

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMIGA, INC., a Delaware corporation,
Plaintiff,
vs.
HYPERION VOF, a Belgium corporation,
Defendant.

CASE NO.: CV07-0631-RSM

**AMIGA'S NOTICE OF MOTION AND
MOTION FOR EXPEDITED DISCOVERY
AND MEMORANDUM OF POINTS AND
AUTHORITIES**

[LOCAL RULE 7(D)(2)]

NOTE ON MOTION CALENDAR:

MAY 11, 2007

COURT: HON. RICARDO MARTINEZ

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. BACKGROUND	3
III. LEGAL ANALYSIS.....	6
IV. CONCLUSION.....	8

A limited liability partnership formed in the State of Delaware

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

Page

1

2

3

4 *GoTo.Com, Inc. v. Walt Disney Company,*
202 F.3d 1199 (9th Cir. 2000)..... 6, 8

5

6 *Renaud v. Gillick,*
2006 U.S. Dist. LEXIS 75169 (W.D.Wash 2006)..... 6

7 *Reno Air Racing association v. McCord,*
452 F.3d 1126 (9th Cir. 2006)..... 6

8

9 *Semitool, Inc. v. Tokyo Electron America, Inc.,*
208 F.R.D. 273 (N.D. Cal. 2002)..... 6, 7

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

A limited liability partnership formed in the State of Delaware

NOTICE OF MOTION AND MOTION

1 On May 11, 2007, the motion will be decided on the briefing and without oral argument,
2 Plaintiff Amiga, Inc. (“Amiga”) will and hereby does move the Court for an order permitting the
3 parties to proceed with expedited discovery.

4 The motion is made pursuant to Local Rule 7(d)(2) and is made on the grounds that good
5 cause exists for the discovery because it appears that Defendant Hyperion VOF (“Hyperion”) is,
6 among other things, infringing Amiga’s trademarks and refusing to turn over the source code to
7 intellectual property that Amiga purchased and rightfully owns. Further, expedited discovery is
8 necessary to secure evidence relating to Hyperion’s recent announcement of a strategic
9 partnership with ACube Systems SRL that threatens further infringement of Amiga’s intellectual
10 property and consequently, would result in additional irreparable harm to Amiga. Amiga needs
11 the discovery to secure additional evidence to support its motion for preliminary injunctive relief
12 and to assist the court in fashioning the appropriate remedy.

13 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
14 and Authorities attached hereto, the Declaration of Morgan W. Tovey, the accompanying Motion
15 for Preliminary Injunction, including all documents and declarations submitted therewith, all
16 pleadings and paper on file in this action and such further evidence and argument that may be
17 submitted to the Court at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

19 **I. INTRODUCTION**

20 Amiga brings this motion for expedited discovery to secure additional evidence necessary
21 to (1) prove Amiga’s motion seeking to enjoin Hyperion from its illegal use of Amiga’s
22 trademarks and requiring Hyperion to turn over the computer software source code legally
23 belonging to Amiga; and (2) aid the court in determining the appropriate equitable relief.

24 Hyperion has hijacked and is now holding as ransom valuable Amiga’s software code
25 and related intellectual property that was developed and paid for by Amiga under an Agreement
26 between Hyperion and Amiga. Despite its limited license to use Amiga’s intellectual property to
27

1 develop and market in a limited manner the software code for Amiga, Hyperion also greatly
2 exceeded the scope of its license, thereby exploiting and infringing upon Amiga's intellectual
3 property rights. Even after Amiga terminated the Agreement, Hyperion has continued, without
4 consent or permission, to exploit Amiga's valuable trademarks and otherwise deprive Amiga
5 from the benefit of its bargain under the parties' Agreement. In order to prevent continued
6 irreparable harm, Amiga brought this lawsuit and a Motion for Preliminary Injunction to recover
7 its valuable, unique intellectual property and to restrain Hyperion from further infringement and
8 breaches of the Agreement.

