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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STARDOCK SYSTEMS, INC.,

Plaintiff,

vs.

PAUL REICHE III and ROBERT
FREDERICK FORD,

Defendants.

Case No: C 17-07025 SBA

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

Dkt. 56

AND RELATED COUNTERCLAIM.

This is a copyright action between Plaintiff and Counter-Defendant Stardock Systems, Inc. (“Stardock” or “Plaintiff”), Defendants and Counter-Claimants Paul Reiche III (“Reiche”) and Robert Frederick Ford (“Ford”) (collectively “Defendants”), and Counter-Defendants GOG Limited and GOG Poland sp. z.o.o (“GOG”) and Valve Corporation d/b/a Steam (“Valve”) (collectively “Counter-Defendants”), regarding a videogame franchise known as “Star Control.”

Reiche and Ford created the concept for Star Control, and, in partnership with Accolade, Inc. (“Accolade”), developed and published a trilogy of videogames under that name in the 1990s. Pursuant to the written agreement of those parties, the intellectual property (“IP”) rights in Star Control were divided, such that Reiche and Ford held some of the rights and Accolade held others. In 2013, Stardock acquired Accolade’s rights in the Star Control IP and began developing a new game titled *Star Control: Origins* (“Origins”). Reiche and Ford contend that *Origins* (as well as promotional content associated therewith) infringes upon their rights in the Star Control IP. Stardock disputes the validity of Reiche and Ford’s claim to ownership of any Star Control IP.

1 GOG and Valve operate online distribution platforms where videogames are
2 purchased and played. Upon the release of promotional content for *Origins*, Reiche and
3 Ford sent GOG and Valve notifications of infringement pursuant to the Digital Millennium
4 Copyright Act (“DMCA”), 17 U.S.C. § 512(c). The DMCA shields online service
5 providers from liability for copyright infringement, provided that they comply with the
6 statute’s “notice and takedown” process. Specifically, if a copyright holder sends a
7 notification of infringement, a service provider must remove allegedly infringing content.
8 If the affected subscriber files a counter-notification, the service provider must replace the
9 content, unless the copyright holder files an action seeking a court order to restrain the
10 subscriber. In response to Reiche and Ford’s DMCA notifications, GOG and Valve
11 removed Stardock’s promotional content from their platforms. Stardock filed a two
12 counter-notifications. Given the pendency of this action, however, the content was not
13 replaced by GOG or Valve.

14 Stardock recently announced the release of *Origins*. Stardock anticipates that
15 Reiche and Ford will send DMCA notices to GOG and Valve regarding *Origins*, resulting
16 in its removal from those distribution platforms. Consequently, Stardock filed the instant
17 motion for preliminary injunction to enjoin Reiche and Ford from sending further DMCA
18 notices directed to material that is the subject of the present litigation and, in particular,
19 *Origins*. Having read and considered the papers filed in connection with this matter and
20 being fully informed, the Court hereby DENIES the motion, for the reasons stated below.
21 The Court, in its discretion, finds this matter suitable for resolution without oral argument.
22 See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

23 **I. BACKGROUND**

24 **A. FACTUAL BACKGROUND¹**

25 **1. The Classic Star Control Games**

26 In 1988, Reiche created the concept for Star Control, a space exploration video game

27 ¹ The factual background of this action is expansive. Only those facts essential to
28 the resolution of the instant motion are set forth.

1 franchise that involves various alien species with unique names, appearances, ships,
2 weapons and backstories. Reiche Decl. ¶¶ 2, 5, 7, 8, 9, Dkt. 64-1. In October of that year,
3 Reiche and Accolade executed a License Agreement whereby they agreed to develop and
4 publish three *Star Control* video games. *Id.* ¶ 3 & Ex. 1. Accolade was granted an
5 exclusive license to publish the games in exchange for the payment of an advance and
6 royalties. *Id.*, Ex. 1 § 3.1² Under the License Agreement, Reiche retained ownership of the
7 copyright and all other proprietary rights in the work, while Accolade owned the title and
8 any trademarks adopted and used in the marketing of the work. *Id.* §§ 11.4, 11.5.

9 Reiche and his long-time business partner, Ford, created and developed *Star Control*
10 (“*Star Control I*”), which Accolade published in 1990. *Id.* ¶ 4. They then created and
11 developed *Star Control II: The Ur-Quan Masters* (“*Star Control II*”), which Accolade
12 published in 1992. *Id.* ¶ 6. Reiche and Ford were the “primary authors of most of the
13 creative materials incorporated into both *Star Control I* and *II*, including the game design,
14 story art, sound effects, software code, and other materials.” *Id.* ¶ 11. Specifically, Reiche
15 “created the names, initial concepts, written descriptions, and sketches of every character in
16 the game, as well as their history, physical and cultural details, and conversation design and
17 text specification.” *Id.* ¶ 12.³ As far as Defendants recall, Ford “wrote all of the code for
18 both *Star Control I* and *II*.” *Id.* ¶ 13. *Star Control I* was printed with “© 1990 Paul Reiche
19 III & Fred Ford,” and *Star Control II* was printed with “© 1992 Paul Reiche III & Fred
20 Ford.” *Id.* ¶ 16. Later, in December 2017 and April 2018, Reiche and Ford obtained U.S.
21 Copyright Registration No. PA 2-071-496 and No. PA-2-107-340, respectively, for the
22 computer program code and audiovisual content of *Star Control II*. *Id.* ¶ 19.

23
24
25 ² The License Agreement conferred a perpetual license to Accolade for as long as
each work or derivative work continued to generate royalties in an amount of \$1,000 per
year. Reiche Decl., Ex. 1 § 2.2.

