

HON. RICARDO MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

and

HYPERION VOF, a Belgium corporation,

Defendant/Counterclaim Plaintiff,

v.

ITEC, LLC, a New York Limited Liability
Company,

Counterclaim Defendant.

CAUSE NO. CV07-0631RSM

**PLAINTIFF AMIGA, INC.’S MOTION
FOR LEAVE TO AMEND ITS
COMPLAINT**

NOTE ON MOTION CALENDAR:
December 21, 2007

I. RELIEF REQUESTED

With the benefit of the court’s ruling denying its motion for a preliminary injunction, as well as the additional time to obtain additional information and documents, Amiga, Inc. (“Amiga”) reviewed and updated its full panoply of potential claims and defenses, conducted further investigation, and located additional documents, including from third parties. As a result of that process, Amiga moves the court to allow the filing of an Amended Complaint. Because “leave shall be freely given when justice so requires,” and an Amended Complaint will not prejudice the defendant or delay this proceeding, the court should grant Amiga leave to amend.

II. FACTS

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2 On April 26, 2007, Amiga filed its Complaint. Contemporaneously, Amiga moved the
3 court for a preliminary injunction. In a detailed ruling, the court denied the motion and identified
4 a series of factual issues. With the benefit of evidence submitted by both parties on the motion
5 and additional time that was not available in the rush to seek preliminary relief, Amiga was able
6 to locate and obtain additional information and documents and has now revised its allegations
7 and its potential claims and defenses accordingly. Having recently obtained a copyright
8 registration, Amiga is now able to assert copyright infringement as an additional claim. Amiga
9 now submits a proposed Amended Complaint reflecting its efforts. The Amended Complaint
10 differs from the original Complaint, *inter alia*, in the following particulars:
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12 Overall, the proposed Amended Complaint provides substantially greater detail than the
13 initial Complaint regarding the various documents, agreements and transactions at issue and
14 describes various parties' and non-parties' respective rights more specifically, accurately and in
15 greater detail, in lieu of defining multiple entities as "Amiga" as was done in the initial
16 Complaint.
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18 Compared with the initial Complaint, the proposed Amended Complaint includes many
19 additional exhibits and detailed explanations, accurately demonstrating the chain of title to
20 various assets. In one instance, the proposed Amended Complaint substitutes a complete, final
21 agreement including all attachments (Exhibit G to the proposed Amended Complaint), in place
22 of what turned out to be a non-final, superseded draft that was mistakenly attached to the flurry
23 of papers filed on the preliminary injunction motion. The proposed Amended Complaint also
24 accurately documents Amiga's corporate name change from KMOS, Inc. to Amiga, Inc. The
25 name change issue became a matter of concern during argument of the preliminary injunction
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1 motion due to an inadvertent photocopying error regarding the certificate of amendment, a
2 certified copy of which is now attached to the proposed Amended Complaint as Exhibit M.

3 Fundamentally, the proposed Amended Complaint clarifies the status of the November 3,
4 2001 (OEM) License and Software Development Agreement (the “2001 Agreement”) that a
5 Washington corporation, then called Amiga, Inc. (“Amiga Washington”), entered into with
6 Hyperion and Eyetech Group Ltd., a UK corporation (“Eyetech”), (which are expressly
7 identified in the 2001 Agreement as having partnered with each other and which are defined
8 collectively as the “Amiga One Partners”). Specifically, the proposed Amended Complaint
9 clarifies that the 2001 Agreement was not assigned to any other person or persons by any of the
10 parties thereto. Contrary to statements made in connection with the preliminary injunction
11 motion, in 2003 Hyperion entered into a separate, standalone purchase and sale agreement with
12 Itec LLC, a New York limited liability company, pursuant to which Hyperion agreed that, for the
13 receipt of \$25,000 (which payment Itec made or caused to be made), it would transfer to Itec all
14 of its interests in OS 4.0 the incremental version of the AMIGA computer operating system then
15 being developed by Hyperion pursuant to the 2001 Agreement. The 2003 agreement between
16 Hyperion and Itec was memorialized in a written contract dated April 24, 2003, annexed to the
17 proposed Amended Complaint as Exhibit B (the “Itec/Hyperion Agreement”). Itec did *not*
18 thereby take assignment of the 2001 Agreement, which for all practical purposes was abandoned
19 by the parties thereto, as described in the proposed Amended Complaint.
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23 The proposed Amended Complaint further describes how, after being formed in
24 Delaware on October 7, 2003, KMOS, Inc. (which later changed its name to Amiga, Inc. the
25 plaintiff in this action) went about acquiring various assets from Amiga Washington, as well as
26 OS4.0, which had been acquired from Hyperion by Itec. In early 2004, KMOS entered into an
27 arrangement with Hyperion that once OS 4.0 was completed, KMOS would provide Hyperion, as

