

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 11-7534-JFW (Ex)**

Date: September 21, 2011

Title: Bethesda Softworks, LLC -v- Masthead Studios, Ltd.

**PRESENT:**

**HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE**

**Shannon Reilly  
Courtroom Deputy**

**None Present  
Court Reporter**

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

**PROCEEDINGS (IN CHAMBERS):**

**ORDER DENYING PLAINTIFF'S *EX PARTE*  
APPLICATION FOR TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION [filed 9/14/2011; Docket  
No. 7];**

**ORDER DENYING PLAINTIFF'S *EX PARTE*  
APPLICATION FOR SUBSTITUTED SERVICE [filed  
9/14/2011; Docket No. 10]**

On September 14, 2011, Plaintiff Bethesda Softworks LLC ("Plaintiff") filed an *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction and an *Ex Parte* Application for Substituted Service. Defendant Masthead Studios Ltd. ("Defendant") did not file an Opposition. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. After considering the moving papers and the arguments therein, the Court rules as follows:

The standard for issuing a temporary restraining order ("TRO") is identical to the standard for issuing a preliminary injunction. See *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); *Stuhlberg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public's interest. *Id.* at 374; see also *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth Circuit recently confirmed that its "serious questions" approach survived *Winter* when applied as part of the four-

element *Winter* test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). In other words, “serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135.

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A plaintiff faces an exceedingly high burden when seeking such relief on an *ex parte* basis. Indeed, as the Court’s Standing Order states, “[e]x parte applications are solely for extraordinary relief.” Standing Order ¶ 6. In order to justify *ex parte* relief, the moving party must establish (1) that its cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures, and (2) that it is without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect. See *Mission Power Eng’g Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D.Cal.1995).

Plaintiff has not demonstrated that it will be irreparably prejudiced if the requested *ex parte* relief is not granted, or that it is without fault in creating the crisis that requires *ex parte* relief. Indeed, Plaintiff was aware as early as February 2011 that Masthead was potentially infringing its copyrights. See Declaration of Joseph J. Lobue, Ex. 6, Supplemental Responses of Interplay Entertainment Corp. to Bethesda Softworks First Set of Interrogatories dated February 8, 2011; see also *Bethesda Softworks LLC v. Interplay Entertainment Corp.*, Case No. 09 CV 2357, D. Maryland, Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction at p. 7 (“According to Interplay, pursuant to this purported development agreement, Masthead Studios is assisting Interplay in developing its Fallout MMOG using the copyrighted Fallout works.”). Yet, Plaintiff waited seven months to apply for *ex parte* relief. The Court finds that Plaintiff unreasonably delayed in seeking relief, and that the emergency that allegedly justifies a TRO is self-created. Accordingly, Plaintiff’s *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction is **DENIED**. If Plaintiff wishes to pursue its request for injunctive relief, it may do so by way of regularly noticed motion after complying with Local Rule 7-3.

Plaintiff’s *Ex Parte* Application for Substituted Service is **DENIED**.

IT IS SO ORDERED.