers' and Petitioner's use of the RAFT mark was not technical trademark use in commerce. "'[E]ven before proper trademark use commences, advertising or similar pre-sale activities may establish priority if they create the necessary association in the mind of the consumer.'" *Andrusiek v. Cosmic Crusaders LLC*, Canc. No. 92064830, 2022 WL 4103636, at *8 (TTAB 2022) (quoting *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, Opp. No. 91188816, 2013 WL 4635990, at *8 (TTAB 2013)), *aff'd*, No. 23-1150, 2023 WL 6889054 (Fed. Cir. Oct. 19, 2023).[63] "To prove prior analogous use, Petitioner need not submit survey evidence or other direct evidence of the consuming public's identification of the [RAFT] mark with Petitioner as the source of [computer games]." *Id.* "'Instead, the fact finder may infer the fact of identification on the basis of indirect evidence regarding [Petitioner's] use of the word or phrase in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications.'" *Id.* (quoting *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 1375 (Fed. Cir. 1996)). Analogous use may also include use on "Internet websites that created a public awareness of the designation as a trademark

[63] The Board's decision in *Andrusiek* was redesignated as a precedent on January 3, 2024 after the Federal Circuit affirmed it.

identifying Petitioner as the source of the relevant goods." *Id.* at *6 (citation omitted).[64]

"The analogous use doctrine allows a party to claim priority as of when it is established that the mark is associated in the mind of the consumer with a source for the goods." *Cent. Garden*, 2013 WL 4635990, at *10. "While the 'activities claimed to constitute analogous use must have substantial impact on the purchasing public,'" *id.* at *8 (quoting *T.A.B. Sys.*, 77 F.3d at 1376), "that does not mean proof is required [that] 'a fixed percentage, like 20%, much less 51%, of the potential customers must have formed the required 'prior public identification.'" *Id.* (cleaned up) (quoting *T.A.B. Sys.*, 77 F.3d at 1377). "The user must prove that the 'necessary association' was created among more than an insubstantial number of potential customers." *T.A.B. Sys.*, 77 F.3d at 1377.

"Thus, Petitioner may establish [its] priority by showing that [it] has used the [RAFT] mark in the United States in a manner analogous to trademark use sufficient to create an association in the mind of the relevant consumers between the mark and the goods, followed by actual trademark use of the mark within a 'commercially

[64] In its order denying the parties' cross-motions for summary judgment, the summary judgment panel noted that "the touchstone of analogous use is a factual determination of whether the use of the mark has created in the minds of the relevant public an association between the goods or services and their source," 49 TTABVUE 16 (quoting *Cent. Garden*, 2013 WL 4635990, at *8), and that "[a]ny such analogous use 'must be an open and notorious public use directed to the segment of the purchasing public for whom the services are intended.'" *Id.* (quoting *Comput. Food Stores, Inc. v. Corner Store Franchises, Inc.*, Opp. No. 91051942, 1973 WL 19922, at *4 (TTAB 1973)).

reasonable' time." *Andrusiek*, 2022 WL 4103636, at *9 (quoting *Dyneer Corp. v. Auto. Prods., PLC*, Opp. No. 89148, 1995 WL 785742, at *5 (TTAB 1995)).[65]

In *Andrusiek*, the petitioner was a Canadian citizen who engaged in activities under his alter ego "Captain Cannabis" that the Board found collectively established his rights in the CAPTAIN CANNABIS mark for comic books in the United States prior to the respondent's priority date of April 2, 2014. *Id.* at *8. He "'created a costumed superhero character and comic book titled CAPTAIN CANNABIS' during the 1970s and obtained a Canadian copyright in 1977 for the 'unpublished Literary and Artistic (comic book) titled CAPTAIN CANNABIS," *id.* at *9; attended a trade show in the United States in 1999 at which he distributed a flyer regarding development of an adult animated series under the mark "Captain Cannabis," *id.*; registered the domain name captaincannabis.com in 1999 and began operating a website under that name, *id.*; began using various social media platforms displaying the CAPTAIN CANNABIS mark in 2010, *id.* at *10; was interviewed in 2007 on programs that were broadcast into the United States on radio and over the Internet, *id.* at *11; and was featured in articles in *High Times* magazine in 2007 and in *Culture* magazine in 2011. *Id.*

The record here contains evidence of exposure of the RAFT mark to United States consumers through means similar to those in *Andrusiek* prior to Respondent's April

[65] Respondent acknowledges that "U.S. trademark law does allow priority to be established through analogous use," but argues that "the legal threshold is exceedingly high. A party must show that its pre-sales promotional activities were extensive, commercial in nature, and effective enough to create a strong public association between the mark and the product or service before actual use. Courts and the TTAB do not grant trademark priority based on incomplete efforts or isolated promotional activity." 125 TTABVUE 18.

