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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
JUDGMENT ON THE PLEADINGS**

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

1. I am Managing Partner of Hyperion VOF (also known as Hyperion Entertainment), a software company located in Belgium. I currently reside in Belgium. I am Belgian and a US citizen. I am over the age of 18, I have personal knowledge of the matters stated herein and I am competent to testify.

2. Hyperion first began to use in commerce the AmigaOS 4.0 trademark immediately following the execution of the 3 November 2001 Agreement between Hyperion, Eyeteck and Amiga, Inc. a Washington Corporation (“Amiga Washington”). The first uses of the name “AmigaOS 4.0” were in the form of interviews and appearances at enthusiasts shows, to create public awareness and explain the project to the public.

**DECLARATION OF EVERT CARTON OPPOSING
MOTION FOR JUDGMENT ON THE PLEADINGS
Cause No: 07-0631-RSM**

- 1

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WILLIAM A. KINSEL, PLLC**
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1 3. Hyperion has made extensive use of the relevant Amiga trademarks over the
2 internet. For instance, the main Hyperion website (<http://www.hyperion-entertainment.biz> or
3 <http://www.hyperion-entertainment.com>), launched in 2001, was used extensively for
4 announcements about the development of OS 4.0, with the explicit use of the AmigaOS 4.0,
5 AmigaOne and BoingBall trademarks. A true and accurate rendering of selected pages in the
6 Amiga-section of the main Hyperion-website is attached hereto as Exhibit A. Please note the
7 use of the “BoingBall” logo in the upper left and right of each page of that website, along with
8 the various announcements related to AmigaOS 4.0 and AmigaOne that appear throughout
9 Exhibit A. As Exhibit A demonstrates, Hyperion has made extensive, continuous use of these
10 trademarks on this site from 2002 through 2007.

12 4. In addition, I have attached hereto as Exhibit B true and accurate copies of three
13 pages from Hyperion’s website dedicated specifically to AmigaOS 4.0. Those documents are
14 Bates numbered H-0477 to H-0479 because we produced those documents in response to the
15 Court’s earlier order requiring us to respond to Amiga Delaware’s initial discovery requests.
16 As can be seen from the footer of those pages, this website was printed on May 28, 2007, it
17 bears Hyperion’s copyright for 2005, and it makes repeated references to Hyperion’s software
18 product known by the name AmigaOS 4.0. This dedicated website ([http://os4.hyperion-](http://os4.hyperion-entertainment.biz)
19 [entertainment.biz](http://os4.hyperion-entertainment.biz)), launched in 2005, was a part of our efforts to develop consumer awareness
20 of our particular product, namely the AmigaOS 4.0 operating system developed by Hyperion
21 for use in the modern computing environment.

23 5. Hyperion has, in short, continuously used the relevant Amiga trademarks in
24 commerce from late 2001 to the present.

25 6. Additional evidence that Hyperion has repeatedly and continuously used the
26 AmigaOS 4.0 trademark, in a way that identifies Hyperion as the origin of that product, is

1 found in my earlier declaration titled "Declaration of Evert Carton in Opposition to Amiga
2 Delaware's Motion for Preliminary Injunction." (Dkt 26.) For instance, the press releases
3 found at Exhibit 8, p. 82, Exhibit 9, p. 83, and Exhibit 11, p 105, all clearly associate Hyperion
4 as the source of AmigaOS 4.0.

5 7. Proof that we succeeded in developing awareness among consumers that
6 Hyperion is the source of AmigaOS 4.0 is found in the Ars Technica review of January 17,
7 2005, found at Exhibit 10, pages 84 to 104, of my earlier declaration. (See in particular Dkt 26,
8 Exhibit 10, thereto, at pp. 86, 98 & 104.) Other signs of public awareness related to the
9 relationship between Hyperion and Amiga OS 4.0, include the Amiga History Guide
10 (<http://www.amigahistory.co.uk>), providing a hyperlink titled "Amiga OS 4.0", linking directly
11 to the Hyperion website and the Wikipedia entry about Amiga OS
12 (<http://en.wikipedia.org/wiki/AmigaOS>), linking to Hyperion's website as "The official Amiga
13 OS 4.0 homepage".

14 8. I have attached hereto as Exhibit C two pages, marked H-0508 and H-0509,
15 which were also produced by Hyperion to Amiga Delaware in this case. Page H-0508 is a
16 photocopy of the outside jacket of the folder that holds the CD containing Hyperion's
17 AmigaOS 4.0. The next page, H-509, is the inside of the jacket. As can be seen on the left-
18 hand side of H-0509, there is a photocopy of the CD itself. This Developer Pre-release was
19 announced by Hyperion in April 2004 and was delivered to customers worldwide from June
20 2004 onwards. I estimate that Hyperion shipped more or less 1000 of that Developer Pre-
21 release, either in direct sales to the customers, (retail price 95 euro, excl VAT) or in a
22 promotion campaign by Eyetech (OEM price 55 euro, excl. VAT), The updates were, and are,
23 available as a free download for registered users.. As can be seen from Exhibit C, this product
24 makes extensive use of the "BoingBall" and AmigaOS 4.0 trademarks.

1 9. Exhibits A, B and C establish that Hyperion used the AmigaOS 4.0 trademark
2 before it was used by KMOS. For instance, as can be seen on Exhibit C, H-0508, the back of
3 the folder states: "©2004 Hyperion Entertainment VOF, developed under license from KMOS,
4 Inc. All rights reserved. "Amiga"® is a registered trademark of Amiga, Inc." (Emphasis
5 added.) This disclosure is repeated on the CD itself, on H-509, although the text is obscured
6 somewhat by the cardboard tab holding the CD in the folder. This language demonstrates that,
7 at the time Hyperion was using the AmigaOS 4.0 and the "BoingBall" trademarks to identify
8 this software as its own, KMOS was not the holder of any Amiga trademark.
9

10 10. In sum, Hyperion had used the AmigaOS, AmigaOne and BoingBall trademarks
11 to identify OS 4.0 as Hyperion's product for years before KMOS came on the scene. We did so
12 in order to establish with the public that Hyperion is the originator of Amiga OS 4.0.

13 11. Hyperion is not and has not been in a formal, legal partnership with Eyetech.
14 The phrase "Amiga One Partners," as used in the 3 November 2001 Agreement (see, e.g., my
15 first declaration, Dkt 26, at Exhibit 2, page 40), is simply a defined term, a shorthand, created
16 for the purposes of that Agreement. That defined term did not create a new legal entity, as
17 should be clear from the identification of the contracting parties at the beginning of the
18 Agreement, at Dkt 26, Exhibit 2, p. 40, and from paragraph 4.05 of the same.


