

HON. RICARDO MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

v.

HYPERION VOF, a Belgium corporation,

Defendant/Counterclaim Plaintiff,

v.

ITEC, LLC, a New York Limited Liability
Company,

Counterclaim Defendant.

CAUSE NO. CV07-0631RSM

**AMENDED COMPLAINT FOR
DAMAGES, SPECIFIC
PERFORMANCE AND INJUNCTIVE
RELIEF [PROPOSED]**

[JURY TRIAL DEMANDED]

Plaintiff, Amiga, Inc., (“Amiga”) alleges as follows:

NATURE OF THE ACTION

1. Amiga is the owner of the world famous AMIGA trademark – a household name in the computer world for over a generation. Indeed, Amiga is the owner of and successor-in-interest to all intellectual property rights long associated with the AMIGA brand computer hardware and software business, including 40 United States copyright registrations, 3 federally

1 registered trademarks, 6 pending federal trademark registrations, and 108 additional trademark
2 registrations worldwide.

3 2. Six years ago, defendant Hyperion VOF (“Hyperion”) contracted with the
4 then owner of those trademarks and other intellectual property rights, Amiga Washington, Inc. (a
5 company not affiliated with Amiga), to develop a new version of the Amiga computer operating
6 system, based upon prior works then owned by Amiga Washington. Because time was of the
7 essence in the highly competitive computer market, integral to this agreement was Hyperion’s
8 representation that it should be able to develop a fully functional, commercial salable version of
9 what was referred to as “Amiga OS 4.0” (“OS 4.0”) by March 1, 2002.

10
11 3. Some five years after that due date had passed, and despite the fact that it
12 has been paid 150% of the amount stipulated in its agreement with Amiga Washington relating
13 to OS 4.0, Hyperion has not delivered the operating system to anyone – not to Amiga
14 Washington and not to Amiga, which by 2004 had acquired all right, title and interest in OS 4.0.

15
16 4. This is not to say that Hyperion has been inactive when it comes to OS 4.0
17 or the AMIGA name and mark. For example, contrary to its agreement that it would use its best
18 efforts to secure favorable terms for Amiga Washington when it contracted with third parties in
19 connection with the development of OS 4.0, Hyperion in fact gave “sweetheart deals” to certain
20 third-party sub-contractor software developers with which it was closely allied, allowing them
21 now to assert bogus claims of rights in OS 4.0. In addition, by 2003 – a full year after
22 Hyperion’s projected completion date for OS 4.0 – Hyperion’s failure to develop a commercially
23 salable operating system had dealt a devastating blow to Amiga Washington and is one of the
24 reasons why Amiga Washington was ultimately forced to exit the business and assign its
25 copyrights, trademarks and other intellectual property rights and assets to Amiga.
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1 5. Indeed, it now appears that Hyperion engaged in a deliberate scheme
 2 calculated to undermine Amiga Washington’s business and financial status by hindering and
 3 delaying the OS 4.0 project with the intent to hijack it after forcing Amiga Washington into
 4 bankruptcy. Although Hyperion did not succeed, with Amiga Washington on the sidelines,
 5 Hyperion, which has absolutely no colorable claim to any of these trademarks, copyrights or
 6 other intellectual property, has been busily holding itself out as the owner of such intellectual
 7 property – not merely engaging in blatant infringement, but even purporting to license third
 8 parties to use the trademarks and copyright works that Amiga and its predecessors spent many
 9 years and millions of dollars developing. And these are only the tip of a very toxic iceberg.

11 6. It is for these and other wrongful acts by Hyperion more fully described
 12 below that Amiga sues herein for breach of contract, declaratory judgment, trademark
 13 infringement and dilution, false designation of origin, unfair competition, copyright
 14 infringement, and indemnification, and seeks, among other things, a declaration of rights,
 15 injunctive relief, specific performance, actual, consequential, enhanced, exemplary and punitive
 16 damages, costs and attorneys’ fees.