28, 2017 priority date, but in a more compressed time frame than in *Andrusiek* and on a much larger scale. The Developers registered the domain name blog.raft-game.com and began publishing blog entries in English regarding the development of the RAFT game on October 13, 2016. Bengtsson Decl. ¶¶ 29-30; Exs. 62-63 (67 TTABVUE 7-8, 87-97). The Developers used social media such as Instagram and YouTube to promote the RAFT game. Bengtsson Decl. ¶¶ 36, 40, 44, 56-57, 65, 86; Exs. 67, 70, 72-74, 84-85, 91, 107-08 (67 TTABVUE 9-11, 13, 15, 19, 104-05, 113-14, 119-28, 171-79, 274-97; 69 TTABVUE 206-12); Bengtsson Tr. 30:18-31:14 (93 TTABVUE 11). The RAFT game received unsolicited media coverage in English-language media including the Hinterland Forums, the rockpapershotgun.com website, Yahoo! News, and pcworld.com. Bengtsson Decl. ¶¶ 53-54, 62, 64, 75; Exs. 82-83, 88-89, 100 (67 TTABVUE 13-16, 160-70, 186-96, 222-23). Three "influencers," a relatively recent phenomenon not discussed in *Andrusiek*, exposed the RAFT game to millions of their followers by posting videos of themselves playing the game. Antoniszczak Decl. ¶¶ 32-35; Exs. 9-12 (75 TTABVUE 8-9, 55-81). On April 14, 2017, the Developers posted an entry on their blog addressed to "Rafters," which noted that the Developers ultimately eyed a launch of the RAFT game on the Steam platform. Bengtsson Decl. ¶ 76; Ex. 101 (67 TTABVUE 17, 225-27).

As discussed above, the analogous "user must prove that the 'necessary association' was created among more than an insubstantial number of potential customers." *T.A.B. Sys.*, 77 F.3d at 1377. In *Andrusiek*, the Board noted that

> [a]lthough there is no record evidence of the size of the comic book market or number of marijuana consumers in

> the United States at the time, both parties seem to be directing their marks to these same niche communities. The evidence attached to Petitioner's affidavit suggests that Petitioner's CAPTAIN CANNABIS mark is reasonably well-known within these communities, even if the numbers are not large in absolute terms, and was reasonably well-known prior to Respondent's priority date. By that date, Petitioner's mark had received regional and national attention in niche publications and media, and Petitioner had promoted its mark on a national level, including through trade shows, social media, and the Internet. We find that the evidence considered in its entirety establishes that Petitioner garnered sufficient notoriety from his pre-sales activities to support a finding that his analogous use "is of such a nature and extent as to create public identification of the target term with the [petitioner's] product."

Andrusiek, 2022 WL 4103636, at *11 (quoting *T.A.B. Sys.*, 77 F.3d at 1375).

Here, as in *Andrusiek*, there is no evidence regarding the exact size of the relevant market for the parties' computer game software, but there is no doubt that in 2017 both parties were "directing their marks to these same niche communities" of gamers, *id.*,[66] and the record shows that by April 28, 2017, the RAFT mark was "reasonably well-known within these communities, even if the numbers are not large in absolute terms." *Andrusiek*, 2022 WL 4103636, at *11, By that date, according to itch.io's data, there were approximately 450,000 players of the RAFT game in the United States, Bengtsson Decl. ¶ 79; Ex. 104 (67 TTABVUE 17; 69 TTABVUE 264-65), and the game had been promoted on the Developers' English-language blog and social media pages. By that time, the RAFT game had also been touted by what Respondent called "well-

[66] Respondent testified on cross-examination that the United States market was the most profitable market for his own RAFT game. Novikov Cross Tr. 39:10-16 (118 TTABVUE 41).

known creators," 125 TTABVUE 57, the social media influencers who showed themselves playing the game, and had received unsolicited media coverage in English-language publications and websites, while being highly ranked as a very popular new game on online game sites. "We find that the evidence considered in its entirety establishes that Petitioner garnered sufficient notoriety from [the Developers'] pre-sales activities to support a finding that [Petitioner's] analogous use 'is of such a nature and extent as to create public identification of the target term with [Petitioner's] product.'" *Id.* (quoting *T.A.B. Sys.*, 77 F.3d at 1375).