19 12. It is my opinion, based upon what I have learned regarding Amiga Washington's
20 insolvency, and regarding the purported transactions between Amiga Washington, Itec LLC
21 and KMOS, that Hyperion, and Eyetech, is each properly considered either or both the
22 successors and assigns of Amiga Washington, as their interests are defined in the 3 November
23 2001 Agreement. For instance, because the evidence previously reviewed for the Court
24 includes the admission by Amiga Washington that it was insolvent prior to any supposed
25 transfer to Itec, paragraph 2.07 of the 3 November 2001 Agreement transferred to Hyperion and
26

1 Eyetech (referred to there as the Amiga One Partners) “an exclusive, perpetual, world-wide and
2 royalty free right and license to develop (at their sole expense), use, modify and market the
3 Software and OS 4 under the “AmigaOS” trademark.” (Dkt. 26, Ex. 2, p. 42.) The Court will
4 observe that “Software” is defined to mean “the Source Code of Amiga OS 3.1 and the
5 upgrades of Amiga OS 3.1 including but not limited to OS 3.5 and 3.9 and associated
6 “BoingBags”. (Dkt. 26, Ex. 2, p. 41.) Given the breadth of this transfer of rights, there appears
7 to be nothing left that could be owned by any other party with respect to AmigaOS , except,
8 e.g., for those entities Hyperion contracted with to develop OS 4.0. This broad transfer fulfills
9 my commonsense understanding of the terms “successor” and/or “assign.” For similar reasons,
10 I consider the transfer that occurred pursuant to paragraph 2.08 of the Agreement to
11 independently make Hyperion a successor or assign.
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1 13. Finally, Amiga Delaware has effectively admitted that Hyperion was not paid
2 \$25,000, as required by the Agreement, through its assertions that there was a mutual mistake
3 regarding the actual amount of money paid to Hyperion. As the General Manager of Hyperion,
4 however, I can affirmatively state that we were never mistaken about the subject, and that we
5 knew that we had not been paid the required sum. Thus, under paragraph 3.01 of the
6 Agreement (Dkt 26, Ex. 2, p. 42), "all ownership and title in the enhancements of and additions
7 to the Software effect by Hyperion and its subcontractors pursuant to this Agreement, shall rest
8 with Hyperion." Hyperion, therefore, is the owner of AmigaOS 4.0 and, necessarily, has the
9 right to identify it in public for what it is, i.e., "AmigaOS 4.0."

11 **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
12 OF THE STATE OF WASHINGTON AND BELGIUM THAT THE
13 FOREGOING IS TRUE AND CORRECT.**