26
27 ³ Reiche and Ford hired other individuals to assist in the development of *Star*
Control I and *II*. Reiche Decl. ¶ 14. Defendants aver that “everyone who contributed
28 creative content to the games agreed to assign any copyrights to their material to [Reiche
and Ford] at that time, and have since signed written agreements confirming this.” *Id.*

1 In 1995, Reiche and Accolade executed Addendum No. 2 to the License Agreement
2 to allow Accolade to develop a third Star Control game without Reiche and Ford's
3 involvement. Id. ¶ 20 & Ex. 5. Pursuant to Addendum No. 2, Reiche granted Accolade the
4 right to use and modify "all characters, names, likenesses, characteristics, and other
5 intellectual property rights pertaining to *Star Control I* and *Star Control II* in which [he]
6 has an ownership interest" in exchange for the payment of an advance and royalties. Id.,
7 Ex. 5 § 2. Accolade published *Star Control III: The Kessari Quadrant* ("*Star Control III*")
8 in 1996. Id. ¶ 20. Pursuant to the License Agreement, Accolade owned the copyright and
9 all other proprietary rights in *Star Control III*, subject to Reiche's copyrights in *Star*
10 *Control I* and *II*. Id., Ex. 1 § 11.4. In 1997, Accolade obtained U.S. Copyright Registration
11 No. PA 799-000 for *Star Control III*, covering its computer code and audiovisual content.
12 Weikert Decl. ¶ 3, Ex. A at ¶ 42 & Ex. H, Dkt. 56-7. It also obtained U.S. Trademark
13 Registration No. 2,046,036 for the "Star Control" mark. Id. ¶ 31 & Ex. E.

14 Reiche, Ford, and Accolade entered into further negotiations and agreements, but no
15 other Star Control sequels were released. Id. ¶¶ 22-27. By 2000, Accolade (and its
16 successors) stopped paying Reiche and Ford royalties for the classic Star Control games
17 (i.e., *Star Control I*, *II*, and *III*). Id. ¶ 27. Thus, according to Reiche and Ford, the License
18 Agreement and all subsequent addenda expired and terminated by April 1, 2001. Id.

19 2. Reiche and Ford's New Game

20 In 2002, Reiche and Ford released an open source edition of *Star Control II*, which
21 was free to use in a non-commercial context. Reiche Decl. ¶ 29. Because Reiche and Ford
22 could not obtain the right to use the Star Control mark, the game was released as *The Ur-*
23 *Quan Masters*. Id. According to Reiche and Ford, they had long planned to develop a
24 sequel to *The Ur-Quan Masters*. Id. ¶ 61. On October 9, 2017, Reich and Ford publicly
25 announced their plan to develop a sequel, titled *Ghosts of the Precursors*. Id. ¶ 62.

26 3. Stardock's Acquisition and New Game

27 In 1999, Atari, Inc. ("Atari") acquired Accolade. Wardell Decl. ¶ 3, Dkt. 56-1. In or
28 about 2013, Atari filed for bankruptcy and put up for sale its assets, including the "Star

1 Control Franchise,” described as *Star Control III*. Steinberg Decl. ¶ 2, Ex. 17 at 49, Dkt.
2 64-18. In July 2013, Stardock and Atari executed an asset purchase agreement, whereby
3 Stardock paid \$300,000 for Atari’s rights in the Star Control IP. Wardell Decl. ¶ 3.
4 According to the “List of Intellectual Property” attached to the purchase agreement, that
5 included the Star Control trademark and the *Star Control III* copyright. Weikert Decl. ¶ 3,
6 Ex. A at ¶ 27 & Ex. D. Stardock claims that it also purchased the exclusive publishing
7 rights to *Star Control I* and *II* under the License Agreement. Reiche and Ford dispute this
8 claim, asserting that: (a) the License Agreement expired; (b) all rights under the License
9 Agreement reverted to Reiche by virtue of Atari’s bankruptcy; and/or (c) the License
10 Agreement could not be assigned without Reiche’s consent. Reiche Decl. ¶ 40.

11 In 2013, after acquiring Accolade’s Star Control IP, Stardock began developing a
12 new game, *Origins*. Wardell Decl. ¶ 4. Around that time, Stardock’s CEO, Bradley R.
13 Wardell (“Wardell”), contacted Reich and Ford. Id. ¶ 5. Wardell now avers that he offered
14 Reich and Ford the “right of first refusal” to collaborate on the development of *Origins*. Id.
15 The correspondence between Wardell, Reich, and Ford tells a different story, however. See
16 Reiche Decl. ¶ 41, Ex. 9.

17 In or about July 2013, Wardell contacted Reiche and Ford seeking to license the Star
18 Control “universe” for *Origins*. Reiche Decl., Ex. 9 at 2, 7. Reiche and Ford made clear
19 that they hold the copyrights to *Star Control I* and *II*, and Wardell acknowledged the same.
20 Id. at 3. Reiche and Ford declined to execute a license, stating that they would like to work
21 on their own Star Control project in the future. Id. at 8. Thereafter, Wardell repeatedly
22 assured Reiche and Ford that Stardock would “not be making use of any of the Star Control
23 1/2 IP (which in this case means alien names, alien designs, lore, art, music, ship designs)
24 without [their] express permission.” Id. at 15; see also id. at 13, 19, 21 (“the new game
25 won’t be including” the “Star Control classic aliens and lore”). Through at least August
26 2017, Wardell also continued to request a license for some or all of the “Star Control alien
27 IP and such.” Id. at 29; see also id. at 14, 19, 22, 30. This included a proposed re-release
28 of *Star Control I* and *II*. Id. at 24. Reich and Ford consistently declined all such offers.