"The second prong of the test for finding analogous use sufficient to support priority requires that the analogous use be followed up within a reasonable time frame by actual trademark use." *Id.* at *12. In *Andrusiek*, the Board found that "by 2017, Petitioner sold comic books under the mark CAPTAIN CANNABIS" and that "Petitioner's actual trademark use in 2017 [was] within a commercially reasonable period of time following his analogous use in 2013-14 so as to create a 'continuing association of the mark' with Petitioner's goods." *Id.* (quoting *Dyneer Corp.,* 1995 WL 785742, at *6).

We have found above that the Developers made analogous use of the RAFT mark between October 2016 and the end of April 2017, and they and Petitioner took steps to commercialize the game both during and after that period. The Developers began discussions with Axolot in January 2017, Bengtsson Decl. ¶ 59 (67 TTABVUE 14), and formed Petitioner in February 2017 and assigned all their rights to the RAFT mark to their company. Bengtsson Decl. ¶¶ 68-69; Ex. 94 (67 TTABVUE 15; 69

TTABVUE 220-23). Petitioner then signed various agreements with Axolot on May 17, 2017 under which Axolot agreed to publish the RAFT game when it was released on the Steam platform. Bengtsson Decl. ¶ 85 (67 TTABVUE 19); Antoniszczak Decl. ¶¶ 46-49; Exs. 15-17 (75 TTABVUE 11; 77 TTABVUE 90-122). During the summer of 2017, the Developers continued to post entries on their blog and on social media with information about the RAFT game and new features that were being added to the game to keep fans and users interested in the game and to get feedback on new features. Bengtsson Decl. ¶ 86; Exs. 107-08 (67 TTABVUE 19, 274-97).

On September 5, 2017, the Developers announced on their blog and on Instagram that the RAFT game would be coming to Steam Early Access in 2018, Bengtsson Decl. ¶ 88; Ex. 110 (67 TTABVUE 19, 309-18), and on May 23, 2018, Petitioner released the RAFT game on Steam Early Access. Bengtsson Decl. ¶¶ 93-94; Exs. 118-19 (67 TTABVUE 20; 68 TTABVUE 28-35). The game's release on Steam Early Access allowed Petitioner to sell the game while it was still being developed even though it was subject to major upgrades. Antoniszczak Decl. ¶¶ 21, 55 (75 TTABVUE 6, 11).

Mr. Bengtsson testified that a little less than one-third of Petitioner's total sales of the RAFT game through Steam have been to United States customers, and that those sales have generated revenues in the mid-eight figures in U.S. dollars. Bengtsson Decl. ¶ 101 (69 TTABVUE 21). We find that Petitioner's sales of the RAFT game on Steam beginning in May 2018 occurred within a commercially reasonable time after the Developers' analogous use of the RAFT mark between October 2016 and the end of April 2017, and "create[d] a 'continuing association of the mark' with

Petitioner's goods." *Andrusiek*, 2022 WL 4103636, at *12. Petitioner accordingly proved its priority by analogous use if its pre-April 28, 2017 distribution of the RAFT game through the Internet did not constitute technical trademark use of the RAFT mark in commerce.

B. Likelihood of Confusion

We have found above that Petitioner's RAFT mark reached our shores before Respondent's RAFT mark did. We turn now to the question of whether Respondent's use of RAFT for a "survival mobile game" is likely to cause consumers to believe mistakenly that his game is Petitioner's game, or is authorized or sponsored by Petitioner.

Under Section 2(d) of the Trademark Act, our determination of the likelihood of confusion is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). *See*, *e.g.*, *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). We consider each *DuPont* factor for which there is evidence and argument. *See*, *e.g.*, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).[67] "Petitioner must establish that there is a likelihood of confusion by a preponderance of the evidence." *Keystone Consol. Indus., Inc. v. Franklin Inv. Corp.*, Canc. No. 92066927, 2024 WL 3771168, at *9 (TTAB 2024).