14 July 22, 2007
Date


Evert Carton

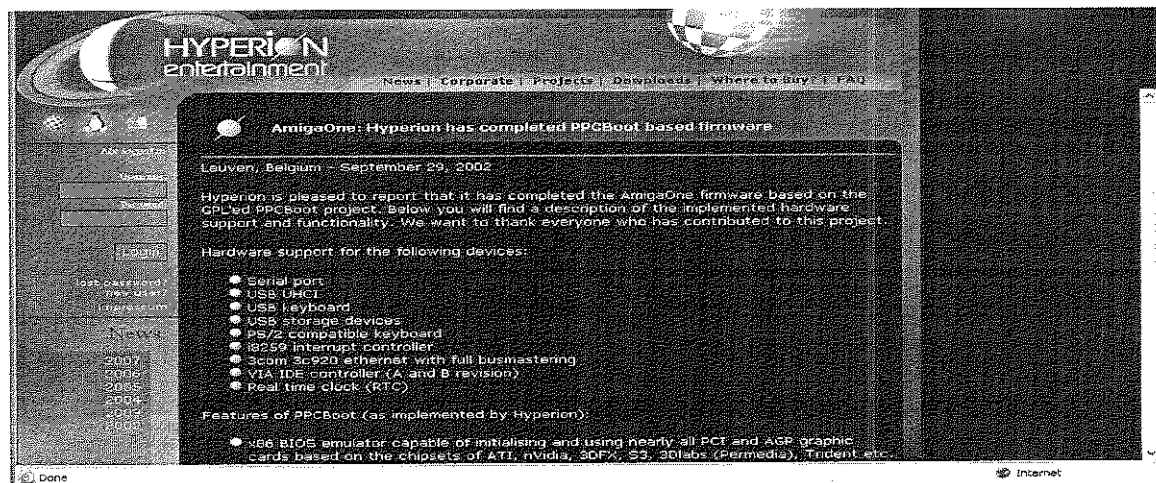
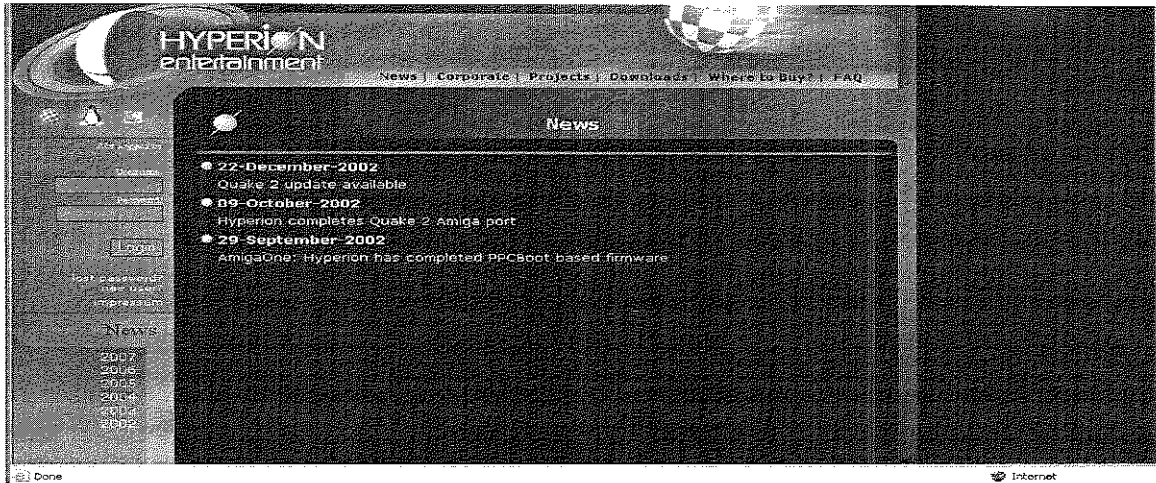
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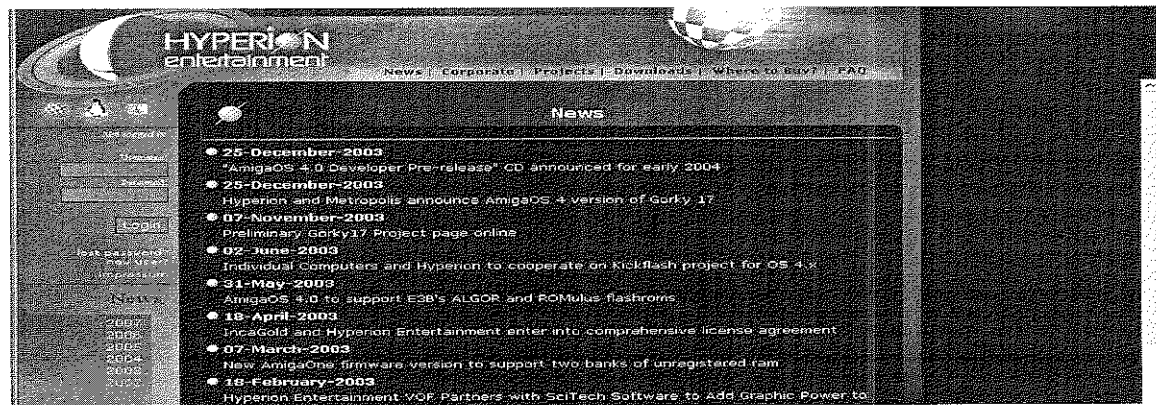
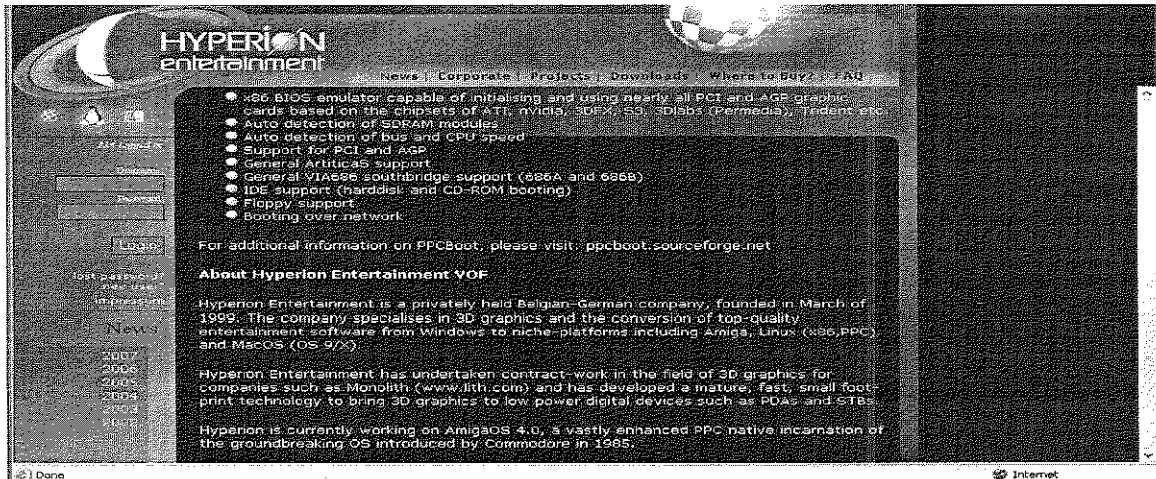
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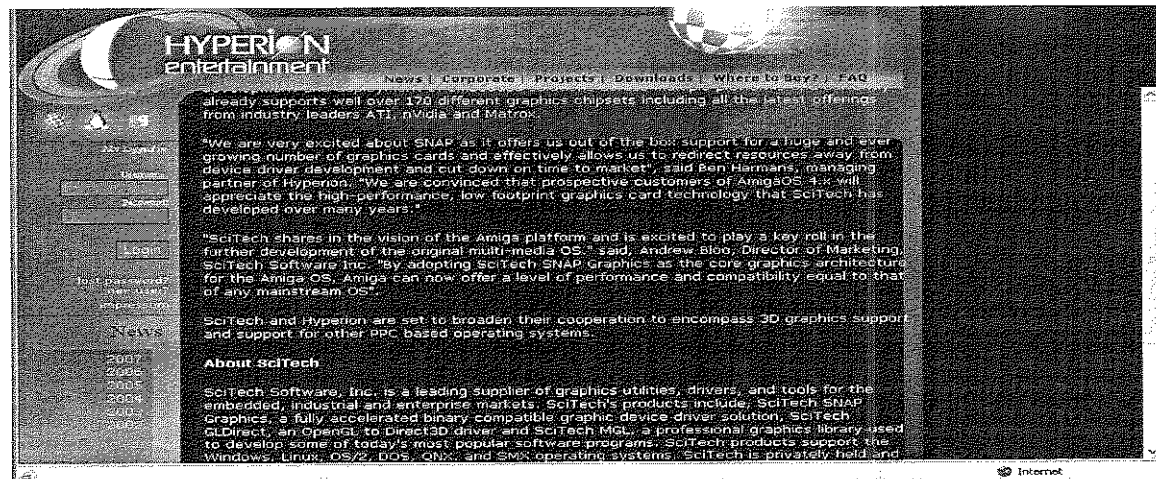
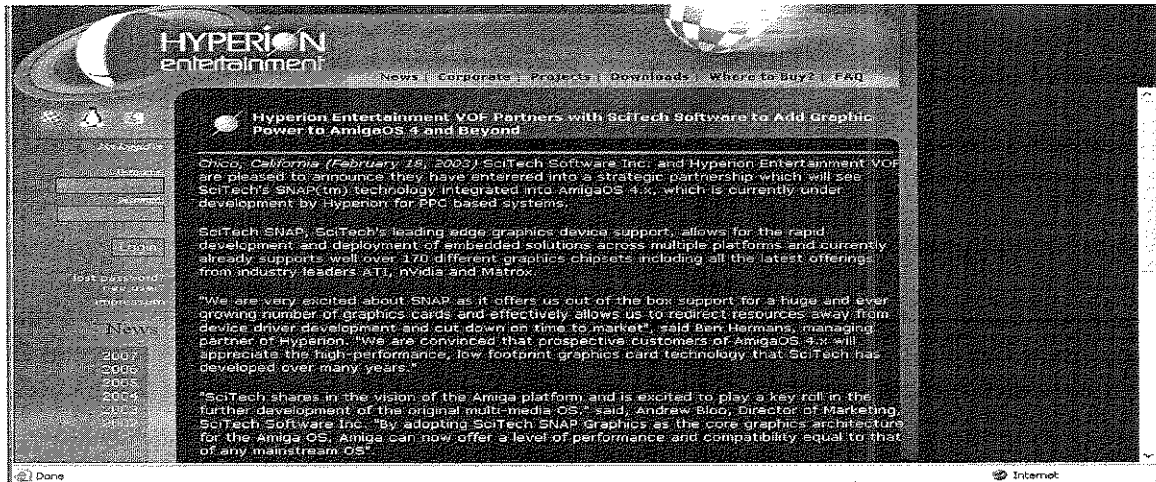
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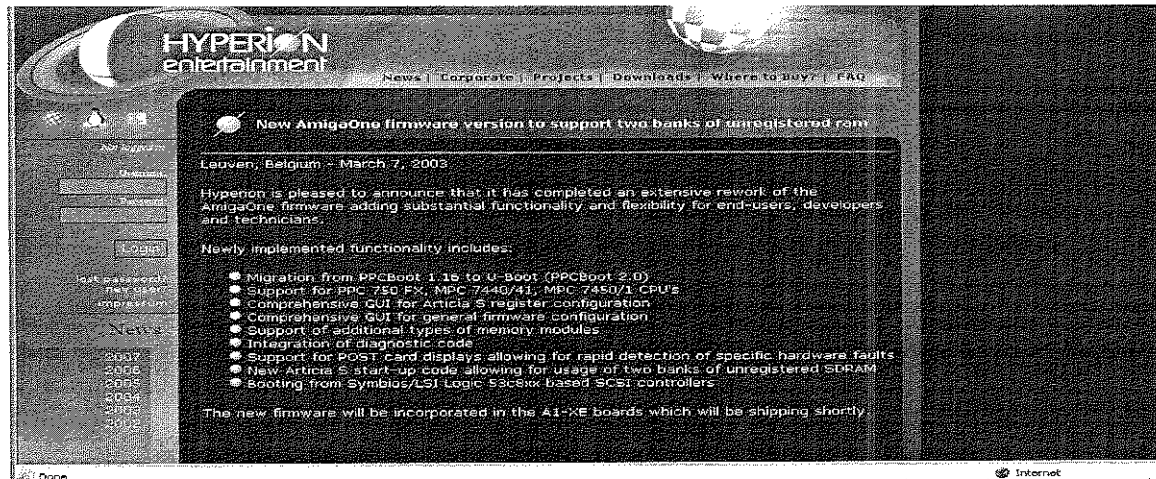
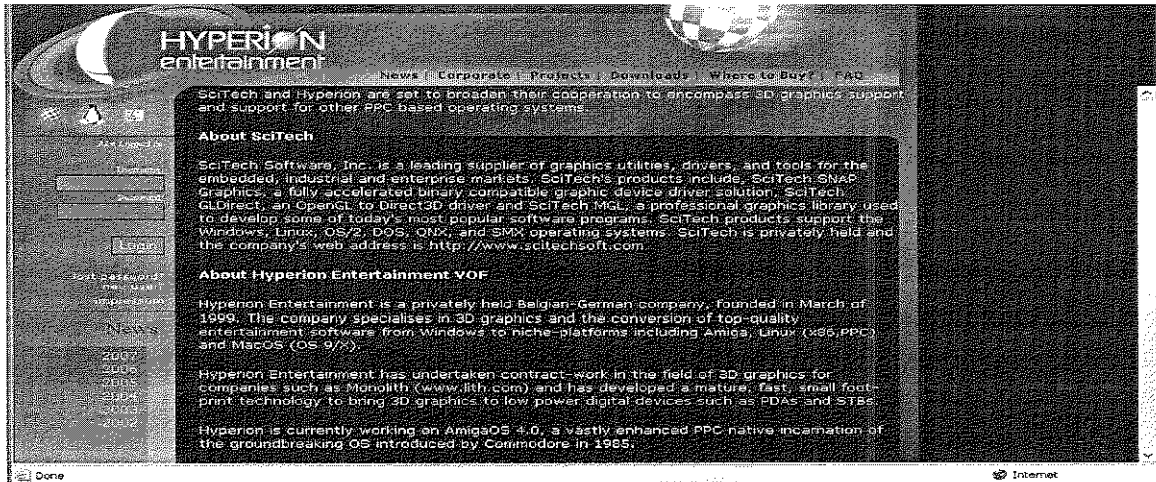
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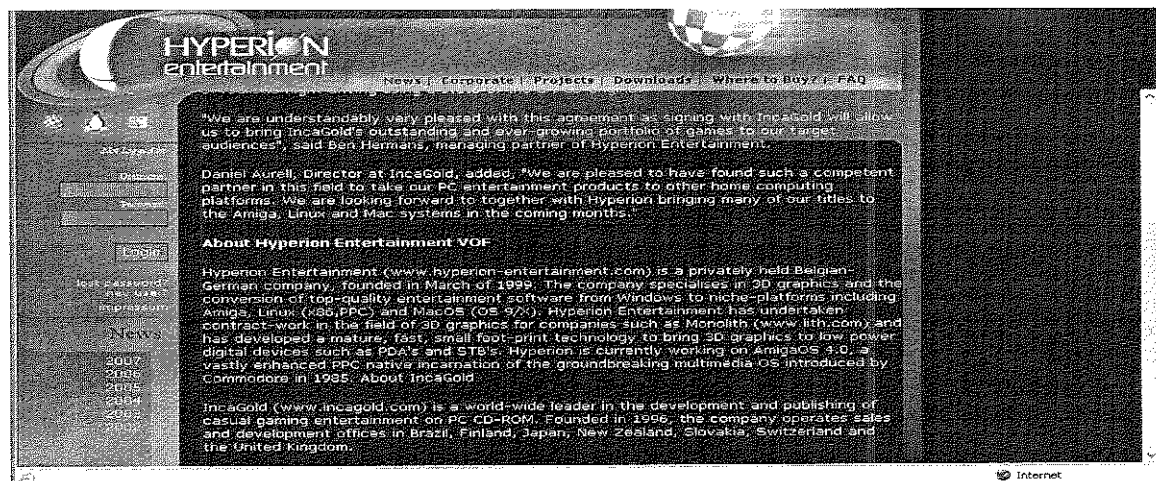
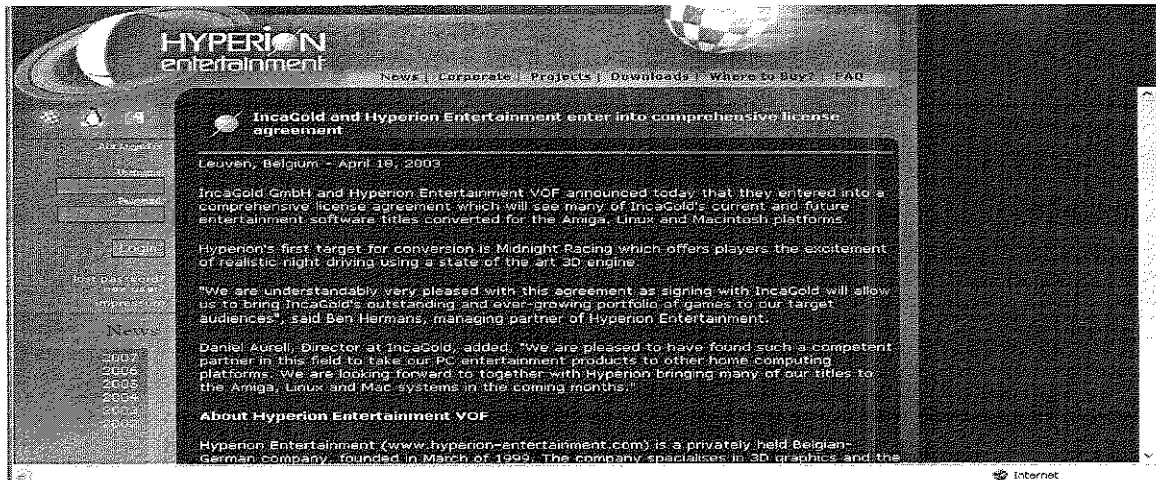
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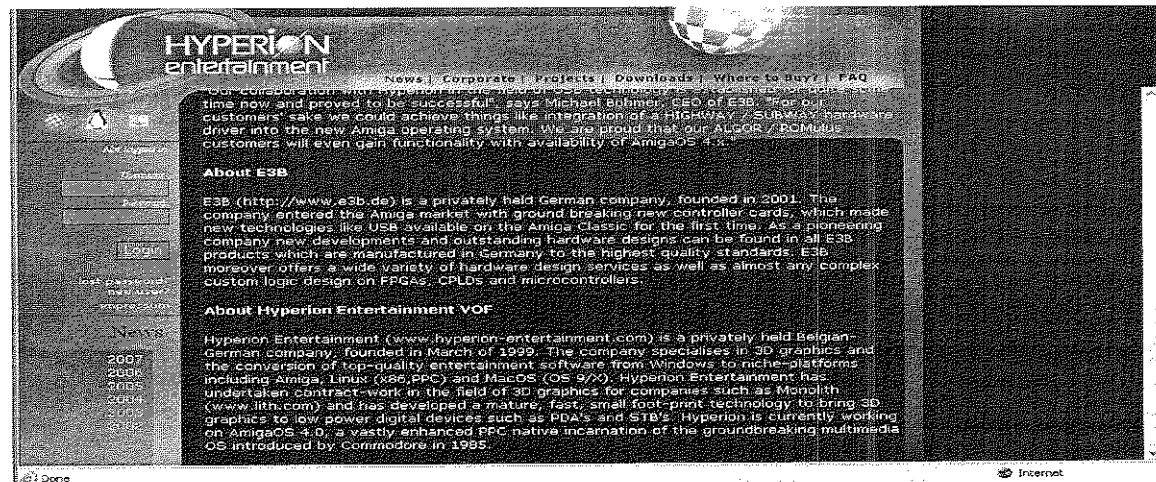
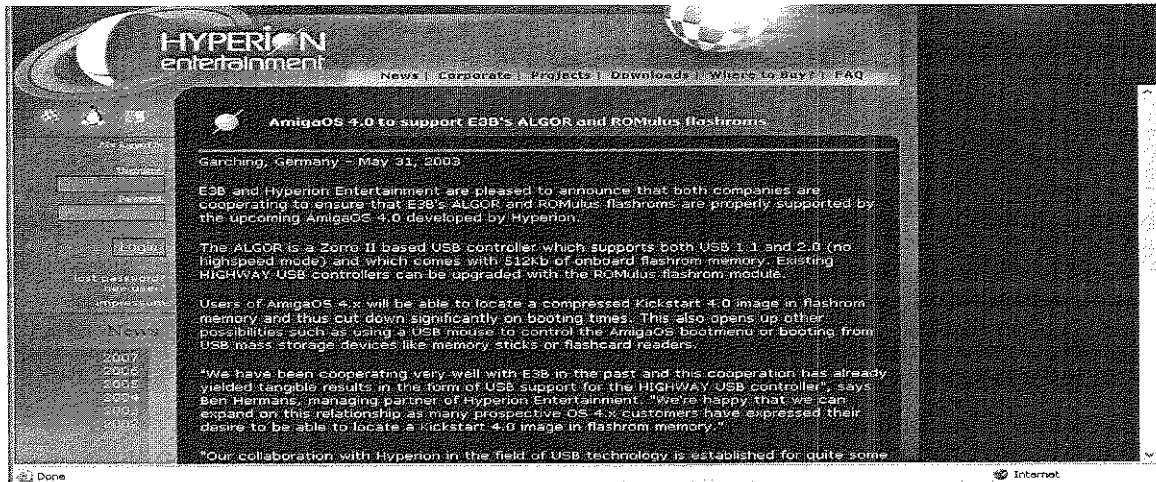


