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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMIGA, INC., a Delaware corporation,  
Plaintiffs,  
v.  
HYPERION VOF, a Belgian corporation,  
Defendant.

No. 07-0631-RSM

**DECLARATION OF EVERT CARTON  
IN OPPOSITION TO AMIGA  
DELAWARE'S MOTION FOR  
PRELIMINARY INJUNCTION**

Evert Carton, under penalty of perjury, declares and states as follows:

1. I am Managing Partner of Hyperion VOF, a software company located in Belgium. I currently reside in Belgium. I am Belgian and US citizen. I am over the age of 18, and I am competent to testify.
2. I am 36 years of age, born 24. October, 1970, in Durham, NC. I grew up in Belgium.
3. I graduated as a Mechanical Engineer. I have worked in various IT positions in the pharmaceutical (clinical trial setup and instrument interfaces) and retail sector (programming custom IDMS database applications in PL/1 on Amdahl mainframe computers). I have worked as an independent IT-consultant through Hyperion, in the steel (business

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1 intelligence) and telecom-industry (business intelligence and Web-technologies). Hyperion has  
2 currently secured a position for me as an independent contractor working as a system/software  
3 architect at the largest Belgian mobile telecommunications operator.

4 4. My skills range from basic knowledge to proficient level in several  
5 programming languages (C, C++, Java, Python, Perl, SAS ...). I worked on different operating  
6 environments, ranging from (mainly) Unix systems (HP-UX, Solaris/SunOS, Linux) to  
7 mainframe systems.

8 5. I founded Hyperion VOF, better known as Hyperion Entertainment, in February  
9 1999 with Mr. Ben Hermans, whom I met during my college years. Mr. Hermans later opted to  
10 pursue a legal career. I am to this date Managing Partner at Hyperion. The company  
11 specializes in 3D graphics and 3D driver development, firmware development for embedded  
12 systems, IT consulting and the conversion of high quality entertainment software from  
13 Windows to niche platforms including Amiga, Linux (x86,PPC) and MacOS .

14 6. Based on my general educational background, my experience in the industry,  
15 and my specific knowledge of events related to Amiga, I have personal knowledge of the  
16 matters stated herein.

17 7. The "Amiga" line of computers was launched on the 23rd of July 1985 and  
18 subsequently acquired and marketed by Commodore Business Machines (CBM or Commodore  
19 who had previously developed and marketed one of the most useful computers of all time, the  
20 Commodore 64).

21 8. Prior to this computers were aimed at a relatively limited audience - they might  
22 be serious business machines with simple text displays, or they might be games machines with  
23 crude graphics, a few colors, basic sound and limited ability to do much beyond playing games.  
24 The Amiga was an entirely different machine with a far wider range of capabilities. Combining  
25 the power of a business machine with market-leading video and audio capability, the Amiga  
26

**DECLARATION OF EVERT CARTON - 2**

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1 was a hugely capable and flexible machine and introduced the world to the concept of  
2 “multimedia”.

3 9. The hardware of the Amiga was based on proprietary chipsets covered by  
4 numerous patents which handled graphics and sound. General purpose computing power was  
5 delivered by a Motorola 68000 series (68K) processor (CPU).

6 10. The Amiga operating system or AmigaOS was designed from its inception as a  
7 true multi-tasking, multi-media operating system. This combination of tightly coupled  
8 proprietary hardware and software (AmigaOS) produced a very fast, powerful and easy to use  
9 computing platform.  
10

11 11. In 1994 Commodore Business Machines filed for bankruptcy. The then current  
12 Amiga models were the low-end Amiga1200 and the high-end Amiga 4000T. Both machines  
13 were still equipped with proprietary chipsets developed in-house by Commodore and powered  
14 by Motorola 68000 series CPU's running at up to only 25 MHz (comparable to Intel's 486  
15 CPU's). These machines were bundled with Amiga OS 3.0 or Amiga OS 3.1.

16 12. Following the 1994 bankruptcy the company and its assets changed from hand  
17 to hand with subsequent acquisitions of the subsidiary “Amiga Technologies” by the German  
18 company Escom AG (1995-1996) and in 1997 by the U.S. computer manufacturer Gateway  
19 (2000) (NYSE:GTW). Neither Escom nor Gateway marketed any new Amiga hardware albeit  
20 Escom succeeded in restarting production of the existing models using left-over parts  
21 manufactured for Commodore. During the Gateway era only existing stock of unmodified  
22 Amiga 1200's and Amiga 4000 produced by Escom were sold.  
23

24 13. In 1998 Amiga Inc. (at that time a fully owned subsidiary of Gateway) entered  
25 into an agreement with the German company Haage & Partner GmbH ([www.haage-](http://www.haage-)  
26

1 partner.com) for the development of Amiga OS 3.5, the first update of the AmigaOS since the  
2 demise of Commodore in 1994.

3 14. Under the agreement between Amiga Inc. and Haage & Partner, Amiga was  
4 required to pay an undisclosed but sizeable upfront amount to Haage & Partner. In return,  
5 Haage & Partner acted as lead contractor for the development of Amiga OS 3.5 and contracted  
6 with dozens of independent subcontractors in order to produce the Amiga OS 3.5 update. An  
7 example of one of those contracts with the independent subcontractors is attached hereto as  
8 Exhibit 1.

9  
10 15. Under the agreement with Amiga Inc., Haage & Partner was entitled to market  
11 and distribute the resulting Amiga OS 3.5 software itself, with Haage & Partner collecting all  
12 revenues and with Amiga receiving only a per unit royalty. Pursuant to the agreements  
13 concluded between Haage & Partner and its subcontractors, said subcontractors similarly  
14 received a per unit royalty from Haage & Partner usually with a minimum royalty guarantee.  
15 Amiga OS 3.5 was released in October of 1998. There was no direct contractual link between  
16 the subcontractors and Amiga.