Petitioner argues that

[67] Only Petitioner cites *DuPont*. 123 TTABVUE 47-49 (arguing that the first, second, third, fourth, fifth, seventh, tenth, and thirteenth *DuPont* factors support a conclusion that confusion is likely).

> [l]ikelihood of confusion between the parties' RAFT marks is clear, and Registrant has introduced ***no*** evidence that would give any indication that Registrant believes to the contrary. Furthermore, because the marks are identical, the goods are identical, and there has been significant actual confusion in the marketplace, likelihood of confusion is inevitable.

123 TTABVUE 45 (emphasis supplied by Petitioner).[68]

"Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *DC Comics v. Cellular Nerd Inc.*, Opp. No. 91246950, 2022 WL 17832492, at *10 (TTAB 2022) (internal quotations and quotation marks omitted). As discussed above, Petitioner has proven priority based on its common-law rights in the mark RAFT for computer games. Petitioner's RAFT word mark is identical to the RAFT word mark shown in Respondent's '897 Registration, which covers computer game software, and the evidence shows that both parties use their RAFT word marks in connection with computer games with the identical theme of survival on the ocean that may be

[68] Petitioner also argues that there has been significant actual confusion, 123 TTABVUE 47; that the parties market their games through the same channels of trade to the same consumers, *id.* at 48; that Petitioner's RAFT mark is strong, *id.*; and that Respondent "copied Petitioner's game and mark with the intent to trade on the goodwill Petitioner had established in the RAFT mark." *Id.* We address Petitioner's arguments under the third and seventh *DuPont* factors below. We need not address Petitioner's argument regarding Respondent's alleged copying because "a showing of bad faith is not required to establish likelihood of confusion under Section 2(d)." *Major League Baseball Players Ass'n v. Chisena*, Opp. No. 91240180, 2023 WL 2986321, at *27 (TTAB 2023) (citing *J&J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1462 (Fed. Cir. 1991); *Jewelers Vigilance Comm. Inc. v. Ullenberg Corp.*, 853 F.2d 888, 891 (Fed. Cir. 1988)), *appeal docketed*, No. 23-2073 (Fed. Cir. June 26, 2023).

downloaded to personal electronic devices.[69] The key first two *DuPont* factors strongly support a conclusion that confusion is likely.

We also agree with Petitioner that the parties have marketed their games to gamers through overlapping trade channels, including the same social media, and Respondent admitted in his Answer to Petitioner's Second Amended Petition to Cancel that "Registrant and Petitioner market their Computer Game Software and Computer Games to the same types of customers." Answ. ¶ 58 (51 TTABVUE 8). The third *DuPont* factor, the "similarity or dissimilarity of established, likely-to-continue trade channels," *DuPont*, 476 F.2d at 1361, also supports a conclusion that confusion is likely.

Under the seventh *DuPont* factor, Petitioner argues that there has been significant actual confusion in which consumers have expressed the mistaken belief that Respondent's game is Petitioner's game, or is otherwise affiliated with

[69] Respondent's identification of goods covers "Computer game software for use on mobile and cellular phones, namely, survival mobile games," while at the time of trial, Petitioner's RAFT game was played only on personal computers, but Mr. Bengtsson testified without contradiction that "[m]any producers of computer games offer versions of their games for both personal computers and for mobile devices," including Fortnite and Call of Duty, and that the existence of Respondent's registration had thwarted Petitioner's development of a game for mobile devices. Bengtsson Decl. ¶ 141; Ex. 151 (67 TTABVUE 28; 68 TTABVUE 166-95; 69 TTABVUE 28). We note in that regard that Respondent's applications to register other RAFT-formative marks cover goods identified as "Downloadable computer game software for use on mobile and cellular phones, personal computers, laptops, home video game consoles, smart TV sets, namely, survival games," and that Respondent admitted in his Answer to Petitioner's Second Amended Petition to Cancel that "Registrant's RAFT brand Computer Game Software and Petitioner's RAFT brand Computer Games and Game Services may be related," Answ. ¶ 53 (51 TTABVUE 7), and that "Registrant and Petitioner use their RAFT marks in the similar fields of use." Answ. ¶ 54 (51 TTABVUE 8). As discussed below, Respondent does not argue that the second *DuPont* factor, or any other factor, supports a conclusion that confusion is unlikely.