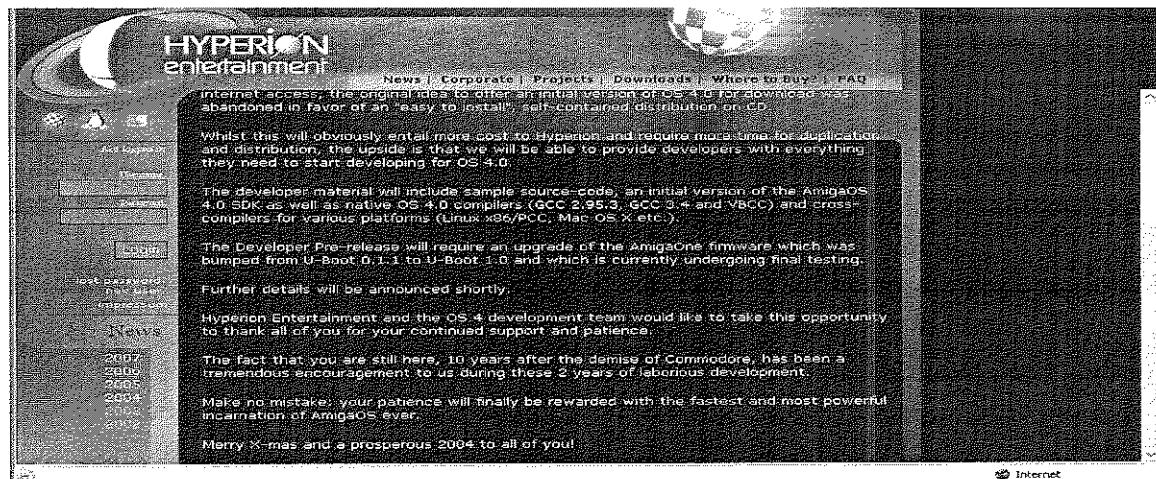
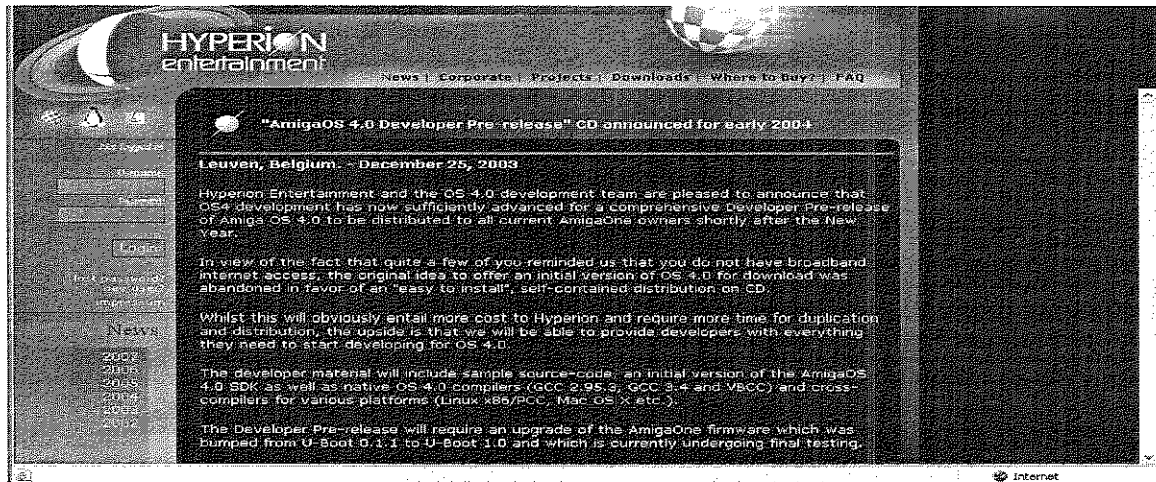