1 In or about October 2017, Stardock changed its position regarding the *Star Control I*
2 and *II* IP. Stardock began selling *Star Control I* and *II* on its website and on Valve's
3 videogame platform, Steam. Reiche Decl. ¶ 63.⁴ It also began taking preorders for *Origins*
4 and releasing promotional content. *Id.* ¶ 65. On or about November 16, 2017, Stardock
5 released a promotional mini-game titled *Star Control: Origins – Beta 1 Fleet Battles*
6 (“*Fleet Battles*”). Wardell Decl. ¶ 6. Stardock also released promotional “content packs,”
7 including the Chenjesu Content Pack and the Arilou Content Pack. *Id.* The promotional
8 content was made available on the GOG and Steam platforms. *Id.*

9 As set forth in more detail below, the instant action commenced in December 2017.
10 In or about March 2018, Wardell publicly stated that *Origins* will include the aliens from
11 *Star Control I* and *II*. Reiche Decl. ¶ 67 & Ex. 11. On June 11, 2018, Stardock publicly
12 announced the official release date for *Origins* as September 20, 2018. Wardell Decl. ¶ 8.
13 Between March and August 2018, Wardell confirmed that *Origins* will include “classic Star
14 Control aliens,” including the Arilou and Chenjesu. Reiche Decl. ¶¶ 69-74 & Exs. 13-16.
15 The Arliou and Chenjesu Content Packs also include these aliens, which Reiche and Ford
16 allege are “substantially similar to and/or derived from” aliens of the same name in *Star*
17 *Control I* and *II*. *Id.* ¶¶ 76-81. Stardock's website includes images of other aliens,
18 including the Yahat, Spathi, and Orz, which Reiche and Ford allege are “substantially
19 similar to and/or derived from” aliens of the same name in *Star Control I* and *II*. *Id.* ¶ 75.

20 On August 17 and 21, 2018, Reiche and Ford sent Valve (d/b/a Steam) and GOG
21 notices of copyright infringement under the DMCA regarding *Fleet Battles* and the
22 Chenjesu and Arilou Content Packs. Wardell Decl. ¶¶ 9, 11 & Exs. A, C. As a result,
23 Valve and GOG removed the promotional content from their respective platforms. *Id.* On
24 August 20 and 27, 2018, Stardock sent Valve and GOG counter-notices under the DMCA.
25 *Id.* ¶¶ 10, 12 & Exs. B, D. The promotional content remained unavailable on the Valve and
26 GOG platforms. Thereafter, Stardock requested that Reiche and Ford withdraw the DMCA

27 _____
28 ⁴ In late 2017, Reiche and Ford sent Valve a notice of copyright infringement under
the DMCA regarding the sale of *Star Control I* and *II*. Reiche Decl. ¶ 64.

1 notices. Weikert Decl. ¶ 4, Ex. C. Reiche and Ford refused and reserved the right to serve
2 further DMCA notices in response to addition infringing content. Id. ¶ 5, Ex. D.

3 **4. The Anticipated DMCA Notice**

4 Stardock anticipates that Reiche and Ford will send DMCA notices to GOG and
5 Valve regarding *Origins*. According to Stardock, *Origins* does not include any
6 “copyrightable artwork” from the classic Star Control games. Wardell Decl. ¶ 7.

7 Stardock asserts that any DMCA notice(s) directed at *Origins* will cause “immediate
8 and irreparable” harm. Id. ¶ 14. Together, the GOG and Steam platforms represent
9 approximately 93% of Stardock’s distribution channel. Id. ¶ 15. Stardock contends that, if
10 the *Origins* release is interrupted, significant resources will have been wasted and its
11 reputation in the marketplace will be harmed. Id. ¶ 16.

12 Specifically, Stardock has spent between \$9 and \$10 million developing *Origins*. Id.
13 ¶ 18. Marketing has been underway since June 2018, and Stardock has spent hundreds of
14 thousands of dollars promoting *Origins*. Id. ¶ 27. According to Stardock, the release of
15 *Origins* was “widely communicated to Stardock’s customers, partners and press.” Id. ¶ 19
16 & Ex. E. As of early September 2018, approximately 10,000 customers had preordered the
17 game. Id. ¶ 20. Stardock asserts that, if a DMCA notice is issued, *Origins* “will have been
18 promoted and released,” but (seemingly operating under the assumption that GOG and
19 Valve will remove the game from their platforms) it will no longer be available for
20 purchase or play on the distributors’ platforms. Id. ¶ 30.

21 Stardock contends that the “rumored suggestion that *Origins* will not be released has
22 *already* led to backlash from Stardock’s customers who have pre-ordered the game and
23 then requested a refund.” Id. ¶ 26. Stardock also asserts that the issuance of a DMCA
24 notice will negatively impact its business relationships, including its ability to partner with
25 a game console publisher for *Origins*. Id. ¶¶ 24, 28.

26 **B. PROCEDURAL BACKGROUND**

27 On December 8, 2017, Plaintiff filed a complaint against Defendants for trademark
28 infringement, copyright infringement, and related claims. Dkt. 1. On February 22, 2018,

1 Defendants filed an answer, Dkt. 16, as well as a counterclaim against Plaintiff for
2 copyright infringement and related claims, Dkt. 17.

3 The parties have amended the pleadings several times. Most recently, on October
4 15, 2018, Defendants filed the operative Second Amended Counterclaim, wherein they first
5 named GOG and Valve as Counter-Defendants. Dkt. 71. Among other things, Defendants
6 added causes of action for Contributory Copyright Infringement and Vicarious Copyright
7 Infringement against the distribution platforms. On October 15, 2018, Plaintiff filed the
8 operative Third Amended Complaint. Dkt. 72. Among other things, Plaintiff added causes
9 of action for Submission of False DMCA Notice, Tortious Interference with Prospective
10 Economic Advantage, and Tortious Interference with Contractual Relations.

11 Defendants have filed a Motion to Dismiss Counts Twelve and Thirteen of the Third
12 Amended Complaint (for tortious interference with prospective economic advantage and
13 contractual relations). Dkt. 76. Plaintiff has filed a Motion to Modify the Scheduling
14 Order and for Leave to File a Fourth Amended Complaint. Dkt. 82. The motions, which
15 were set for hearing on December 12, 2018, have been taken under submission.