Petitioner. 123 TTABVUE 47. Petitioner's cited evidence of actual confusion consists largely of alleged "complaints about mobile versions of our game" that required Petitioner to "explain to the complainers that our game is only on Steam and that we do not make any mobile versions of the game." Bengtsson Decl. ¶ 127 (67 TTABVUE 26). Mr. Bengtsson testified that he believed that "many of these complaints were incidents where users confused us with a mobile version of a 'Raft' game involve Registrant's 'Raft' game for mobile phones," Bengtsson Decl. ¶ 127 (67 TTABVUE 26), but he conceded, with respect to multiple such complaints, that "[w]e do not know what knock-off 'Raft' mobile game was being referred to in this email." Bengtsson Decl. ¶¶ 128, 130-32, 135, 138; Exs. 139, 141-43, 146, 149 (67 TTABVUE 26-28; 68 TTABVUE 131-32, 135-40, 145-46, 151-55).[70] Mr. Bengtsson's admissions that Petitioner does not know that the inquiries involved Respondent's game rather than another one of the "several different knock-off 'Raft' games" that appeared in 2018 and 2019, Bengtsson Decl. ¶ 108 (67 TTABVUE 102), preclude us from finding actual confusion between the parties' games based on these complaints.

Petitioner's evidence also includes consumer correspondence to Petitioner inquiring about a possible relationship between Petitioner and Respondent. Bengtsson Decl. ¶¶ 134 (describing the consumer as "wondering if we have a relationship with Registrant's 'Raft' game"), 136 (describing the consumer as "asking if we were connected with the 'Raft Mobile' game offered by Registrant"), 137

[70] In one instance involving an Android listing, Mr. Bengtsson admitted that "[w]e do not believe that Registrant is the person behind this particular listing." Bengtsson Decl. ¶ 129; Ex. 140 (67 TTABVUE 36, 68 TTABVUE 133-34).

(describing the consumer as "asking us if Registrant's 'Raft Survival: Ocean Nomad – Simulator' on Facebook is connected to us"); Exs. 145, 147-48 (67 TTABVUE 27-28, 68 TTABVUE 143-44, 147-50). Such inquiries do not involve actual confusion. *Sabhnani*, 2021 WL 6072822, at *23.

Finally, Mr. Bengtsson pointed to online reviews of what he claimed to be Respondent's game, Bengtsson Decl. ¶ 139; Ex. 150 (67 TTABVUE 28; 68 TTABVUE 156-65), most of which characterized Respondent's game as a "knockoff," "copy," "clone," or "remake" of Petitioner's game, or "not the real RAFT game." By definition, such reviews manifest the reviewer's understanding that Respondent's game and Petitioner's game are not the same and have different sources.

We find that Petitioner did not prove significant actual confusion, but as the Federal Circuit recently reiterated, the "failure to **prove** instances of actual confusion is **not** dispositive against a trademark plaintiff, because actual confusion is hard to prove." *Sunkist Growers, Inc. v. Intrastate Distribs., Inc.*, 144 F.4th 1376, 1381 (Fed. Cir. 2025) (emphasis in bold here in italics in the original; quotation omitted). The seventh *DuPont* factor is neutral in our analysis of the likelihood of confusion.

Respondent does not argue that any *DuPont* factor shows that confusion is unlikely, but instead relies solely on statements made by Petitioner to the USPTO in response to an office action during prosecution of Petitioner's '576 Application, which statements Respondent claims show that Petitioner "argued unequivocally that

confusion between its logo and the RAFT word mark (Novikov's mark) was unlikely based on dissimilarity of marks and sophistication of customers." 125 TTABVUE 44.

Petitioner's response to the office action stated, among other things, that "[p]roperly considered in their entireties, Applicant's mark is so dissimilar from the cited mark that confusion is unlikely," Woldow Decl. ¶ 12; Ex. 169 (84 TTABVUE 5, 36); that "[w]hen Applicant's mark and the cited mark are viewed in their entireties, it is respectfully submitted that there is no likelihood of confusion between the two marks due to the significant visual differences between the marks," 84 TTABVUE 37; that "Applicant's goods are sold to educated gamers that are looking for a specific product from a particular source," *id.* at 38; and that "[g]iven the dissimilarity in the marks and the sophistication of those to whom sales are made, likelihood of confusion is remote." *Id.*

Respondent argues that "[w]hen a party tells the USPTO one thing to secure a registration and later tells the TTAB the opposite to cancel someone else's rights, the doctrine of judicial estoppel or, at the very least, equitable estoppel is triggered." 125 TTABVUE 44.[71] According to Respondent, "TTAB precedent makes it clear: statements made during prosecution are admissible and probative in later disputes.