9 Most recently, Hyperion has compounded its bad acts by purporting to enter into an
10 "strategic partnership" with a third party, ACube Systems Srl ("ACube"), whereby Hyperion
11 purports to grant ACube rights to distribute OS 4.0 on a worldwide basis for "a range of PPC
12 hardware platforms." Amiga has not consented to or licensed such use of Amiga's software
13 code and marks. Hyperion's attempt to hijack Amiga's software – a code that is highly
14 specialized, unique and essential Amiga's success – and misappropriate Amiga's exclusive right
15 to obtain a "first to market" position, while at the same time infringing Amiga's trademarks, is
16 harming Amiga irreparably.

17 Good cause exists for the very limited expedited discovery related to the Motion for
18 Preliminary Injunction based on Hyperion's continued improper use of Amiga's trademarks, its
19 unjustified refusal to turn over to Amiga the valuable intellectual property that Amiga bargained
20 and paid for under the parties' Agreement and the irreparable harm that Amiga is suffering as a
21 result of Hyperion's infringement and breaches. The discovery – including just eight (8)
22 document requests, ten (10) requests for admission and two (2) interrogatories – is necessary to
23 provide further evidence in support of Amiga's request for preliminary equitable relief and to
24 assist in fashioning an appropriate preliminary injunction. [*See* Declaration of Morgan W.
25 Tovey in Support of Motion for Expedited Discovery ("Tovey Dec.") ¶¶ 4-6, Exs. B-D]. In
26 contrast, any prejudice to Hyperion is minimal, as the discovery has been narrowly tailored to the
27 most pertinent issues at this juncture of the case. Accordingly, Amiga respectfully requests that
28

1 the Court grant Amiga the right to conduct expedited discovery as set forth in the accompanying
2 proposed order.

3 **II. BACKGROUND**

4 Amiga is a software and hardware development company that was once a pioneer of early
5 entertainment computer systems. For instance, its original Classic Amiga operating system (OS)
6 garnered praise throughout the industry as being “ahead of its time” and “light years” ahead of
7 the competition. Indeed, Amiga’s graphically rich and multi-threaded system won a devoted
8 band of enthusiasts the likes of which the computing industry had never previously witnessed.
9 Despite the great success witnessed by Amiga in the 1980s, Amiga experienced some growing
10 pains. Multiple changes of ownership, and attendant changes in direction, stunted Amiga’s
11 growth, and Amiga experienced stagnant business and financial woes in the 1990s. [*See*
12 Declaration of Bill McEwen in support of Motion for Preliminary Injunction and Motion for
13 Expedited Discovery (“McEwen Dec.”) ¶¶ 3-7].

14 Nonetheless, Amiga fans have remained loyal, and since 2000, the company has been
15 positioning itself to comeback as an industry leader. In early 2001, Amiga identified an
16 opportunity to help achieve its goal of re-emerging an industry leader. Amiga decided to
17 develop a new operating system, Amiga OS 4.0 that would propel Classic Amiga operating
18 system into the next century and re-establish the Amiga OS as the innovative and valuable
19 operating system of choice. [McEwen Dec. ¶ 8.]

20 Because of budgetary and time constraints, Amiga decided to contract with an outside
21 entity, Defendant Hyperion VOF (“Hyperion”), a foreign corporation located in Belgium, to
22 develop OS 4.0. In November of 2001, Amiga signed an OEM LICENSE AND SOFTWARE
23 DEVELOPMENT AGREEMENT (the “Agreement”) with Hyperion. [*See* Declaration of Barrie
24 Jon Moss in support of Motion for Preliminary Injunction and Motion for Expedited Discovery
25 (“Moss Dec.”) ¶10, Ex. A.]