16 In the meantime, Plaintiff filed the instant Motion for Temporary Restraining Order
17 and Order to Show Cause Why Preliminary Injunction Should Not Be Granted, wherein it
18 seeks an order enjoining Defendants from submitting any further DMCA notice(s) directed
19 to material that is the subject of the present litigation and, in particular, *Origins*. Dkt. 56.
20 The parties then executed a stipulation and proposed order for interim relief with a
21 proposed briefing schedule, Dkt. 59, which the Court adopted, Dkt. 60. Pursuant to that
22 stipulation, Defendants agreed not to file any further DMCA notices pending resolution of
23 the instant motion. The motion is fully briefed and ripe for adjudication.

24 **II. LEGAL STANDARD**

25 Federal Rule of Civil Procedure (“Rule”) 65 provides for the issuance of a
26 preliminary injunction. The purpose of a preliminary injunction is to “preserve the status
27 quo ante litem pending a determination of the action on the merits.” Los Angeles Mem’l
28 Coliseum Comm’n v. Nat’l Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); accord

1 Broadman v. Pac. Seafood Grp., 822 F.3d 1011, 1024 (9th Cir. 2016). A preliminary
2 injunction is an “extraordinary remedy” never awarded as of right; rather, it demands a
3 “clear showing” that the movant is entitled to such relief. Winter v. Natural Res. Def.
4 Council, 555 U.S. 7, 22, 24 (2008). The party seeking a preliminary injunction must show
5 that (1) it is “likely to succeed on the merits,” (2) it is “likely to suffer irreparable harm in
6 the absence of preliminary relief,” (3) “the balance of equities tips in [its] favor,” and
7 (4) “an injunction is in the public interest.” Disney Enter., Inc. v. VidAngel, Inc., 869 F.3d
8 848, 856 (9th Cir. 2017) (quoting Winter, 555 U.S. at 20). A preliminary injunction may
9 also issue if there are (1) “serious questions going to the merits” and (2) “the balance of
10 hardships tips sharply in the [movant’s] favor,” provided that the second and fourth Winter
11 factors are satisfied. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir.
12 2011); accord Disney Enter., 869 F.3d at 856.⁵ Either way, the moving party must make a
13 showing on all four prongs and bears the burden of demonstrating that a preliminary
14 injunction is warranted. Cottrell, 632 F.3d at 1135.

15 **III. DISCUSSION**

16 **A. EVIDENTIARY MATTERS**

17 The parties filed various declarations and evidentiary objections. Specifically, in
18 support of the motion for preliminary injunction, Plaintiff submitted a declaration by
19 Wardell (Dkt. 56-1). Defendants filed evidentiary objections thereto (Dkt. 64-26), and
20 Plaintiff filed a response to the objections (Dkt. 66-11). In support of the opposition to the
21 motion for preliminary injunction, Defendants filed a declaration by Reiche (Dkt. 64-1).
22 Plaintiff filed evidentiary objections thereto (Dkt. 66-12), and Defendants filed a response
23 to the objections (Dkt. 67). Finally, in support of its reply brief, Plaintiff filed declarations
24 by Wardell (Dkt. 66-1), David L. May (Dkt. 66-2), and Robert A. Weikert (Dkt. 66-4).

25
26 ⁵ Defendants contend that the requested injunctive relief involves a restraint on
27 speech, and thus, a heightened standard applies requiring a “particularly strong” showing as
28 to the likelihood of success on the merits and irreparable harm. Opp’n at 8. Plaintiff
disagrees. Because Plaintiff’s motion fails under the usual preliminary injunction standard,
the Court does not reach whether a heightened standard applies and has been satisfied.

1 Defendants filed evidentiary objections thereto (Dkt. 67-1; Dkt. 67-2; Dkt. 67-4), and
2 Plaintiff filed a single response to the objections (Dkt. 68).

3 As a threshold matter, the Court notes that “a preliminary injunction is customarily
4 granted on the basis of procedures that are less formal and evidence that is less complete
5 than in a trial on the merits.” Univ. of Texas v. Camenish, 451 U.S. 390, 395 (1981).
6 Consequently, “the Federal Rules of Evidence do not strictly apply to preliminary
7 injunction proceedings.” Disney Enters., Inc. v. VidAngel, Inc., 224 F. Supp. 3d 957, 966
8 (C.D. Cal. 2016), aff’d, 869 F.3d 848 (9th Cir. 2017) (citing Republic of the Philippines v.
9 Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc) (holding that it was within the
10 district court’s discretion to accept hearsay evidence for purpose of a preliminary injunction
11 motion); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) (holding that
12 district court’s “may give even inadmissible evidence some weight” when deciding whether
13 to issue a preliminary injunction)). ““While district courts may consider inadmissible
14 evidence in the context of a preliminary injunction, this does not mean that evidentiary
15 issues have no relevance to this proceeding. Such issues, however, properly go to weight
16 rather than admissibility.” Disney Enters., 224 F. Supp. 3d at 966 (quoting Am. Hotel &
17 Lodging Ass’n v. City of Los Angeles, 119 F. Supp. 3d 1177, 1185 (C.D. Cal. 2015)).
18 Here, the parties’ objections offer little of substance as to the weight of the evidence, which
19 the Court can easily assess without the aid of the parties’ arguments.⁶

20
21
22 ⁶ Many of the parties’ objections are frivolous. For example, Plaintiff objects to
23 Reiche’s declaration, “I created the concept for the Star Control computer game,” on the
24 ground that it lacks foundation. Dkt. 66-12 at 2. Clearly Reiche has personal knowledge as
25 to what he did or did not create. See Fed. R. Evid. 602 (a witness’s own testimony may
26 support a finding that he has personal knowledge of the matter to which he testifies). On
27 the other hand, the merit of other objections is obvious. For example, Defendants object to
28 Wardell’s declaration, “Stardock has not incorporated any copyrightable artwork from Star
Control I, Star Control II, or Star Control III into the *Origins* game itself,” on the ground
that Wardell lacks the expertise necessary to opine as to what constitutes “copyrightable
artwork.” Dkt. 64-26 at 2-3. Indeed, not only has Wardell failed to establish any such
expertise, but his opinion as to whether the work in question is “copyrightable” constitutes
an improper legal conclusion. See United State v. Diaz, 876 F.3d 1194, 1197 (9th Cir.
2017) (citing Fed. R. Evid. 704). Such legal conclusions are without evidentiary value.