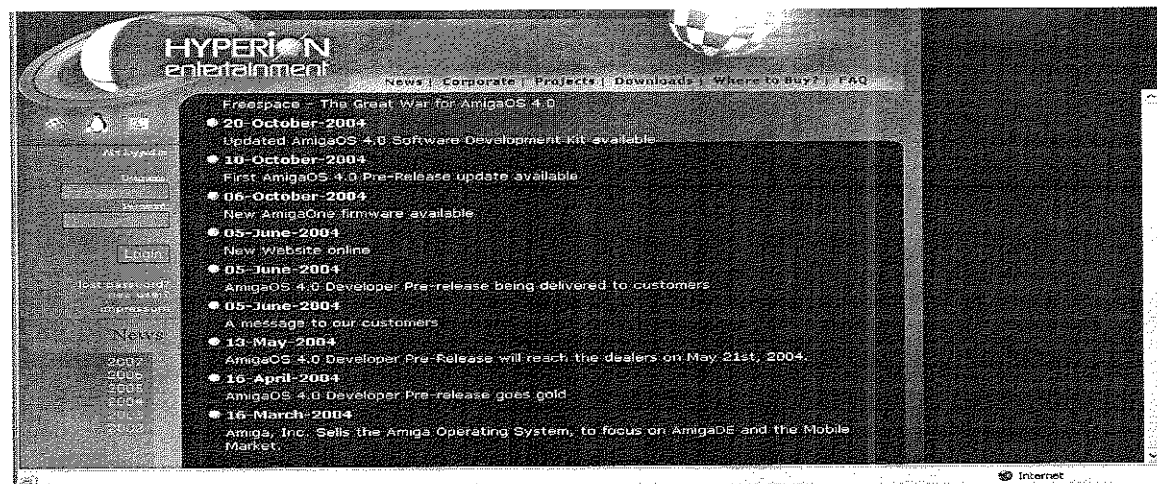
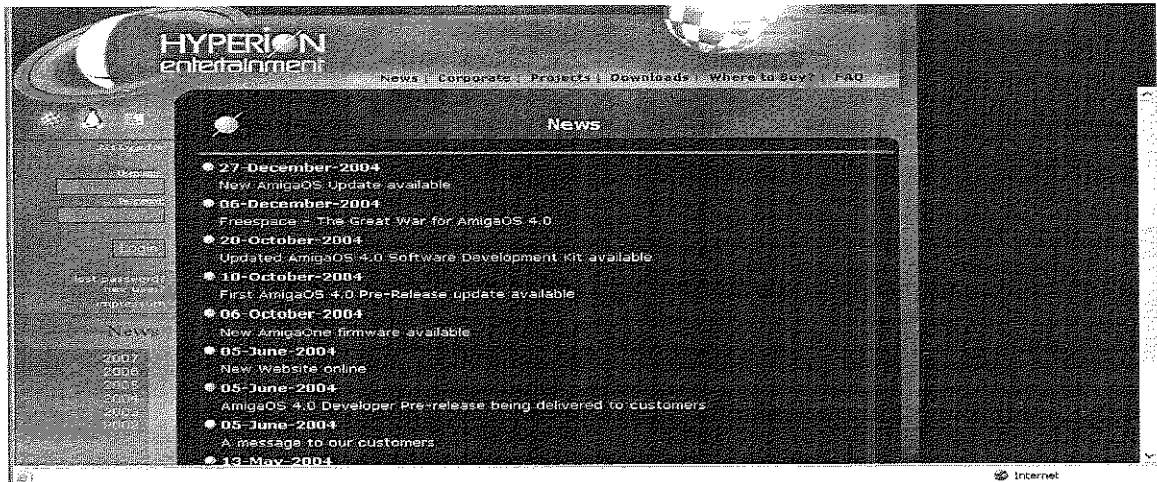