17  
18 16. In December of 1999 Gateway sold its Amiga subsidiaries to a group of venture  
19 capitalists i.e. N.Y. based Invisible Hand and Netventures (based in Holland) for 4.5 million  
20 USD. Following the acquisition, the new management of the company (with William McEwen  
21 as CEO and Barry Jon Moss as CTO) immediately refocused the company's strategy and  
22 resources on the software technology from the U.K. based company TAO (www.tao-  
23 group.com) which was entirely unrelated and incompatible with AmigaOS and which to this  
24 date still serves as a delivery platform for Amiga's content for mobile devices (largely games):  
25 the AmigaDE and AmigaAnywhere products.

26  
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1           17.     In late 1999 and already under the new management, Amiga entered into  
2 another agreement with Haage & Partner in order to develop Amiga OS 3.9, another update of  
3 the old AmigaOS. The terms of the 1999 agreement between Amiga are similar to those of the  
4 1998 agreement. As with Amiga OS 3.5, Amiga OS 3.9's new functionality largely consisted  
5 of materials licensed from third party developers. Once again, Haage & Partner was entitled to  
6 market and distribute Amiga OS 3.9 itself and collect all revenues from sales with a per unit  
7 royalty payment to Amiga and Haage & Partner's third party suppliers who had no direct  
8 contractual link with Amiga.  
9

10           18.     In order to "appease the loyal Amiga enthusiasts" (Moss. Declaration in support  
11 of the plaintiff, par. 7) in 2000 Amiga decided to contract development of Amiga OS 4.0 out to  
12 an outside party. Amiga OS 4.0 would herald the switch away from the outdated 68K series of  
13 Motorola CPU's which were limited to 50-66 MHz to the much more modern PowerPC CPU's  
14 developed and marketed by IBM and Motorola/Freescale and which until very recently were  
15 also used by Apple in its line of computers. The PowerPC CPU's are RISC CPU's (reduced  
16 instruction set) which are entirely incompatible with the Motorola 68K series of CISC CPU's  
17 (complex instruction set).  
18

19           19.     Amiga OS 4.0 was initially intended to run on third-party add-on hardware for  
20 the Amiga 1200 and Amiga 3000/4000 equipped with PowerPC CPU's which was produced  
21 during the Gateway era by the German hardware manufacturer Phase 5 (now defunct).  
22 Moreover, the British company Eyetech Group Ltd. had, in the second half of 2001, contracted  
23 with the German company Escena GmbH to develop and produce new PowerPC equipped add-  
24 on hardware for the Amiga 1200/4000, subsequently referred to as "the AmigaOne A1200 and  
25 the AmigaOne A4000" respectively. AmigaOS 4.0 was also intended to run on this PowerPC  
26 hardware which in effect could not be marketed without Amiga OS 4.0 as earlier versions of

1 the Amiga OS including Amiga OS 3.1, 3.5 and 3.9 were compiled for the incompatible 68K  
2 Motorola series of processors and could not run unmodified on the AmigaOne hardware.

3 20. Since Amiga was not willing and able to invest in development of Amiga OS  
4 4.0 in the form of an upfront payment (in contrast with AmigaOS 3.5 and 3.9), no agreement  
5 was found between Haage & Partner and Amiga for the development of Amiga OS 4.0.

6 21. Subsequently, in September and October of 2001, the managing director of  
7 Eyetech Group Ltd., Mr. Alan Redhouse, brokered a tripartite deal between Amiga, Hyperion  
8 and Eyetech. Under that contract, Hyperion would act as the lead contractor for the  
9 development of AmigaOS 4.0, Haage & Partner would work as a subcontractor, Eyetech would  
10 produce the required AmigaOne hardware, and Amiga would not be required to cover any  
11 development cost but would be entitled to a per unit royalty payable from Eyetech for each  
12 AmigaOne sold by Eyetech. A true and accurate copy of that contract, signed in November  
13 2001, is attached hereto as Exhibit 2. Please note that unlike the copy of the contract provided  
14 by Amiga Delaware, Exhibit 2 is a complete copy of that November 2001 agreement, as it  
15 includes the Annex that lists all of the subcontractors. As the Court will see, both Hans-Joerg  
16 Frieden and Thomas Frieden appear on that Annex II.

17 22. Under the November 2001 contract, and in return for absorbing all the  
18 development costs for Amiga OS 4.0, Hyperion is entitled to retain all royalties stemming from  
19 the sale of Amiga OS 4.0. Amiga indicated that it might at a later date be interested to resume  
20 development of AmigaOS through the release of subsequent versions of AmigaOS 4 and  
21 therefore included a clause which allowed it to "buy in" all intellectual property developed  
22 within the framework of the agreement (to the extent it was owned by Hyperion) and subject to  
23 the payment of a symbolic threshold amount. In article 2.01 of the Agreement Amiga granted  
24  
25  
26

1 the AmigaOne partners (defined in art. 1.01 as “Eyetech and Hyperion collectively”) the  
2 following licenses:

- 3 1. “a right and license to use and modify the Software”
- 4 2. “an exclusive right and license to market and distribute OS 4  
5 - as a standalone version for the Target Hardware  
6 - and as an OEM version shipped with the AmigaOne”
- 7 3. “a right and license to use the Amiga trademarks in conjunction with  
8 the AmigaOne”.

9 Article 1.01 defines the Target Hardware as “*the PPC based hardware developed and marketed*  
10 *for the Amiga platform including but not limited to the hardware developed and marketed by*  
11 *Phase 5, DCE and the AmigaOne hardware developed by Escena under contract with the*  
12 *AmigaOne Partners.*” Article 2.01 therefore grants Hyperion a license for any hardware based  
13 on PowerPC CPU’s and developed and marketed for the Amiga platform.