1 Moreover, the parties' evidentiary objections and responses do not comply with the
2 local rules. Pursuant to Civil Local Rule 7-3(a), "[a]ny evidentiary and procedural
3 objections to the motion must be contained *within* the brief or memorandum." Likewise,
4 "[a]ny evidentiary and procedural objections to the opposition must be contained *within* the
5 reply brief or memorandum." *Id.* 7-3(c). Here, Defendants *separately* filed 6 pages of
6 evidentiary objections to Plaintiff's motion evidence, and Plaintiff *separately* filed 19 pages
7 of evidentiary objections to Defendants' opposition evidence. Pursuant to Rule 7-3(d)(1), a
8 party may file a separate Objection to Reply Evidence, but that filing is not to exceed 5
9 *pages*. Defendants' evidentiary objections to Plaintiff's reply evidence spans *12 pages*. In
10 addition, Plaintiff filed a 9-page response to Defendants' objections to the motion evidence,
11 Defendants filed a 32-page response to Plaintiff's objections to the opposition evidence,
12 and Plaintiff filed a 4-page response to Defendants' objections to the reply evidence.
13 Responses to evidentiary objections are *not* contemplated in the local rules. See Civ. L.R.
14 7-3. Nor did the parties request or receive permission to file these documents.⁷

15 In view of the foregoing, the Court hereby STRIKES the parties' non-compliant
16 filings. See Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002) ("The district
17 court has considerable latitude in managing the parties' motion practice and enforcing local
18 rules that place parameters on briefing."); Ready Transp., Inc. v. AAR Mfg., Inc., 627 F.3d
19 402, 404 (9th Cir. 2010) (recognizing the district court's "power to strike items from the
20 docket as a sanction for litigation conduct"). Notwithstanding the striking of the parties'
21 respective objections, where evidence bearing on the resolution of the instant motion lacks
22 or is of limited evidentiary value, the Court will so note.

23 **B. MOTION FOR PRELIMINARY INJUNCTION**

24 Plaintiff moves for a preliminary injunction to enjoin Defendants from filing further
25 DMCA notices directed to the material that is the subject of the instant action, and in
26

27 ⁷ Notably, the parties also filed motion, opposition, and reply briefs that themselves
28 *exceed* the page limits set by the Court. Consequently, the parties' separate evidentiary
filings further circumvent those page limits in violation of the Court's standing orders.

1 particular, *Origins*. Plaintiff’s justification is twofold: (1) the issuance of a DMCA notice
2 is tantamount to an injunction, for which Defendants have not made the requisite showing
3 under Winter; and (2) alternatively, Plaintiff itself satisfies the standard for preliminary
4 injunctive relief under Winter. The Court addresses these arguments in turn.

5 **1. Defendants’ Issuance of a DMCA Notice is Not an Injunction**

6 “Congress enacted the DMCA in 1998 to comply with international copyright
7 treaties and to update domestic copyright law for the online world.” Ellison v. Robertson,
8 357 F.3d 1072, 1076 (9th Cir. 2004) (citing Pub. L. No. 105-304, 112 Stat. 2860 (1998)).
9 Title II of the DMCA, also known as the Online Copyright Infringement Liability
10 Limitation Act (“OCILLA”) (codified at 17 U.S.C. § 512), created four “safe harbors” that
11 protect “service providers” from liability for claims of copyright infringement based on the
12 actions of their users. Id. at 1176-77. Title II does not alter the standards for liability under
13 the various doctrines of direct, vicarious, and contributory copyright infringement. Id. at
14 1177 (claims against service providers are “generally evaluated just as they would be in the
15 non-online world”); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109 (9th Cir. 2007).
16 Rather, Title II limits the relief available (principally by precluding monetary relief) against
17 service providers that qualify for one or more safe harbor. UMG Recordings, Inc. v.
18 Shelter Capital Partners LLC, 718 F.3d 1006, 1014 (9th Cir. 2013).

19 As is pertinent here, section 512(c) limits liability for infringement “by reason of the
20 storage . . . of material that resides on a system or network controlled or operated by or for
21 the service provider,” where said storage is “at the direction of a user.” 17 U.S.C. § 512(c).
22 There are “a number of requirements” a service provider must satisfy to “receive § 512(c)
23 safe harbor protection.” UMG Recordings, 718 F.3d at 1014-15.⁸ Among other things, a
24 service provider must not have “actual or red flag knowledge of the infringing material.”
25

26 ⁸ The parties do not address all of the general requirements that a service provider
27 must satisfy to qualify for safe harbor under section 512(c). As such, the Court lacks
28 sufficient information upon which to determine whether the safe harbor, in fact, applies
here. For purposes of the instant motion, however, the Court assumes *arguendo* that GOG
and Valve satisfy the general requirements for safe harbor.

1 Mavrix Photos., LLC v. LiveJournal, Inc., 873 F.3d 1045, 1052 (9th Cir. 2017); 17 U.S.C.
2 § 512(c)(1)(A) (service provider must not have “actual knowledge” of infringement, or “in
3 the absence of such actual knowledge,” must not be “aware of facts or circumstances from
4 which infringing activity is apparent”). “[U]pon obtaining such knowledge or awareness,”
5 a service provider must act “expeditiously to remove, or disable access to, the material.” 17
6 U.S.C. § 512(c)(1)(A). If invoked by a copyright holder, a service provider must also
7 comply with the DMCA’s “notice and takedown” process. Rossi v. Motion Picture Ass’n
8 of Am., Inc., 391 F.3d 1000, 1003 (9th Cir. 2004).