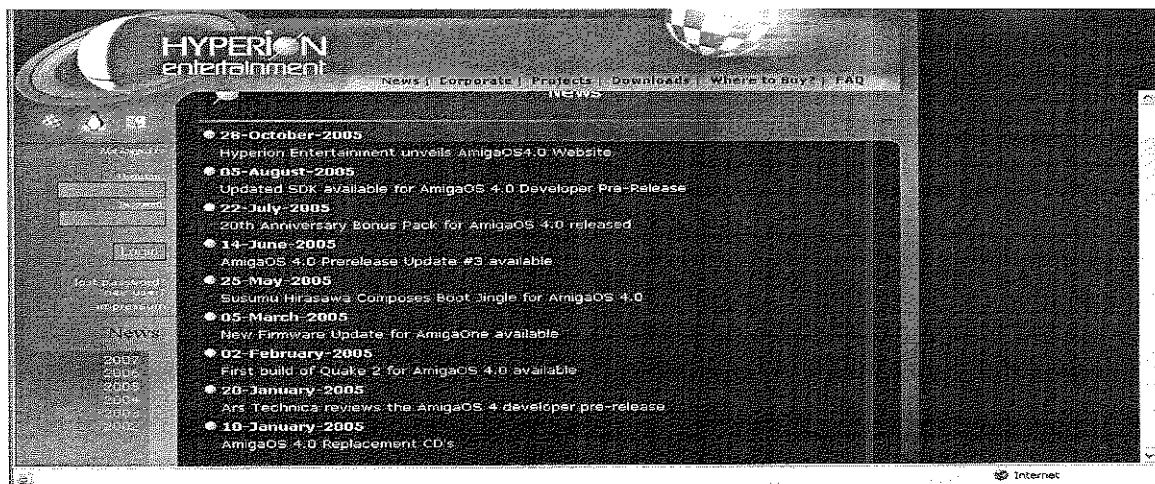
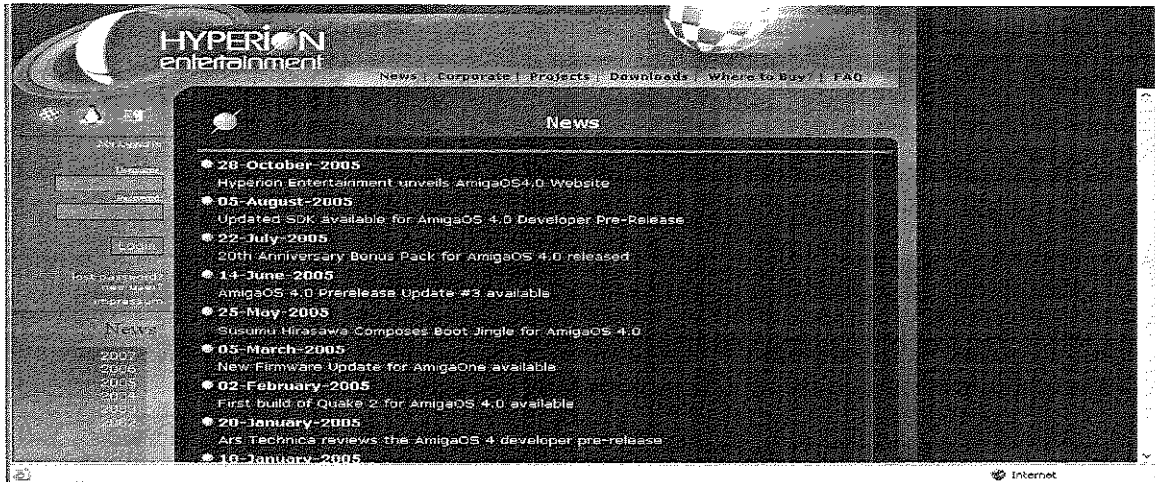