14 23. Contrary to what Amiga claims, Hyperion has not distributed AmigaOS 4 for  
15 any hardware which does not conform to this definition setting forth the approved scope of  
16 Hyperion’s license. Moreover, Hyperion has to date only marketed Amiga OS 4 for the  
17 AmigaOne hardware. Furthermore, the “strategic partnership” Hyperion announced on 25  
18 March, 2007 with the Italian company ACube Systems Srl has not been performed upon yet  
19 and relates only to hardware explicitly mentioned in the definition of the Target Hardware in  
20 article 1.01, i.e. Phase 5 and DCE hardware and the AmigaOne hardware. Under the agreement  
21 with Hyperion, ACube Systems will act as manufacturer and worldwide distributor of the  
22 Amiga OS 4 software packages.

24 24. In article 2.02 of the November 2001 agreement, Hyperion undertook to “*use*  
25 *best efforts to ensure that Amiga OS 4.0 is ready for release before March 1, 2002*”.

26  
DECLARATION OF EVERT CARTON - 7

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1 (Exhibit 2.) Hyperion can demonstrate that it has used best efforts to complete Amiga OS 4.0  
2 in a timely manner taking into account all relevant factual circumstances.

3 25. In accordance with article 3.02, Amiga was to “*provide Hyperion with all*  
4 *necessary Source Code and documentation to allow Hyperion to carry out its contractual*  
5 *obligations under this Agreement*”. This provision has to be read in light of article 2.01 which  
6 grants Hyperion “*a right and license to use and modify the Software*”. In article 1.01 “*the*  
7 *Software*” is defined as “*the Source Code of Amiga OS 3.1 and the upgrades of Amiga OS 3.1*  
8 *including but not limited to OS 3.5 and 3.9 and associated ‘Boing Bags’*”. In article 4.06  
9 (*‘Power to grant rights’*) “*Amiga represents and warrants that:*

10  
11 *(a) it has the right, power and authority to grant the rights and licenses*  
*granted in this Agreement and fully perform its obligations hereunder;*

12 *(b) the making and performance of this Agreement by Hyperion does not*  
13 *and shall not violate any separate agreement, right or obligation existing*  
*between Amiga and any third party; and*

14 *(c) there are no outstanding liens, security interests or other*  
15 *encumbrances of any kind whatsoever in or to the Software or to any of*  
*the intellectual property rights therein.”*

16 Contrary to what Amiga claims, in order for Hyperion to develop OS 4.0, Amiga was to  
17 provide Hyperion not only with the source-code of Amiga OS 3.1 but also of Amiga OS 3.5  
18 and Amiga OS 3.9.

19 26. Further, “*OS 4.0*” is defined in article 1.01 of the agreement as “*the version of*  
20 *the Classic AmigaOS<sup>1</sup> developed by Hyperion pursuant to this Agreement with the functionality*  
21 *described in Annex I hereof*”. Annex I explicitly states under the heading of “*Design Goals of*  
22 *OS 4*”:  
23

24  
25 <sup>1</sup> The term “Classic Amiga OS” was used to differentiate the Amiga OS from the products  
26 developed by Amiga on the basis of the totally unrelated software developed Tao Group Ltd.  
i.e. “AmigaDE” and “AmigaAnywhere”.



1 “The following summarizes the desired design goals of OS 4.0:

2 Essentially, OS 3.9 running on the AmigaOne and Cyberstorm PPC  
3 without using the 68K CPU, using a 68K Emulator (...).

4 As much PPC-native as necessary as soon as possible. (...).”.

5 In order for Hyperion to carry out the contractually agreed upon software development it  
6 required full access to the Amiga OS 3.5 and 3.9 source-code, in order to make the necessary  
7 additions and enhancements, and to recompile the source-code to the PowerPC CPU native  
8 format, which is incompatible with the native format of the 68K CPU.

9 27. In the course of November 2001 Hyperion attempted to obtain access from  
10 Amiga of the AmigaOS 3.5 and 3.9 source-code. It was revealed that Amiga did not in fact  
11 have access to this source-code. Moreover, it was revealed that there was a dispute between  
12 Haage & Partner and Amiga about the intellectual property rights of Amiga OS 3.5, 3.9 and the  
13 subsequently released “Boing Bags” (i.e. service packs).

14 28. We learned from third party developers with whom Haage & Partner had  
15 subcontracted for the development of Amiga OS 3.5 and 3.9 that said developers had only  
16 granted very limited rights to Haage & Partner on the basis of standard contracts drafted by the  
17 legal department of Gateway for the development of Amiga OS 3.5 which were subsequently  
18 recycled for the development of Amiga OS 3.9. A true and accurate copy of an example of one  
19 of those contracts is attached hereto as Exhibit 3. Under article 4 of these agreements (“*Grants*  
20 *of License*”) each developer (referred to as “*Supplier*”) “*grants to H&P an exclusive, perpetual*  
21 *right within the Territory to:*

23 4.1.1. Copy and reproduce or have copied or reproduced, license and  
24 distribute the Product.

25 4.2 *No other use of Supplier Software, H&P Software, Amiga Software,*  
26 *Third-Party Software or the Derivative Works is granted hereby.”*

DECLARATION OF EVERT CARTON - 9

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1 29. In article 9.1 of these agreements under the heading of “ownership” Haage &  
2 Partner “*acknowledges and agrees that all right, title and interest in and to the Supplier*  
3 *Software, in whole or in part, in any form (...) shall belong to Supplier and that Haage &*  
4 *Partner’s sole rights thereto shall be only those rights granted by Supplier pursuant to this*  
5 *Agreement. (...)*”. In other words Haage & Partner and by extension Amiga only had a limited  
6 right and license to reproduce and no source-code license to use and modify. In accordance  
7 with article 11 of said agreements, each party moreover had the right to terminate the license  
8 after 2 years.