9 Under the DMCA’s notice and takedown process, a copyright owner must provide
10 written notification to the service provider identifying the work claimed to be infringed and
11 the material claimed to be infringing. 17 U.S.C. § 512(c)(3). The service provider, “upon
12 notification of claimed infringement [in accordance with (c)(3)],” must expeditiously
13 remove or disable access to the allegedly infringing material and promptly notify the
14 affected subscriber. Id. § 512(c)(1)(C), (g)(2)(A). The affected subscriber may then submit
15 a “counter-notification,” asserting a good faith belief that the material was removed or
16 disabled due to mistake or misidentification. Id. § 512(g)(3). Upon receipt of a counter-
17 notification, the service provider must promptly notify the copyright holder, and replace or
18 restore access to the allegedly infringing material within 10 to 14 business days, unless the
19 service provider first receives notice that the copyright holder “has filed an action seeking a
20 court order to restrain the subscriber from engaging in infringing activity related to the
21 material on the service provider’s system or network.” Id. § 512(g)(2)(B), (C).⁹

22 Here, asserting that the issuance of a notice of infringement will result in the
23 removal of *Origins* from the GOG and Steam platforms, Plaintiff argues that Defendants’
24 use of the DMCA notice and takedown process constitutes a “backdoor” or “self-help”
25 injunction without the requisite showing to obtain such relief. Mot. at 10, 13. Likening the

26 _____
27 ⁹ Title II creates a cause of action for material misrepresentations made knowingly
28 by a copyright holder or servicer provider in connection with a DMCA notice or counter-
notice. 17 U.S.C. § 512(f). As stated above, Plaintiff has brought such a claim against
Defendants regarding their filing of DMCA notices for the *Origins* promotional content.

1 DMCA notice and takedown process to the impoundment of virtual goods, Stardock argues
2 that, as applied here, it “is at odds with the requirements of Rule 65 and violates due
3 process protections.” *Id.* at 14. “To bring the DMCA in harmony with Rule 65,” Plaintiff
4 urges the Court to “maintain the status quo until the copyright issues central to this
5 litigation may be determined on the merits.” *Id.* at 17. In other words, Plaintiff contends
6 that Defendants should be enjoined from issuing a notice of infringement that seeks the
7 removal of *Origins* from the GOG and Steam platforms unless and until *Defendants* file a
8 motion to obtain such relief in this action. Plaintiff’s threshold argument is unconvincing.

9 As Defendants correctly observe, Plaintiff’s argument is based on the “flawed
10 premise” that the issuance of a notice of infringement under the DMCA is the equivalent of
11 an injunction *requiring* the removal of allegedly infringing material. It is not. Contrary
12 to Plaintiff’s assertion, *see* Mot. at 13, Defendants cannot “unilaterally” block *Origins* or
13 any other content from distribution by issuing a DMCA notice. *See* 17 U.S.C. § 512. Such
14 notice simply serves to provide knowledge of alleged infringement to service providers.
15 Critically, receipt of a notice of claimed infringement does not mandate that a service
16 provider remove or disable access to allegedly infringing material.¹⁰ Rather, in providing
17 safe harbor from liability, Title II of the DMCA *incentivizes* services providers to remove
18 infringing material. *Rossi*, 391 F.3d at 1003 (“Title II of the DMCA contains a number of
19 measures designed to *enlist the cooperation* of Internet and other online service providers
20 to combat ongoing copyright infringement.”) (emphasis added) (citing H.R. Rep. 105-551,
21 pt. 2, at 49 (1998) (“Title II preserves *strong incentives* for service providers and copyright
22 owners to cooperate to detect and deal with copyright infringements that take place in the
23
24

25
26 ¹⁰ In fact, Title II of the DMCA *elsewhere* provides for injunctive relief against
27 service providers, including an order restraining the service provider from providing access
28 to infringing material or activity residing at a particular online site on the provider’s system
or network. *See* 17 U.S.C. § 512(j). Such relief may be sought, pursuant to § 502, in any
court having jurisdiction of a civil action arising under the Copyright Act.

1 digital networked environment.”) (emphasis added)). Plaintiff acknowledges as much. See
2 Mot. at 13 (“service providers . . . have every incentive to take down targeted content”).¹¹

3 Plaintiff claims that the loss of section 512’s safe harbor proves too great an
4 incentive for service providers, causing them to “take down targeted content immediately,
5 regardless of the merits (or lack thereof) of a takedown request.” Mot. at 13. Insofar as
6 Plaintiff questions the wisdom of the DMCA process, however, its quarrel is with
7 Congress, not this Court. As the Ninth Circuit has recognized, Title II of the DMCA
8 grapples with “[d]ifficult and controversial questions of copyright liability in the online
9 world.” Ellison, 357 F.3d at 1076. The notice and takedown process is a “carefully
10 considered protocol,” UMG Recordings, 718 F.3d at 1018, which strikes a balance between
11 the competing interests of various stakeholders, Mavrix Photographs, 873 F.3d at 1051-52.
12 Whether that balance would benefit from recalibration is a matter for Congress to decide.
13 See Ventura Content, Ltd. v. Motherless, Inc., 885 F.3d 597, 612 (9th Cir. 2018) (noting
14 that “Congress, not judges, makes the policy decisions” underlying section 512). For
15 purposes of the instant motion, the Court is satisfied that the DMCA notice and takedown
16 process is not tantamount to an injunction.