26 Under the Agreement, Amiga would grant Hyperion a limited license and access to
27 Amiga’s source code for Amiga OS 3.1, and related updates, to develop the next generation
28

1 Amiga operating system: OS 4.0. In exchange, under the Agreement, Amiga offered Hyperion
2 the following limited licenses: (1) a non-exclusive license to access, use and modify, Amiga's
3 Software (again, defined as the source code for OS 3.1 and related upgrades), (2) an exclusive
4 license to market and distribute OS 4 (defined as any version of the classic Amiga OS developed
5 by Hyperion under the Agreement) and OS 4.0 as (a) a stand-alone version for the Target
6 Hardware (meaning that Hyperion could market and sell the OS 4 and OS 4.0 software to
7 consumers with computers that use a certain processing chip, called the powerPC, within the
8 Amiga platform), and (b) as an original equipment manufacturer (OEM) version shipped as part
9 of the Amiga One computer (meaning that Hyperion could market and sell OS 4.0 as part of a
10 pre-installed package with the Amiga One computer, manufactured by Eyetech Corporation,
11 (also a party to the Agreement but not this Complaint), and (3) a license to use Amiga
12 trademarks in conjunction with marketing and sales efforts concerning OS 4.0 as bundled with
13 the Amiga One. [Moss Dec. ¶¶ 10, Ex. A, 12, 15, 18; McEwen Dec. ¶19.]

14 The Agreement expressly provides that Amiga would retain all ownership of its existing
15 intellectual property assets along with the right, at Amiga's sole option, to acquire, for the sum of
16 \$25,000 (USD), the key intended output of the Agreement: the source code, object code and
17 intellectual property title to OS 4.0. By carefully limiting Hyperion's rights to market OS 4.0 in
18 connection with the Amiga One computer and in narrowly defined markets, Amiga also reserved
19 for itself the right to market OS 4.0 in all other markets and platforms. Further, the agreement
20 required Hyperion to exercise its "best efforts" to ensure that Amiga OS 4.0 would be ready for
21 release by March 1, 2002. [Moss Dec. ¶¶ 10, Ex. A, 13, 19; McEwen Dec. ¶¶ 18-21.]

22 After years of attempting to work with its Hyperion as a development partner, Amiga has
23 realized that Hyperion has breached the Agreement and otherwise infringed Amiga's rights in
24 multiple ways. Hyperion not only failed to exercise its "best efforts" to ensure Amiga OS 4.0
25 would be ready for release within the allotted time, Hyperion exceeded the scope of its license to
26 market and distribute OS 4.0 in violation of the Agreement and Amiga's trademark rights.
27 Specifically, Despite its limited license market and distribute OS 4.0, Hyperion's website reveals
28

1 that Hyperion sells Amiga OS 4.0 for everything from kiosks, set top boxes, hand-held devices
2 using PowerPC processors, high-end servers and other devices using the PowerPC architecture.
3 [McEwen Dec. ¶¶ 22-23.] Moreover, the same website shows that Hyperion uses the AMIGA®
4 mark, the AMIGA name, the “Powered by Amiga” logo and the Amiga “Boing Ball” in
5 conjunction with the advertisement and distribution of OS 4.0 far beyond that permitted under
6 the Agreement. Hyperion’s unauthorized use of the Amiga’s software and trademarks breaches
7 the Agreement and infringes Amiga’s trademarks. [*Id.* ¶ 23.]

8 Based on these multiple material breaches of the agreement, and statutory intellectual
9 property violations, in November 2006, Amiga gave notice to Hyperion of Amiga’s intent to
10 terminate the Agreement. By its terms, on or about, December 20, 2006, the agreement, as well
11 as all intellectual property licenses granted to Hyperion therein, terminated. [*Id.* ¶ 28.]

12 Notwithstanding the termination of the agreement, Hyperion continues to market OS 4.0-
13 based products, along with Amiga’s famous trademarks, without Amiga’s license or consent not
14 only in markets in which Amiga had granted a license to Hyperion during the term of the license
15 but also to markets and platforms for which Hyperion *never* had a license. [*Id.* ¶ 23.] Hyperion
16 also refuses to turn over to Amiga the code and title to OS 4.0 despite Amiga’s payments under
17 the Agreement. Amiga bargained for, paid for, and now owns – but does not possess – the source
18 code, object code and title to OS 4.0 – intellectual property assets that are a key component of
19 Amiga’s plans for a comeback. [*Id.* ¶¶ 24-26.]