9  
10 30. As lead-contractor of Amiga for the development of Amiga OS 3.5 and 3.9,  
11 Haage & Partner had concluded similar master agreements with Amiga, granting Amiga only a  
12 limited reproduction license. As a result, Haage & Partner was unwilling to provide Amiga  
13 (and by extension Hyperion) with the source-code of Amiga OS 3.5 and 3.9 despite the fact that  
14 Amiga had represented to Hyperion that it had full access and rights to the Amiga OS 3.5 and  
15 3.9 source-code.

16 31. In order for Hyperion to carry out its contractually agreed upon development  
17 work, it had to negotiate and enter into dozens of individual agreements with a significant  
18 number of individual Amiga OS 3.5 ad 3.9 subcontractors (developers) in order to gain access  
19 to their source-code. Despite using best efforts, Hyperion was not able to conclude agreements  
20 with all OS 3.5 and 3.9 developers. Most notably, as a result of the ongoing dispute between  
21 Amiga and Haage & Partner relating inter alia to the Amiga OS 3.5 and 3.9 intellectual  
22 property, no agreement between Hyperion and Haage & Partner was reached. This led to  
23 totally unforeseen and very substantial additional costs and loss of time related to the  
24 duplication of the OS 3.5 and 3.9 functionality which Hyperion was not able to secure.  
25  
26

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1           32.     As a direct consequence of the dispute with Amiga, Haage & Partner moreover  
2 opted not to play any part in the development of Amiga OS 4.0. This led to further delays as  
3 Haage & Partner (explicitly listed as a subcontractor in Annex II of the 2001 Agreement) was  
4 originally going to carry out key development work as described in Annex I. Hyperion had to  
5 retask some of its key subcontractors to take over the work originally planned for Haage &  
6 Partner.

7           33.     When Hyperion asked Amiga to provide it with the Amiga OS 3.1 source-code,  
8 Amiga directed this question to Mr. Olaf Barthel, a key Amiga OS 3.5 and 3.9 developer who  
9 had also carried out work for Escom's subsidiary Amiga Technologies GmbH. At the request  
10 of Amiga's current CTO, Mr. Barry Jon Moss, Mr. Barthel had spent very substantial time  
11 reworking the Amiga OS 3.1 source-code to reduce the dependency on the 68K series of  
12 Motorola CPU's (i.e. converting assembly files to C source-code) and generally improving  
13 source-code quality and uniformity. Since Amiga had repeatedly promised Mr. Barthel  
14 compensation for this work, Mr. Barthel was not willing to hand over the reworked source-code  
15 and Hyperion had to enter into an agreement with Mr. Barthel to secure access to the Amiga  
16 OS 3.1 source-code dating back to 1994. The alternative would have been another duplication  
17 of efforts with more ensuing costs and delays Attached hereto as Exhibit 4 is a true and  
18 accurate copy of the contract between Hyperion and Mr. Olaf Barthel mistakenly dated October  
19 instead of December of 2001. Attached hereto as Exhibit 19 is a true and accurate copy of the  
20 e-mail of 25 November of 2001 by Mr. Barry Moss, CTO of Amiga, acknowledging that  
21 compensation for the aforementioned work was promised to Mr. Barthel by Amiga. The  
22 alternative would have been another duplication of efforts with more ensuing costs and delays.  
23  
24

25           34.     In March of 2002 Eyetech informed Hyperion it had terminated the agreement  
26 with Escena GmbH for the development of the AmigaOne 1200/4000 as Escena failed to

1 deliver. Eyetech subsequently did find an alternative solution in the form of the PPC based  
2 motherboards developed by (the now defunct) Fremont, CA based Mai Logic Inc. In a press-  
3 release of 9 July of 2002 Mai Logic and Eyetech officially announced the agreement. A true  
4 and accurate copy of that announcement is attached hereto as Exhibit 5. This announcement  
5 was subsequently officially endorsed by Amiga on their website as the new AmigaOne. A true  
6 and accurate copy of that announcement is attached hereto as Exhibit 6.

7  
8 35. Contrary to the design of Escena, which was intended to operate as an add-on to  
9 the original Amiga 1200 or Amiga 4000 motherboards with full access to the Amiga's custom  
10 proprietary chipsets as developed by Commodore, the Mai Logic design was a standalone  
11 motherboard with a PowerPC CPU and off the shelf components which were used in various  
12 mainstream PCs but without the proprietary Amiga chipsets.

13 36. As Amiga states on its own website: "The "Amiga Operating System" originally  
14 targeted the desktop computing market. It was built around tightly integrated hardware and  
15 software." See Exhibit 7, which is a true and accurate copy of the relevant portion of Amiga's  
16 website.

17 37. As a result of the cancellation of the Escena developed AmigaOne 1200/4000 in  
18 favor of the stand-alone Mai Logic AmigaOne without the Amiga proprietary custom chipsets,  
19 Hyperion had to tackle the very substantial task of "decoupling" the Amiga operating system  
20 from the Amiga custom chipsets. As a result of the tight integration between the Amiga  
21 hardware and software, this required very extensive changes throughout the AmigaOS source-  
22 code in addition to a whole new set of device drivers (e.g. IDE, USB) for the off the shelf  
23 components present on the Mai Logic AmigaOne, work which was originally planned by  
24 Amiga for a hypothetical Amiga OS 4.2.  
25  
26