[71] This argument appears to relate to Respondent's purported second Affirmative Defense, Answ. Aff. Def. ¶ 2 (51 TTABVUE 8), although Respondent did not describe that defense as involving either judicial estoppel or equitable estoppel.

They are not automatically binding, but they are treated as 'admissions against interest' and weighed heavily against a party trying to reverse itself." *Id.*[72]

Respondent's position is incorrect. Arguments made during prosecution do not "rise to the level of an admission against interest." *Anthony's Pizza*, 2009 WL 4075365, at *12 (citing *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 929 (CCPA 1978)). Instead, the fact that "a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact" and "that fact may be received in evidence **as merely illuminative of shade and tone in the total picture confronting the decision maker**." *DC Comics*, 2022 WL 17832492, at *30 (emphasis in original) (quoting *Interstate Brands*, 576 F.2d at 929). "To that limited extent, a party's earlier contrary opinion may be considered relevant and competent. Under no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record." *Id.* (quoting *Interstate Brands*, 576 F.2d at

[72] In support of these arguments, Respondent does not cite any "TTAB precedent," 125 TTABVUE 44, but instead relies on a Third Circuit case, *Freedom Card, Inc. v. JPMorgan Chase & Co.*, 432 F.3d 463 (3d Cir. 2005), in which Respondent claims that "the court treated prior denial of confusion as relevant and persuasive to rebut later attempts to claim it." 125 TTABVUE 44. We are again not bound by this regional circuit court decision, but in *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, Opp. No. 91171509, 2009 WL 4075365 (TTAB 2009), *aff'd*, 415 F. App'x 222 (Fed. Cir. 2010), the Board explained that in *Freedom Card*, the Third Circuit had "considered the plaintiff's contrary position as being 'illuminative of shade and tone in the total picture confronting the decision maker' when considered in context with the other evidence." *Anthony's Pizza*, 2009 WL 4075365, at *13. The Third Circuit's analysis is consistent with the analysis that is required under the controlling Federal Circuit precedent discussed below.

929).[73] *See also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1322 (Fed. Cir. 2014) ("A party's prior arguments may be considered as illuminative of shade and tone in the total picture, but do not alter the Board's obligation to reach its own conclusion on the record") (internal quotation and quotation marks omitted).

In any event, the USPTO rejected Petitioner's arguments in concluding that confusion was likely with respect to the non-identical RAFT marks and different goods and services at issue on the refusal to register the mark shown in the '576 Application. In issuing its August 4, 2020 final refusal to register Petitioner's composite mark, the USPTO found that the composite RAFT mark was confusingly similar to the RAFT word mark shown in the '897 Registration, and that Respondent's "Computer game software for use on mobile and cellular phones, namely, survival mobile games" was related to the services identified as "Providing on-line computer games; providing information on-line relating to computer games

[73] Respondent argues that in the Board's *Interstate Brands* decision that was affirmed on appeal by the CCPA, "the Board admonished a party for reversing positions and emphasized that prosecution arguments 'illuminate the shade and tone of the total picture' adding '[t]o that limited extent, a party's earlier contrary opinion may be considered relevant and competent'." 125 TTABVUE 45. The Board never mentioned "the shade and tone of the total picture" in its *Interstate Brands* decision, but instead held that "Opposer's argument in support of its registration is . . . in essence, an admission in view of the cumulative differences herein between the marks and goods that confusion is unlikely to occur." *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 1977 WL 22576, at *6 (TTAB 1977). On appeal, the CCPA held that "[t]he board erroneously concluded in the present case that: 'Opposer's argument in support of its (own application for) registration . . . is, in essence, an admission in view of the cumulative differences herein between the marks and goods that confusion is unlikely to occur.'" *Interstate Brands*, 576 F.2d at 929. The CCPA held that "[i]n reaching the legal conclusion, the decision maker may find that a fact, among those on which the conclusion rests, has been admitted; he may not, however, consider as 'admitted' a fact shown to be non-existent by other evidence of record; nor may he consider a party's opinion relating to the ultimate conclusion an 'admission.'" *Id.*

and computer enhancements for games; electronic games services provided by means of the internet." Woldow Decl. ¶ 14; Ex 170 (84 TTABVUE 5, 40-90).