20 Adding further insult to competitive injury, Hyperion recently announced that it had
21 entered into a strategic partnership with ACube Systems Srl (“ACube”) in which ACube would
22 act as a worldwide distributor of Amiga OS 4.0 for a range of hardware devices – all without
23 Amiga’s license or consent. [See ACube Systems and Hyperion Entertainment joint
24 announcement, attached to the McEwen as Ex. I.] In the months leading up to this
25 announcement, Amiga and ACube were in negotiations for a strategic partnership relating to
26 Amiga OS 4.0. [*Id.* ¶ 23.] By refusing to release the code to OS 4.0 to Amiga, Hyperion
27 usurped this “first to market” opportunity for itself, further irreparably harming Amiga. [*Id.*]

1 As a result of Hyperion's breaches and the irreparable harm caused by Hyperion,
2 Amiga has filed the instant lawsuit and has moved for preliminary injunctive relief to restrain
3 further trademark infringement and recover the source code, object code and intellectual property
4 to OS 4.0 under the Agreement.

5 Amiga now seeks expedited discovery, which is narrowly tailored to address factual
6 issues concerning Amiga's Motion for Preliminary Injunction, including the extent of Hyperion's
7 breaches, the status and location of the source code, object and intellectual property to OS 4.0
8 and the like. [See Tovey Dec. ¶¶ 4-6, Exs. B-D (copies of proposed discovery requests)].

9 III. LEGAL ANALYSIS

10 Courts allow parties to conduct expedited discovery in advance of a Rule 26(f)
11 conference where the party establishes "good cause" for such discovery. *See Semitool, Inc. v.*
12 *Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (J. Chen). Good cause may
13 be found where the need for expedited discovery, in consideration of the administration of
14 justice, outweighs the prejudice to the responding party. *Id.* An *ex parte* motion for expedited
15 discovery is appropriate where, as here, notice to the adverse party would cause irreparable
16 injury to the moving party before the adverse party can be heard in opposition. *Renaud v.*
17 *Gillick*, 2006 U.S. Dist. LEXIS 75169 at *5 (W.D.Wash 2006) (quoting *Reno Air Racing*
18 *association v. McCord*, 452 F. 3d 1126, 1131 (9th Cir. 2006); Fed. R. Civ. Pro. 65(b)(1)). Here,
19 Amiga easily meets the requirements for obtaining *ex parte* the expedited discovery it seeks.

20 Initially, where, as here, the case involves claims of infringement, courts frequently
21 find good cause to permit expedited discovery. *See Semitool*, 208 F.R.D. at 276. This is not
22 surprising because establishing such claims gives rise to a presumption of irreparable harm to the
23 plaintiff. *See GoTo.Com*, 202 F.3d at 1205 n. 4 (showing of reasonable likelihood of success on
24 a trademark claim warrants a presumption of irreparable injury).

25 Further, the expedited discovery Amiga seeks here will substantially contribute to
26 moving the case forward, as it is essential to securing additional evidence to further support entry
27 of a preliminary injunction claim. *See Semitool*, 208 F.R.D. at 277 (granting expedited
28

1 discovery). Amiga's Complaint alleges prima facie cases of trademark infringements. Amiga
2 owns and has registered various trademarks, which Hyperion first licensed and then used outside
3 the scope of its license, and now, even after termination of the license, continues to use without
4 permission from Amiga. Amiga has further asserted breach of contract and specific performance
5 claims on which it is likely to succeed based on Hyperion's multiple violations of the
6 Agreement. Hyperion has breached the Agreement by, among other things, (1) exceeding the
7 scope of its license to distribute and market OS 4.0, a unique software program, and (2) refusing
8 to turn over to Amiga the rights to source code, object code and intellectual property to OS 4.0
9 despite Amiga's payment under the Agreement.