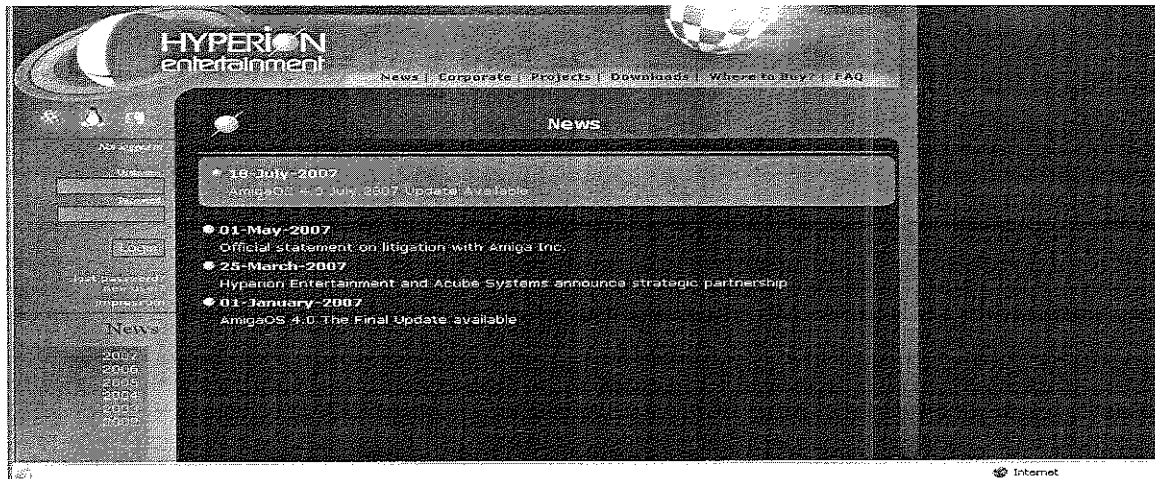
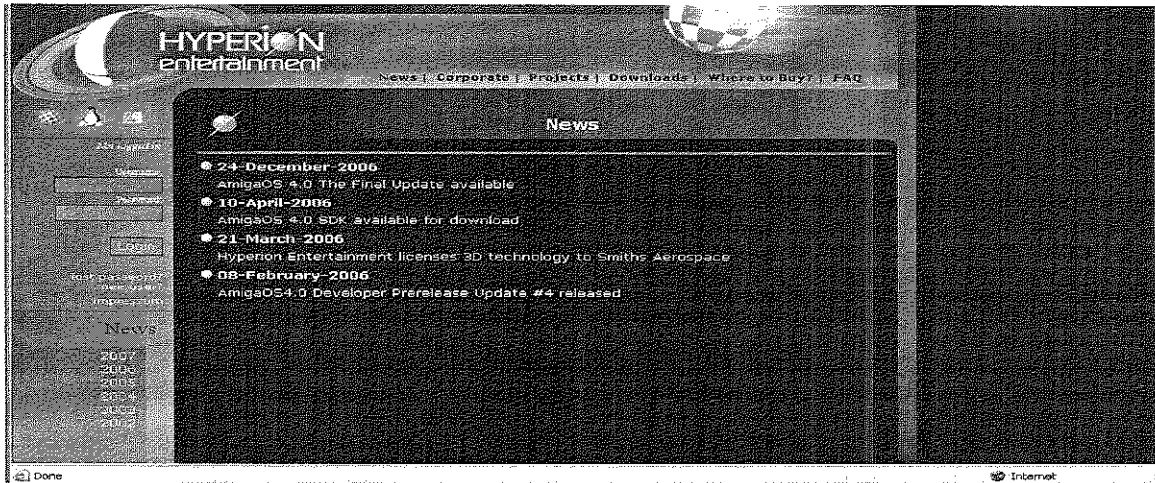














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Welcome to AmigaOS4.0



Welcome to the official website of AmigaOS4.0. Here you will find information and resources relating to the latest release of the Operating System that introduced the world to multimedia and proves the fact that so much of the computing industry has forgotten - that computers can be fun.

20 years after the Amiga Operating System was first unveiled to the public it is returning, better than ever, thanks to a joint effort by Amiga Inc. and Hyperion Entertainment VOF. This new version of the famous OS takes all the features that made the original AmigaOS great, and updates them with the latest requirements for cross-platform 21st Century computing devices of all sorts. From desktop computers to mobile hardware, AmigaOS4.0 delivers a uniquely accessible, powerful, and above all fun way to use technology.

Whether you are one of the thousands of dedicated enthusiasts for the platform or an ex-user curious to see what's going on, if you are completely new to the Amiga experience or a potential OEM client considering the deployment of AmigaOS 4.0 on your own hardware, we hope you'll find plenty in this website to interest you.