1           38. In spite of this Hyperion released the first version of Amiga OS 4.0 to the  
2 AmigaOne owners in May of 2004. A true and accurate copy of a notice of that release is  
3 attached hereto as Exhibit 8. The first version of Amiga OS 4.0 included all functionality  
4 which was listed in Annex I of the 2001 Agreement as “essential.” On October 10, 2004 a first  
5 update of Amiga OS 4.0 was released to the AmigaOne owners which included functionality  
6 listed in Annex I as “important” or “optional” or even scheduled for a hypothetical Amiga OS  
7 4.2. A true and accurate copy of the notice of that release is attached hereto as Exhibit 9. The  
8 highly acclaimed independent tech website “Ars Technica” reviewed the first update of Amiga  
9 OS 4.0 on 17 January 2005 and concluded: *“I have used PDAs that have similar CPU and RAM*  
10 *capacities as my AmigaOne and they do not provide the same speed and functionality that is*  
11 *already available in OS4. OS4 feels like a full desktop, yet has the resource requirements of a*  
12 *handheld.”* A true and accurate copy of that review is attached hereto as Exhibit 10. **Most if**  
13 **not all of the features listed in Annex I are mentioned throughout this review, some more**  
14 **explicitly than others.** On December 27 2004, another update of Amiga OS 4.0 was released  
15 which contained all features described in Annex I as “essential” or “important” and which  
16 included many optional features, some not even listed in Annex I of the 2001 Agreement. A  
17 true and accurate copy of that release is attached hereto as Exhibit 11.  
18

19           39. It should also be noted that at no point prior to November 2006 did Amiga  
20 Washington or its purported legal successor KMOS, subsequently renamed to Amiga Inc  
21 (Delaware) (KMOS did publicly announce they had renamed themselves to “Amiga Inc”. We  
22 had unfortunately no way to know what the exact nature of the transformation was.), and  
23 current plaintiff, ever raise the issue that Hyperion had not used best efforts to complete Amiga  
24 OS 4.0 to the contractual specifications. Quite the contrary, on 26 May 2004 KMOS/Amiga  
25 entered into a separate agreement with Hyperion to produce a demonstration version of Amiga  
26

DECLARATION OF EVERT CARTON - 13

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1 OS 4.0 for the PDA reference design from IBM, the Arctic (“Agreement for the provision of  
2 software development services.”) A true and accurate copy of that agreement is attached hereto  
3 as Exhibit 12. **Please note that the unsigned contract submitted by Amiga Delaware as**  
4 **Exhibit G relating to the same Arctic development work is materially different and is**  
5 **unknown to us.** Without the decoupling of the Amiga OS from the proprietary Amiga custom  
6 chipsets—which was never part of the original contractual specifications for Amiga OS 4.0—  
7 this would not have been possible in a reasonable timeframe.

8  
9 40. Amiga Delaware maintains that Hyperion is in breach of contract by refusing to  
10 turn over all source-code and intellectual property title for Amiga OS 4.0. Amiga Delaware  
11 bases this claim on article 3.01 of the 2001 Agreement which provides the following:

12 Amiga may, at any time but no later than six (6) months after the  
13 completion of OS 4.0, elect to pay Hyperion Twenty Five Thousand  
14 USD (25,000 USD) in order to acquire the Object Code, Source Code  
15 and intellectual property of OS 4.0 pursuant to and within the limits set  
16 out in article 2.06 hereof. Said payment will be first be applied against  
17 the balance of any outstanding invoices by the AmigaOne Partners vis à  
18 vis Amiga. In the event Amiga does not elect to carry out the  
19 aforementioned payment, all ownership and title in the enhancements of  
20 and additions to the Software effected by Hyperion and its  
21 subcontractors pursuant to this Agreement, shall rest with Hyperion.

17 There is no other contractual or legal mechanism which Amiga can invoke to lay claim to the  
18 Amiga OS 4.0 source-code in the absence of a direct contractual link between Amiga and  
19 Hyperion’s subcontractors, most of whom are located in the European Union.

20  
21 41. From the wording of this article 3.01 three important conclusions can be drawn:  
22  
23  
24  
25  
26

1 (1) Once completed (i.e. once all contractually agreed upon tasks  
2 considered essential or important in Annex I were completed), Amiga  
only had 6 months remaining to exercise the “buy in” clause.

3 (2) Any payments would first be applied against any outstanding  
4 invoices Amiga had with the Amiga One Partners.

5 (3) In the event Amiga did not elect to exercise the buy-in option within  
6 the contractually allotted timeframe, all ownership and title in the  
7 enhancements of and additions to the Software effected by Hyperion and  
its subcontractors pursuant to this Agreement, shall rest with Hyperion to  
the extent that it was transferred to Hyperion by the subcontractors in the  
first place.

8 Amiga Delaware’s claim that the buy-in option was exercised in 2003 is without merit because  
9 Amiga Delaware fails to produce proof of payment of the full amount of 25,000 USD and can  
10 instead only demonstrate effective payment of 22,250 USD and not even by Amiga itself. (See  
11 Exhibit J to the Declaration of William McEwen In Support of Plaintiff Amiga, Inc.’s Motion  
12 for Preliminary Injunction and Motion for Expedited Discovery.)

13 42. Whilst Hyperion’s invoice mentioned USD 22500, the actual amount received  
14 was USD 22250 USD as can be ascertained from the plaintiff’s Exhibit J. Hyperion does not  
15 deny having received USD 2250 from Tachyon Corporation on April 8<sup>th</sup>, 2003 (with no  
16 accompanying message), and USD 20000 on May 6<sup>th</sup> 2003 from Itec LLC (“RE: AMIGA  
17 OPERATING SYSTEM”). Acting in good faith, both payments were combined in the invoice  
18 that mistakenly mentions 22500 USD and that was issued to Itec LLC, the party the November  
19 3rd 2001 Agreement was purportedly transferred to, and dated December 31, 2003, fiscal  
20 yearend. Said invoice, a true and accurate copy of which is attached hereto as Exhibit 13, was  
21 registered as ‘Payment pursuant to article 3.01 of the November 3.01 agreement between  
22 Amiga, Eyetech and Hyperion’).