17 Furthermore, Plaintiff’s claim that third party service providers such as GOG and
18 Valve act instinctively to remove material claimed to be infringing, regardless of the merits
19 of the claim, is overstated and without basis, at least as applied to the instant case. Plaintiff
20 provides no evidence to support its assertion that GOG and Valve (or similar service
21 providers) remove content regardless of the merits of a claim of infringement. Based on the
22 evidence provided to the Court (including Stardock’s contractual relationships with GOG

23
24 ¹¹ The only authority offered in support of Plaintiff’s claim that the DMCA acts as
25 an injunction is found in its reply brief, wherein it cites Wendy Seltzer, Free Speech
26 Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First
27 Amendment, 24 Harv. J.L. & Tech. 171, 19[2] (2010). Reply at 5, Dkt. 66. Plaintiff’s
28 citation to this article is misleading and misplaced. The article discusses the DMCA’s
potential chilling effect on free speech and the conflict between copyright and First
Amendment protections. The instant case in no way implicates these concerns. The
contemplated DMCA notice would not be directed at protected speech. Rather, the
disputed content is an allegedly infringing videogame in an action between commercial
parties with competing claims to certain IP.

1 and Valve), it appears these service providers benefit financially from the sale of games
2 that occur on their respective platforms. See Second Wardell Decl. ¶¶ 2-4. Thus, these
3 service providers are not disinterested actors. Nor are they uninformed actors. The Court
4 notes that GOG and Valve are parties to this action and already have notice of the claims of
5 infringement being asserted by Defendants. Notably, if Defendants’ claims of infringement
6 prove successful, GOG and Valve are *already* at risk of forfeiting any safe harbor under
7 section 512(c) if they continue to offer *Origins*. See 17 U.S.C. § 512(c)(1)(A) (requiring a
8 service provider with actual or red flag knowledge of infringement to act “expeditiously to
9 remove” the material); see also Ventura Content, 885 F.3d at 604 (to maintain its shield, a
10 service provider “must delete or disable access to known or apparent infringing material, as
11 well as material for which he receives a statutorily compliant takedown notice”).

12 In view of the forgoing, the Court will not enjoin Defendants from filing DMCA
13 notices based solely on Defendants’ failure to satisfy the standard for injunctive relief.

14 2. Plaintiff Is Not Entitled to a Preliminary Injunction

15 Although Plaintiff contends that an injunction should issue “based solely on the
16 failure of Defendants to meet the requirements for injunctive relief (or even move the Court
17 for such relief),” Plaintiff alternatively argues that it has made the requisite showing under
18 Rule 65 to enjoin Defendants from filing further DMCA notices. Specifically, Plaintiff
19 argues that it is likely to succeed in its defense against Defendants’ copyright claims, that
20 Plaintiff will suffer irreparable harm in the form of lost revenue and reputational injury
21 absent an injunction, that the balance of hardships favors Plaintiff, and that the requested
22 relief is in the public interest. Defendants oppose Plaintiff’s motion on various grounds,
23 including that: (1) a preliminary injunction will upset the status quo, not maintain it; (2)
24 Plaintiff faces no irreparable harm; and (3) any harm is of Plaintiff’s own making because it
25 chose to release *Origins* during the pendency of this action. As discussed below, the Court
26 finds Defendants’ arguments persuasive.

1 a) *Balancing the Equities – Preservation of the Status Quo*

2 The purpose of a preliminary injunction is to “preserve the status quo ante litem
3 pending a determination of the action on the merits.” Los Angeles Mem’l Coliseum
4 Comm’n, 634 F.2d at 1200; accord Broadman, 822 F.3d at 1024. “The status quo ante
5 litem refers not simply to any situation before the filing of a lawsuit, but instead to ‘the last
6 uncontested status which preceded the pending controversy.’” GoTo.com, Inc. v. Walt
7 Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000) (citations omitted)). Defendants argue
8 that the requested injunction would upset the status quo, not preserve it. Tellingly, Plaintiff
9 does not respond to this argument. This is fatal to its motion for preliminary injunction.

10 Here, the status quo ante litem involves Plaintiff’s development of a new game
11 within the Star Control universe based solely on its Star Control IP and without making use
12 of the material covered by Defendants’ rights to *Star Control I* and *II*. See, e.g.,
13 GoTo.com, 202 F.3d at 1210 (“In this case, the status quo ante litem existed before Disney
14 began using its allegedly infringing logo.”). Upon learning of Plaintiff’s intent to develop
15 *Origins*, Defendants stated that they hold copyrights to *Star Control I* and *II*. Plaintiff
16 acknowledged the same and repeatedly sought a license to use the *Star Control I* and *II* IP
17 in *Origins*. Defendants declined. Through at least August 2017, Plaintiff assured
18 Defendants that *Origins* would not make use of “any of the Star Control 1/2 IP (which in
19 this case means alien names, alien designs, lore, art, music, ship designs).” Plaintiff
20 ultimately changed its position, however, and a copyright dispute materialized in the fall of
21 2017. Plaintiff now asserts that Defendants have no protectable interest in *Star Control I*
22 and *II* and/or that its use of the *Star Control I* and *II* IP in *Origins* does not constitute
23 infringement. Notably, *Origins* had not been released, nor had its release date been
24 announced, when the instant action commenced in December 2017.

25 Under these circumstances, preventing Defendants from filing any further DMCA
26 notices in response to the release of potentially infringing content, including *Origins*, would
27 not preserve any semblance of the last uncontested status that preceded the present
28 litigation. Indeed, it would go far beyond preservation of the status quo by protecting

1 Plaintiff's release of the potentially infringing *Origins* game, development of which was in
2 its infancy (or at the very least, did not incorporate any of the *Star Control I* and *II* IP) at
3 the time of the last *uncontested* status prior to this litigation. Indeed, Plaintiff seeks not
4 simply to release purportedly infringing material during the pendency of the action, but to
5 foreclose Defendants from exercising their statutory right to issue a DMCA notice of
6 infringement in response. This is inequitable and would turn the status quo doctrine on its
7 head. An alleged infringer cannot release purportedly infringing material in the midst of
8 litigation and then reasonably ask the Court to hamstring the alleged copyright holder in its
9 efforts to curb the alleged infringement. See Aoude v. Mobil Oil Corp., 862 F.2d 890, 893
10 (1st Cir. 1988) (status quo doctrine is one of "equity, discretion, and common sense"). This
11 factor alone supports the denial of a preliminary injunction. As set forth below, an analysis
12 of the irreparable harm prong further supports the Court's conclusion.