The USPTO's conclusion in August 2020 regarding the likelihood of confusion was consistent with Respondent's own stated position on that issue about two months earlier. In June 2020, Respondent's counsel sent a letter to Petitioner's Swedish counsel in which Respondent's counsel claimed that "[b]ased on your admission, **confusion is very likely due to similarities in marks and goods**," and demanded that Petitioner cease all further use of the RAFT mark for computer games and all efforts to register it. Bengtsson Decl. ¶ 111; Ex. 128 (67 TTABVUE 23; 68 TTABVUE 87-90) (emphasis added). A "letter of infringement in which a party expresses the view that there is likelihood of confusion between its mark and that of the adverse party is not necessarily controlling on the question of likelihood of confusion," but "the admission contained in the letter may be a persuasive factor in resolving any doubts which may exist concerning the likelihood of confusion." *Ultra Elecs., Inc v. Workman Elec. Prods., Inc.*, Canc. No. 92011142, 1976 WL 21150, at *1 (TTAB 1976). We find that Respondent's June 2020 demand letter asserting that "confusion is very likely due to [the] similarities in the marks and goods," 68 TTABVUE 89, corroborates our findings under the key first two *DuPont* factors that confusion is likely.

"The likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record but 'may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.'" *Sunkist Growers*, 144 F.4th at 1379. Our

"ultimate conclusion on the entire record" here, *DC Comics*, 2022 WL 17832492, at *30 (quoting *Interstate Brands*, 576 F.2d at 929), is that confusion is likely. Petitioner has thus established the second element of its claim under Section 2(d).

C. Respondent's Laches Defense

We turn now to Respondent's laches defense, which is unavailable against Petitioner's Section 2(d) claim "[i]f confusion is inevitable [because] any private injury to the defendant is outweighed by the public's interest in preventing confusion." *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, Opp. No. 91247034, 2023 WL 4261426, at *9 (TTAB 2023) (citation omitted). *See also Ultra-White Co. v. Johnson Chem. Indus., Inc.*, 465 F.2d 891, 893-94 (CCPA 1972) (where confusion is inevitable, "notwithstanding the equities between the parties and the equitable principles of § 1069, the public interest expressed in § 1052(d) is the dominant consideration").

We use the *DuPont* factors to determine whether confusion is inevitable. *Turner v. Hops Grill & Bar Inc.*, Canc. No. 26674, 1999 WL 959435, at *3 (TTAB 1999). "A showing of inevitable confusion is subject to a stringent standard that is satisfied only where both the goods and marks are nearly identical." *Advance Mag. Publishers*, 2023 WL 4261426, at *9 (finding no inevitable confusion between the marks EVOGUE for consumer electronic devices and accessories and VOGUE for magazines, online media content in the fields of lifestyle and fashion, and software in the field of lifestyle and fashion for use with digital electronic devices). Here, unlike in *Advance Mag. Publishers*, the key first two *DuPont* factors strongly

support our ultimate conclusion that confusion is likely, and no factor supports a contrary conclusion.

The Board has held in the context of an ownership dispute that "when the parties are claiming rights in the same mark for the same goods or services, likelihood of confusion is inevitable." *Wonderbread 5 v. Gilles*, Canc. No. 92052150, 2015 WL 4380986, at *7 (TTAB 2015). Here, in the context of what is essentially a priority dispute, both parties claim rights in the same RAFT word mark for computer games involving the same theme of survival on the ocean, and we find that confusion is inevitable. We thus need not consider the merits of Respondent's laches defense because "it is well established that equitable defenses such as laches and estoppel will not be considered and applied where, as here, the marks of the parties are identical and the goods are the same or essentially the same." *Reflange Inc. v. R-Con Int'l*, Canc. No. 16423, 1990 WL 354565, at *7 (TTAB 1990) (citations omitted).

D. Summary

Petitioner proved its Section 2(d) claim by showing its entitlement to a statutory cause of action, its priority of use of the RAFT mark, and the existence of a likelihood of confusion, by a preponderance of the evidence. Confusion is not only likely, but inevitable given the identity of the marks and goods and, thus, Respondent's laches defense is unavailable.

Decision: The Second Amended Petition to Cancel is granted and Registration No. 5447897 will be cancelled in due course.