23 43. The Exhibit J filed by Plaintiff does confirm the declaration by William  
24 McEwen that two payments were issued, in April and May 2003. The payments Mister  
25  
26



1 McEwen refers to do however total only 22250 USD, instead of the purported USD 25000. We  
2 have never contested nor disputed the actually paid out amounts. Indeed, as stated above, we  
3 have officially acknowledged said payments with the aforementioned invoice to Itec LLC.  
4 Hyperion has not found any payment by the company that was at the time known as Amiga.

5 44. Moreover, in 2003 Amiga still had one outstanding invoice with Hyperion to the  
6 amount of USD 5000 dated 31 May 2001 and relating to 3D work carried out by Hyperion for  
7 the AmigaDE software. A true and accurate copy of that invoice is attached hereto as Exhibit  
8 14. The existence of the invoice was subsequently acknowledged by Amiga's CTO Barry Jon  
9 Moss aka "Fleecy" by e-mail. A true and accurate copy of that e-mail is attached hereto as  
10 Exhibit 15. Any payments by Amiga had to be applied first to this account receivable (with  
11 accrued interest) as per art. 3.01 of the Agreement.  
12

13 45. Itec LLC committed to honouring these financial obligations by Amiga  
14 Washington in the Transfer Agreement, by the clause in the agreement stating:

15 "Hyperion confirms that for the receipt of 25000 US, Hyperion shall transfer the  
16 ownership of the Object Code, Source Code and intellectual property of OS 4.0 to Itec  
17 in accordance with the provisions of the November 1, 2001 agreement between Amiga,  
Hyperion and Eyetech and to the extent it can do so under existing agreements with  
third party developers whose work shall be integrated in OS 4.0"

18 This statement implies a commitment to Article 3.01 in the November 3<sup>rd</sup>, 2001 Agreement,  
19 explicitly mentioning "Said payment shall first be applied against the balance of any  
20 outstanding invoices by the AmigaOne partners vis à vis Amiga".

21 46. In conclusion it can be stated with absolute certainty that the buy-in clause was  
22 not activated in 2003 because insufficient funds were transferred to Hyperion to satisfy the  
23 contractual conditions. The subsequent payments in November 2006 for outstanding invoices  
24 of Amiga were in fact made outside the time-period allotted for the buy-in clause to be  
25 activated seeing as Amiga OS 4.0 was completed and released to the contractual specifications  
26

**DECLARATION OF EVERT CARTON - 16**

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1 in December of 2004 and following that date, Amiga only had 6 months to make full payment  
2 which it failed to do.

3 47. In October and November of 2006 Hyperion also insisted on payment of the  
4 legal fees Hyperion had had to pay in 2005 on behalf of Amiga Delaware following Amiga  
5 Delaware's former CEO Mr. Garry Hare retaining Hyperion's Belgian law firm to write a legal  
6 opinion on the legal standing of various AmigaOS derivatives under EU and Belgian  
7 intellectual property law. The initial agreement between Hyperion and Amiga was that  
8 Hyperion would foot half of the legal fees for this work and that Amiga would pay the other  
9 half. Unsurprisingly, Amiga never paid their half which amounted to a retainer of 5,000 euros  
10 (6767 USD at the current exchange rate) of a total retainer of 10000 euros.  
11

12 48. Hyperion agreed on 24 April 2003 to assign the 2001 agreement to Itec, LLC, a  
13 State of New York, U.S.A., limited liability company with its administrative seat at 102 Prince  
14 Street, NY, NY 10012, U.S.A. A true and accurate copy of that agreement is attached hereto as  
15 Exhibit 16. Itec LLC was a company controlled by Mr. Pentti Kouri who was also the main  
16 shareholder of Amiga Washington. The idea behind the transaction was purportedly to separate  
17 the Classic Amiga OS products and activities (such as Amiga OS 4.0) from the new product-  
18 line AmigaDE and AmigaAnywhere based on the entirely incompatible and unrelated  
19 technology from Tao Group.  
20

21 49. The agreement between Hyperion and Itec was only one part of the  
22 documentation needed to successfully assign Amiga Washington's rights to Itec. Section 7.12  
23 of the 3 November 2001 agreement reads in part as follows:  
24  
25  
26

1 Neither party shall assign or subcontract the whole or any part of this  
2 Agreement without the other party's prior written consent.

3 (Exhibit 2.) As the first page of Exhibit 2 explains, the November 3, 2001 contract was  
4 between Amiga Washington and the "Amiga One Partners," meaning "Eyetech and Hyperion  
5 collectively." (Exhibit 2, Art. 1.01.) Thus, according to the contract, in order to have an  
6 effective assignment of Amiga Washington's rights to Itec, *both* Amiga Washington and  
7 Eyetech had to give their prior written consent. Eyetech has not done so and, to my knowledge,  
8 neither has Amiga Washington.

9 50. Another important condition of the 3 November 2001 contract is found in  
10 paragraph 2.07, Bankruptcy:

11 In the event Amiga files for bankruptcy or becomes insolvent, the Amiga  
12 One Partners are granted an exclusive, perpetual, world-wide and royalty  
13 free right and license to develop (at their sole expense), use, modify and  
market the Software and OS 4 under the "Amiga OS" trademark.

14 (Exhibit 2.) It was only after signing the 24 April 2003 contract with Itec that Hyperion found  
15 out that in reality Amiga Washington was in a state of virtual bankruptcy and insolvent and that  
16 this assignment was part of a larger scheme to extract assets out of Amiga Washington to  
17 relocate them into KMOS Inc. (leaving only debts in the Washington State entity) which  
18 subsequently renamed itself as Amiga Delaware, the current plaintiff. In this process KMOS  
19 Inc. acquired Itec LLC. It appears, then, that the Amiga One Partners (Hyperion and Eyetech)  
20 already owned an exclusive, perpetual right to the Software and OS 4 under the "Amiga OS"  
21 trademark on 24 April 2003, and that Amiga had nothing to assign to Itec.