10 The narrowly tailored discovery Amiga seeks by way of this motion directly relates, and
11 is narrowly tailored to explore, the extent of Hyperion's breaches and Hyperion's apparent
12 "defense" that it somehow does not possess or have access to the source code, object code and
13 intellectual property to OS 4.0 (even though Hyperion is required to provide that code and
14 property to Amiga). The discovery further seeks to determine what portion of the code Hyperion
15 does possess and what steps are required, if any, for Hyperion to obtain the code in order to
16 fulfill its contractual duties to Amiga. As such, the discovery is directly relevant to Amiga's
17 preliminary injunction motion and will assist the Court in determining the motion and fashioning
18 an appropriate remedy to prevent ongoing irreparable harm Hyperion is inflicting on Amiga.

19 Moreover, the discovery will not prejudice Hyperion. The discovery is not only narrowly
20 tailored, but is limited to just eight (8) document requests, ten (10) requests for admission and
21 two (2) interrogatories. Amiga further seeks a reasonable time frame for response – a full ten
22 days after service of the Court's Order.

23 Finally, this motion is properly heard *ex parte* because the discovery relates to Amiga's
24 preliminary injunction motion and ample evidence supports that Amiga will suffer irreparable
25 harm if a normal noticed motion schedule is applied to this motion. Specifically, Amiga has
26 established a *prima facie* case for a trademark infringement claim, therefore raising a
27 presumption that it will suffer irreparable injury. *GoTo.Com, Inc. v. Walt Disney Company*, 202
28

1 F.3d 1199, 1205 at n. 4 (9th Cir. 2000) (once there is a showing of likelihood of success on the
2 merits, irreparable injury is presumed in a trademark case). Likewise, Hyperion has refused and
3 continued to refuse to turn over the source code to OS 4 despite being required to do so by the
4 terms of the Agreement. If this Motion is heard on a normal noticed motion schedule, substantial
5 delay will occur causing Amiga further irreparable harm.

6 **IV. CONCLUSION**

7 Hyperion has infringed, and continues to infringe, upon Amiga's trademarks and unique
8 contractual rights by continuing to use Amiga's software and trademarks without consent from
9 Amiga. Hyperion is further causing irreparable harm by refusing to turn over unique intellectual
10 property that was bargained and paid for by Amiga under the parties' Agreement. Amiga cannot
11 possibly grow its sales, much less re-emerge as an industry leader, without such property. The
12 limited expedited discovery sought will help substantiate Hyperion's breaches and infringements
13 and will further support the grant of, and provide information helpful to determine the proper
14 scope of, a preliminary injunction in this case. Accordingly, good cause exists for Amiga to
15 proceed with the expedited discovery set forth in the accompanying proposed order.

1 DATED this the 27th day of April, 2007.

2 CABLE, LANGENBACH, KINERK & BAUER, LLP

3
4 By: /s Lawrence R. Cock
5 Lawrence R. Cock, WSBA No. 20326
6 lrc@cablelang.com
7 Cable, Langenbach, Kinerk & Bauer, LLP
8 1000 Second Avenue
9 Suite 3500
10 Seattle, WA 98104
11 Telephone: (206) 292-8800
12 Facsimile: (206) 292-0494

13 Scott D. Baker (Pro Hac Vice application pending)
14 sbaker@reedsmith.com
15 Morgan W. Tovey (Pro Hac Vice application pending)
16 mtovey@reedsmith.com
17 Alison B. Riddell (Pro Hac Vice application pending)
18 ariddell@reedsmith.com
19 Reed Smith LLP
20 Two Embarcadero Center, Suite 2000
21 San Francisco, CA 94111-3922
22 Telephone: (415) 543-8700
23 Facsimile: (415) 391-8269

24 Attorneys for Plaintiff
25
26
27
28