13 ***b) Irreparable Harm***

14 Plaintiff claims it will suffer irreparable harm if "Defendants are able to utilize the
15 DMCA notice procedures" to "sabotage" the release of *Origins*. Mot. at 23-24. Plaintiff's
16 purported injury takes the form of lost revenue and reputational harm. As a threshold
17 matter, the Court finds Plaintiff's evidence in support of its claim of irreparable injury
18 wanting. Plaintiff's claim depends on the unsupported assumption that GOG and Valve
19 will remove *Origins* upon receipt of a DMCA notice of infringement. See Winter, 555 U.S.
20 at 22 (movant must show that "irreparable injury is *likely* in the absence of an injunction,"
21 not that such injury is possible). Although Plaintiff enjoys contractual relationships with
22 GOG and Valve—who are also parties to this action—it offers no evidence (in the form of
23 a declaration or otherwise) that GOG and Valve will act to remove *Origins*.

24 Further, even assuming *Origins* will be removed, the evidence of irreparable injury
25 is inadequate. "[E]conomic injury alone does not support a finding of irreparable harm
26 because such injury can be remedied by a damage award." Rent-A-Ctr., Inc. v. Canyon
27 Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991). Therefore,
28 Plaintiff's loss of revenue alone does not support a finding of irreparable harm. Cognizant

1 of this fact, Plaintiff asserts related intangible injuries, such as damage to its business
2 development strategy and ongoing business relationships (e.g., finding a console publisher
3 for *Origins*). The only evidence offered in support of these claims are the conclusory
4 statements of its own executive, however. This is insufficient. Am. Passage Media Corp.
5 v. Cass Commc'ns, Inc., 750 F.2d 1470, 1473 (9th Cir. 1985) (declaration of movant's
6 executives regarding intangible injuries did not support issuance of a preliminary injunction
7 because they were "conclusory and without sufficient support in facts").

8 Moreover, setting aside any evidentiary deficiencies, the Court agrees with
9 Defendants that the threatened harm is of Plaintiff's "own making." Opp'n at 24, Dkt. 64.
10 "If the harm complained of is self-inflicted, it does not qualify as irreparable." Caplan v.
11 Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 839 (3d Cir. 1995) (reasoning,
12 because the movants "acted to permit the outcome which they find unacceptable, we must
13 conclude that such an outcome is not irreparable injury"); accord Salt Lake Tribune Pub.
14 Co., LLC v. AT&T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003); see also Adtrader, Inc. v.
15 Google LLC, No. 17-CV-07082-BLF, 2018 WL 1876950, at *4 (N.D. Cal. Apr. 19, 2018)
16 ("Harm does not constitute irreparable injury if it is self-inflicted.").

17 As aptly observed by Defendants, "Stardock announced the release date and
18 launched its marketing campaign for *Origins* in June 2018—long after this case was at
19 issue and Stardock was well aware of Reiche and Ford's allegation that *Origins* infringed
20 their copyrighted work. Stardock could have suspended development, or at least postponed
21 the marketing and release of *Origins* until this case resolves who owns the copyrights to the
22 content at issue and whether Stardock's planned use of certain content infringes. . . .
23 Instead, Stardock did nothing to avoid the purported risk of irreparable harm that it now
24 bases its motion on, and Stardock announced the release of *Origins* in the middle of this
25 case and ramped up its spending." Id. Plaintiff does not directly respond to this point.
26 Further scrutiny of its alleged harm supports Defendants' argument, however.

27 Plaintiff asserts that it stands to lose substantial monies spent on the development
28 and marketing of *Origins*. Plaintiff was aware of Defendants' copyright claim to *Star*

1 *Control I* and *II* since the development of *Origins* commenced, however, and was aware of
2 the contours of the present copyright dispute since at least December 2017. Thus, whatever
3 monies Plaintiff invested in *Origins* was done with the knowledge that serious copyright
4 disputes were likely to arise or had arisen. Plaintiff further asserts that the release of
5 *Origins* “has been widely communicated to Stardock’s customers, partners, and the press,”
6 and that any disruption in its release will be injurious to Plaintiff’s reputation. Mot. at 23.
7 Again, Plaintiff announced the release of *Origins* in June 2018, six months after this action
8 commenced. Plaintiff thus invited reliance on its announcement regarding the release of
9 *Origins* with knowledge of Defendants’ claims.

10 In view of the foregoing, the harm Plaintiff complains of is indeed of its own
11 making. Plaintiff had knowledge of Defendants’ copyright claims from the outset. Despite
12 that knowledge, it developed potentially infringing material without resolution of the IP
13 ownership issues, and then publicized the release of that material during the pendency of
14 this action. It now claims that its investment in *Origins* and reputation are on the line.
15 Given that Plaintiff largely created the foregoing predicament, the Court is disinclined to
16 extricate Plaintiff from a peril of its own making. See GEO Grp., Inc. v. United States, 100
17 Fed. Cl. 223, 229 (2011) (“[T]he court is ill-inclined, at this late hour, to pull [the
18 plaintiff’s] chestnuts out of a fire sparked by its own ill-fated tactical decision.”).

19 In sum, Plaintiff has not made an adequate showing on the second and third prongs
20 of the preliminary injunction standard. Accordingly, Plaintiff has failed to satisfy its
21 burden to obtain preliminary injunctive relief, and the Court need not address the remaining
22 prongs. See Winter, 555 U.S. at 20-21 (movant must satisfy all four prongs).

23 **IV. CONCLUSION**

24 For the reasons stated above, IT IS HEREBY ORDERED THAT Plaintiff’s motion
25 for a preliminary injunction is DENIED. This Order terminates Docket 56.

26 IT IS SO ORDERED.

27 Dated: 12/27/18

28 
SAUNDRA BROWN ARMSTRONG
Senior United States District Judge