22 51. If, on the other hand, the 24 April 2003 agreement was a valid transfer, it still  
23 contains a restatement of art. 3.01 of the 2001 Agreement:  
24  
25  
26

1 Hyperion confirms that for the receipt of 25,000.00 USD, Hyperion shall  
2 transfer the ownership of the Object Code, Source Code and intellectual  
3 property of OS 4.0 to Itec in accordance with the provisions of the  
4 November 1, 2001 agreement between Amiga, Hyperion and Eyetech  
and to the extent it can do so under existing agreements with third party  
developers whose work shall be integrated in OS 4.0.

5 As pointed out above, the payment of 25.000 USD was subsequently never carried out in full  
6 which is why many months later Hyperion on 31 December 2003 raised an invoice of 22.500  
7 USD to Itec in order to justify the payments in its accounts. (See Exhibit 13.)

8 52. The November 2001 Agreement therefore makes it abundantly clear that  
9 Hyperion can only transfer Source-Code and the intellectual property contained therein subject  
10 to the rights granted to Hyperion by Hyperion's subcontractors. Hyperion is precluded by  
11 copyright law and by contract from transferring more rights that it has secured itself.  
12 Furthermore, even if "ownership" had been transferred to Amiga, Hyperion would still have  
13 retained a license to use that intellectual property under Art. 2.01 of the November 2001  
14 agreement (Exhibit 2.) Any other arrangement would have been unreasonable because Amiga  
15 Washington was obligated to pay none of the upfront development costs. By contrast,  
16 Hyperion has invested approximately EURO 830000, which amounts to US \$1.128.000 as of  
17 the 18 May 2007 official exchange rate. It simply is not reasonable for Amiga Delaware to  
18 claim that it could extinguish all of Hyperion's rights and interest in this intellectual property  
19 for a mere US \$25.000 payment.  
20

21 53. Several developers have indeed elected to restrict the rights granted to Hyperion  
22 to various degrees, some by granting only an object code license i.e. a license to copy,  
23 reproduce and distribute in binary form. A true and accurate example of one of those contracts  
24 is attached hereto as Exhibit 17. The Agreement of 24 April 2003 contains a similar, explicit  
25 acknowledgement of the rights of third party developers. (Exhibit 16.)  
26

1 54. Even if one were to admit (which is not the case), that article 3.01 of the 3  
2 November 2001 contract was executed fully in a timely manner, Hyperion can never be  
3 required to turn over more rights than it has itself, but that is exactly what Amiga is seeking to  
4 accomplish.

5 55. Moreover, if Amiga Delaware's purported termination of the 3 November 2001  
6 agreement was considered effective, and even if one were to admit that art. 3.01 was fully  
7 executed in a timely manner, Amiga Delaware has removed the contractual foundation for the  
8 transfer of the intellectual property rights which Hyperion obtained contractually from third  
9 parties. Said third parties would need to decide to keep the contracts between Hyperion and  
10 themselves in place, instead of exercising their right to terminate these agreements. It should  
11 be noted in this respect that all contracts between Hyperion and its third party contractors are  
12 subject to Belgian law and provide for Belgian courts as an exclusive venue.

14 56. Amiga Delaware also claims that Hyperion committed a material breach of the  
15 2001 Agreement by failing to secure the widest possible rights to the intellectual property  
16 developed within the framework of the 2001 Agreement. Article 2.06 of the 2001 Agreement  
17 indeed states the following:

18 (...)  
19 (...)At any time prior to the completion of OS 4.0, and no later than six  
20 (6) months thereafter and provided Amiga makes the payment pursuant  
21 to article 3.01 hereof, Hyperion shall transfer all Source-Code, interest  
22 and title in OS 4.0 to Amiga to the extent it can do so under the  
23 agreements concluded with third party contractors. Hyperion shall use  
best efforts to secure the widest possible rights from third party  
contractors. Amiga hereby acknowledges and accepts that some third  
parties may only grant an Object Code license or may otherwise restrict  
the rights granted to Hyperion.

24 (Exhibit 2, emphasis added.) In view of the fact that Amiga Washington did not invest any  
25 funds in the Amiga OS 4.0 development and instead and from the outset defaulted on its  
26 primary contractual obligation, i.e. the provision of the Amiga OS 3.1, 3.5 and 3.9 source-code

1 which caused substantial extra costs for Hyperion, Hyperion did indeed use best efforts to  
2 secure the widest possible rights. In most cases wherein no source-code access could be  
3 obtained this was due to the fact that the financial requirements of the subcontractor for full  
4 transfer of ownership or a source-code license could not be justified by Hyperion within the  
5 limited funding available for the project.

6 57. Amiga had no reasonable expectation that for an amount of 25,000 USD it could  
7 obtain more rights than it had previously obtained pursuant to the 1998 and 1999 agreements  
8 with Haage & Partner for the development of Amiga OS 3.5 and Amiga OS 3.9, especially  
9 because Hyperion did communicate the identity and the number of the subcontractors in Annex  
10 II of the 2001 agreement which included Haage & Partner.

11 58. Under these agreements between Amiga and Haage & Partner (“Grants of  
12 License”) Haage & Partner merely grants to Amiga an exclusive, perpetual right within the  
13 Territory to:

14 copy and reproduce or have copied or reproduced, license and distribute  
15 the Product.

16 No other use of Supplier Software, H&P Software, Amiga Software,  
17 Third-Party Software or the Derivative Works is granted hereby.”