AmigaOS4.0 Memory Allocation

Back in the old days of the original AmigaOS, the system used to allocate areas of unused memory to new tasks was pretty simple. The size and position of blocks of free memory were kept in a list, and when memory was needed the system would traverse this list until it found a block that was sufficiently large. This block was then split, one part returned by the allocator for use, while the other part (whatever part of the block wasn't needed) was left in the free list. This method served its purpose well enough at the time, but with the increased demands of modern computing - and of course our desire to bring this new version of the Operating System to the cutting edge - AmigaOS4.0 has introduced a better way of doing things.

[Read more...](#)

More...

[AmigaOS4.0 website launched](#)[Feature Spotlight: The RAM Disk](#)

AmigaOS 4.0 new memory system revisited

In a previous item, we described how the AmigaOS4.0 memory system works in terms of managing memory allocations from the top. However, there is more to allocating memory than that. The object caches of course work on memory that has already been mapped into the virtual memory space. But both the virtual address ranges, as well as the physical memory has to come from some source, too.

[Read more...](#)

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H-0477

Exhibit B, p. 17



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The AmigaOS advantage - your advantage.

If you are looking for an Operating System solution, AmigaOS4.0 could be the perfect answer to your needs. Compact, efficient, and proven over 20 years of use, AmigaOS is a unique and compelling advantage for OEM solutions.

[Read more...](#)

4.0 for Amiga Users

Are you an Amiga enthusiast? One of the dedicated users who has stuck through thick and thin with the Amiga because you know just how good a computer can be? If so you've been waiting a long time for a major upgrade to the Amiga Operating System, and with AmigaOS4.0 it's finally here. Welcome to the biggest upgrade in the history of the OS.

[Read more...](#)

Nostalgic for the Amiga?

Remember when computing was fun? Remember the Amiga?

Are you an ex-Amiga user? Perhaps you owned one, or used one at work or school? You've heard there's a new version and want to know all about it? Then read on...

[Read more...](#)

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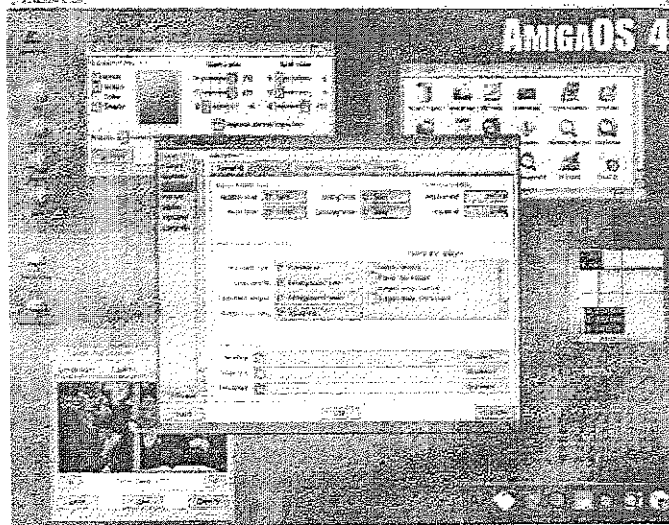


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The AmigaOS advantage - your advantage.

If you are looking for an Operating System solution, AmigaOS4.0 could be the perfect answer to your needs. Compact, efficient, and proven over 20 years of use, AmigaOS is a unique and compelling advantage for OEM solutions.

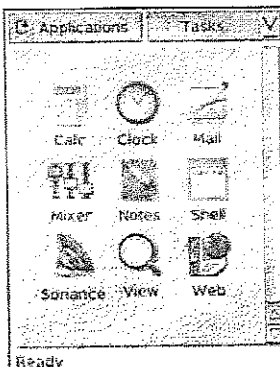


AmigaOS4.0 Workbench

Evaluating Operating Systems for OEM production has always been a matter of balancing compromises. In an imperfect world, nothing ever seems quite perfect for your requirements unless you make it yourself, and few companies have the resources to develop an entirely custom Operating System for anything other than the most basic of devices. Instead you are forced to choose between offerings on the market that have targeted uses other than your own, and inevitably they will not entirely match your requirements. Operating Systems with a desktop legacy will be unwieldy, bloated with functions that are unnecessary for embedded applications, whilst embedded OS designs inevitably have less flexibility and a smaller feature set, and therefore require more work to suit your purpose.

History has benefited the AmigaOS with a unique middle-ground position that gives it extraordinary scalability and grants it many of the advantages traditionally associated with embedded Operating Systems as well the flexibility and feature-rich environment of a desktop OS. If you're in the process of evaluating the potential of Operating Systems for an OEM development, then read on and discover why AmigaOS4.0 could present the perfect opportunity for you.

When the first version of AmigaOS was developed twenty years ago, it was a unique union of design philosophies that bridged a divide that was barely recognised at the time. There were two driving forces in the creation of the AmigaOS - the desire to create an Operating System suitable for a games machine, which we would today consider an embedded application, and the desire to create a world-beating desktop Operating System, taking inspiration from the *nix world to include sophisticated architectural features years ahead of its desktop competition. It was written for a computer running a 7Mhz, 16-bit processor and 256kB of RAM, yet provided a graphical interface that was sophisticated enough to provide a rich



Small footprint, low

cost-to-market: AmigaOS4.0 can provide fast, responsive multimedia displays even on low-end hardware such as kiosks or STBs. It has display and GUI capability that can scale down from high-definition screens to small LCD displays. Its compactness and efficiency offer high performance with low CPU and memory specification hardware, and can run on small solid-state devices with no hard drive or other moving parts for greater hardware reliability and lower unit failure rates.

A controllable, customisable environment: The AmigaOS has a highly customisable GUI system that allows you to create the interface you want, without having to code it from scratch. The unique "screens" system allows any application to open on its own custom private or shared screen, allowing you to expose as much or as little of the interface to the user as you choose, and allowing completely branded and customised displays. For rapid deployment of information and Kiosk applications, you might consider a complete third-party solution, such as the Hollywood interactive multimedia engine. Alternatively it's easy to create your own user-friendly and responsive GUI using one of the two sophisticated GUI environments that come with the OS, taking advantage of all the multimedia features and inter-application scripting control built into

H-0479

AVIIOA

OS 4.0

Developer Pre-release

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"Aviio" is a registered trademark of Aviio, Inc.

Exhibit C, p. 20

H-0508

Exhibit C, p. 21

H-0509



Developer Pre-Release

Installation Instructions

In order to install AmigaOS 4.0, your AmigaOne needs to be flashed with the latest firmware. You can find this firmware on the CD in the "Firmware" directory. You need to select the appropriate update (either "from_01" if you have U-Boot 0.1, or "from_1.0" if you have a beta U-Boot 1.0, use the 'ver' command on the U-Boot prompt to find the version number).

After the firmware update, you can boot this CD. From the U-Boot prompt, enter

- > ide reset
- > setenv boot1 cdrom
- > boota

If you have trouble installing AmigaOS 4.0, you will find an extensive installation guide on the CD in the directory "OS4InstallGuide" on this CD.