1 distributor, with certain rights and benefits, which Hyperion would have received from Amiga
2 Washington had the 2001 Agreement not been abandoned by the parties and substituted with this
3 new arrangement with KMOS, taking into account that KMOS was the owner of the OS 4.0, that
4 Amiga Washington was out of the picture, and that Hyperion's role was as coordinator of third-
5 party developer-subcontractors rather than as having any claim of ownership in OS 4.0.

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7 Finally, the proposed Amended Complaint updates facts regarding Amiga's trademarks
8 and Hyperion's infringement and dilution of those trademarks, in addition to adding a copyright
9 infringement claim based on the recent issuance of a copyright registration to Amiga's for the
10 "AMIGA Operating System (OS) and software Version 3.1," also referred to as "Amiga OS 3.1,"
11 including all Source Code and Object Code relating thereto.

12 **III. ISSUE PRESENTED**

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14 The court "shall" freely grant leave to amend a pleading. Fed.R.Civ.P. 15(a). Here,
15 seven months after filing its initial Complaint, Amiga wishes to add claims against Hyperion
16 VOF that arise out of the same transactions underlying the claims and counterclaims previously
17 asserted by the parties. The defendant, Hyperion VOF, will not be prejudiced by the addition of
18 Amiga's new claims and the case will not be delayed. Should this Court grant Amiga leave to
19 file an Amended Complaint?

20 **IV. EVIDENCE RELIED UPON**

21 The records and files herein.

22 **V. ARGUMENT**

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24 A party may amend a pleading by leave of the Court; and leave shall be freely granted
25 where justice so requires. CR 15(a). This rule allows amendment where the opposing party is
26 not prejudiced thereby. Richardson v. U.S., 841 F.2d 993, 999 (9th Cir. 1988). A mere passage
27 of time between the filing of the original pleading and the requested amendment, by itself, is

1 insufficient to demonstrate prejudice. Id. “[R]ather, there must be an affirmative showing of
2 either prejudice or bad faith.” Id., at 999-1000, citing Islamic Republic of Iran v. Boeing Co.,
3 771 F.2d 1279, 1287 (9th Cir.1985), cert. dismissed, 479 U.S. 957, 107 S.Ct. 450, 93 L.Ed.2d
4 397 (1986) (two-year delay insufficient); Howey v. United States, 481 F.2d 1187, 1190-91 (9th
5 Cir.1973) (five-year delay insufficient).

6
7 No prejudice to Hyperion VOF will result if Amiga is allowed to amend its Complaint at
8 this time. The facts underlying the new claims asserted by Amiga are similar to the facts
9 relevant to the claims and counterclaims which have been asserted previously by the parties in
10 this case. Furthermore, discovery is in its infancy; Hyperion VOF will be able to undertake full
11 discovery regarding new issues raised by Amiga’s Amended Complaint.

12 In the interest of justice, the claims asserted in Amiga’s proposed Amended Complaint
13 should be tried at the same time as the claims which have already been raised in this case.
14 Denying Amiga’s motion to amend would either foreclose its ability to bring all claims arising
15 out of its transactions with Hyperion VOF or would require a separate litigation to duplicate the
16 efforts of this one.

18 **VI. CONCLUSION**

19 The permissive standard found in CR 15(a) was designed to freely allow the amendment
20 of pleadings. Amiga’s proposed amendment will not prejudice any party to this case and the
21 court should therefore grant Amiga leave to file its proposed Amended Complaint.
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1 DATED this ____ day of December, 2007.

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CERTIFICATE OF SERVICE

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3 I hereby certify that on December 12, 2007, I electronically filed the foregoing with the
4 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
5 following:
6

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