18 (Exhibits 1 and 3) Moreover said exclusive “object code only” licenses to reproduce and copy  
19 were subject to termination by either party after an initial term of two year.

20 59. Since Hyperion had to enter into dozens of agreements with third party  
21 contributors to Amiga OS 3.5 and 3.9 to obtain their source-code, Hyperion actually secured  
22 “joint ownership” with full source-code access of these sections of Amiga OS 3.5 and Amiga  
23 OS 3.9. A true and accurate example of one of those agreements is attached hereto as Exhibit  
24 18. In essence, Hyperion has more extensive rights on Amiga OS 3.5 and 3.9 than Amiga  
25  
26

1 Washington owned when it signed the 3 November 2001 contract. Amiga Delaware therefore  
2 has no claim to those rights under that agreement.

3 60. Hyperion moreover has full access to the reworked Amiga OS 3.1 source-code  
4 through a contract with Mr. Olaf Barthel, something which Amiga was never able to secure as  
5 it failed to compensate Mr. Barthel for his efforts. A true and accurate copy of Hyperion's  
6 contract with Mr. Barthel (mistakenly dated October of 2001 instead of December of 2001) is  
7 attached hereto as Exhibit 4.

8  
9 61. Quite a number of contracts with developers actually provide for full transfer of  
10 ownership to Hyperion, exclusive or non-exclusive perpetual source-code licenses. A true and  
11 accurate example of one of those agreements is attached hereto as Exhibit 17.

12 62. Amiga also claims Hyperion failed to disclose to Amiga that the ExecSG kernel,  
13 which was developed by Hans-Joerg Frieden and Thomas Frieden as Hyperion's  
14 subcontractors, would not be owned by Amiga if it exercised Art. 3.01 of the 2001 Agreement.

15 63. In response, it should first of all be noted that both Hans-Joerg and Thomas  
16 Frieden are explicitly listed as independent subcontractors in Annex II of the 2001 Agreement.  
17 (Exhibit 2, last page.) The fact that they were not employees of Hyperion was always clear to  
18 Amiga Washington who had contracted with Hyperion in 2001 for the development of 3D  
19 technology for their AmigaDE software ("Ami3D"). In the agreement of 26 May 2004  
20 ("Agreement for the provision of software development services") this fact is once more  
21 explicitly acknowledged in article 2.01 of this agreement wherein it is stated that 'Hyperion  
22 shall procure the services of Hans-Joerg and Thomas Frieden as independent sub-contractors to  
23 carry out the Work.' (Exhibit 12.)  
24

25 64. Moreover, Hyperion did secure a broad object-code license to the ExecSG  
26 kernel with a contractual option to acquire full ownership at a later date. (Exhibit 18.) In view

**DECLARATION OF EVERT CARTON - 22**

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1 of the fact that the original Exec kernel—which is used in Amiga OS 3.1, Amiga OS 3.5 and  
2 Amiga OS 3.9—is entirely written in assembly (machine code of the Motorola 68000 series of  
3 CPU which precludes recompilation on a different machine) rendering it entirely useless within  
4 the framework of an operating system intended to operate on the incompatible PowerPC  
5 CPU's, Amiga is from a purely practical and technical standpoint now not worse off with an  
6 object-code license of a PowerPC kernel which is written in C and no longer tied to the Amiga  
7 proprietary custom chipsets. PowerPC is a RISC microprocessor architecture created by the  
8 1991 Apple-IBM-Motorola alliance, known as AIM. Originally intended for personal  
9 computers, PowerPC CPUs have since become popular embedded and high-performance  
10 processors as well. PowerPC was the cornerstone of AIM's PReP and Common Hardware  
11 Reference Platform initiatives in the 1990s, but the architecture found the most success in the  
12 personal computer market in Apple's Macintosh lines from 1994 to 2006 (before Apple's  
13 transition to Intel).

14  
15 65. In addition to all of the other problems with Amiga Delaware's arguments, Art.  
16 2.08 provides that "*in the event Amiga decides to halt development of the Classic Amiga OS for*  
17 *the Target Hardware, the Amiga One Partners are granted an exclusive, perpetual, worldwide*  
18 *right and license to develop, use, modify and market the Software and OS 4 under the "Amiga*  
19 *OS" trademark and at their sole expense. (...). Amiga shall be deemed to have halted*  
20 *development of the Classic Amiga OS in the event that no substantially new version of the*  
21 *Classic Amiga OS for the Target Hardware is released within 6 (six) months after the*  
22 *completion of OS 4.0 by Hyperion."* (Exhibit 2.)

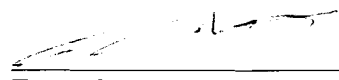
23  
24 66. Hyperion did in fact complete and release Amiga OS 4.0 to the contractual  
25 specifications (as described in Annex I of the 2001 Agreement) in December of 2004. Amiga,  
26 however, did not develop a substantially new version of the Classic Amiga OS for the Target

1 Hardware Amiga within six months of that date. Amiga therefore is deemed to have halted  
2 development of the Classic AmigaOS. As a result, since no later than July of 2005 the  
3 AmigaOne Partners have “an exclusive, perpetual, worldwide right and license to develop, use,  
4 modify and market the Software and OS 4 under the “Amiga OS” trademark and at their sole  
5 expense.”

6 67. For all of the above reasons, Amiga Delaware could not terminate the 2001  
7 Agreement in December of 2006.

8 **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS**  
9 **OF THE STATE OF WASHINGTON AND BELGIUM THAT THE**  
10 **FOREGOING IS TRUE AND CORRECT.**

11  
12 May 15, 2007  
Date

  
\_\_\_\_\_  
Evert Carton

13  
14 Antwerpen, Belgium  
Place

15 506p.doc