JURISDICTION

19 7. This Court has jurisdiction over this action under 28 U.S.C. Section
 20 1332(a)(2) (diversity jurisdiction), 28 U.S.C. Section 1331 (federal question jurisdiction); 28
 21 U.S.C. Section 1338(a) (any act of Congress relating to patents, copyrights and trademarks); 28
 22 U.S.C. Section 1367 (supplemental jurisdiction); and the doctrines of ancillary and pendent
 23 jurisdiction. The amount in controversy exceeds \$75,000, exclusive of interest and costs.

VENUE

1
2 8. Venue is proper in this District pursuant to 28 U.S.C. Sections 1391(b)
3 and 1400(a) because a substantial part of the events giving rise to the alleged claims in this
4 action occurred in this judicial district and, by contract, the parties stipulated to jurisdiction and
5 to venue in this judicial district.

PARTIES

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8 9. Upon information and belief, Hyperion is a foreign entity organized under
9 the laws of Belgium with its principal place of business at Leuven, Belgium. Hyperion purports
10 to be a software development company and claims to specialize in 3D graphics and the
11 conversion of entertainment software. Hyperion primarily engages in efforts to “port” existing
12 computer software (primarily games) from one hardware platform to a different hardware
13 platform.

14
15 10. Amiga, a Delaware corporation, formerly known as KMOS, Inc., is the
16 owner of, inter alia, 40 United States copyright registrations, 3 federally registered trademarks, 6
17 pending federal trademark registrations, and 108 additional trademark registrations worldwide.
18 On August 30, 2004, while known as KMOS, Inc., Amiga acquired all tangible and intangible
19 assets of an unrelated Washington corporation known as Amiga, Inc. (“Amiga Washington”) for
20 good and valuable consideration. The assets so acquired by KMOS, Inc. (which thereafter
21 changed its name to Amiga) include all copyrights, trademarks and other intellectual property
22 then owned by Amiga Washington, whether created by Amiga Washington itself or by any
23 predecessor-in-interest of Amiga Washington.

24
25 11. Upon acquiring the assets of Amiga Washington in 2004, KMOS became
26 the successor-in-interest to the intellectual property rights long associated (under the AMIGA
27 name and trademark) with ground-breaking technological advances in computer operating

1 systems, wired and wireless computers and devices and applications, including copyrights in the
2 operating system (“OS”) that traces its lineage back to the highly acclaimed operating systems
3 for the original AMIGA computers introduced in 1985.

4 12. On January 26, 2005, KMOS, Inc. changed its name to Amiga, Inc.
5 Accordingly, Plaintiff Amiga is referred to herein as “KMOS” with respect to the period from
6 the date of its incorporation as KMOS, Inc. until January 26, 2005 when it changed its name to
7 Amiga, Inc. With respect to subsequent periods, it is referred to herein as “Amiga.”
8

9 **BACKGROUND**

10 13. The AMIGA brand computer hardware and software business was
11 founded in the early-1980s. From 1984 through 1998, the business was bought and sold by
12 various entities, including various subsidiaries and affiliates of Commodore International, Inc.
13 and Gateway 2000, Inc.
14

15 14. In 1985, a new, multi-function and multi-purpose computer, the
16 “Amiga1000,” was introduced featuring a new, powerful operating system – originally dubbed
17 “Workbench,” and later referred to as the “Amiga Operating System” or “Amiga OS.” This new
18 operating system represented an enormous technological development and garnered praise in the
19 industry for its graphically rich, multi-tasking and multi-threaded system.
20

21 15. In subsequent years, through various changes in ownership, Amiga’s
22 predecessors-in-interest continued to upgrade the “Amiga OS” to provide even greater
23 functionality, and the AMIGA brand operating system and computers acquired a devoted
24 following of enthusiasts. By the early-to-mid-1990s, when “Amiga OS 3.1” was released, the
25 AMIGA OS was state of the art.

26 16. In or about late 1999, Amiga Washington (then known as Amino
27 Development Corporation) acquired the intellectual property, including copyrights and

1 trademarks, from Amiga Development LLC as well as other assets and liabilities of the business
2 from two entities owned by and/or affiliated with Gateway 2000, Inc. On or about September
3 30, 2004, Amiga Washington was placed in administrative dissolution status by the Secretary of
4 State for the State of Washington. All actions relevant to this complaint which were taken by
5 Amiga Washington during the period of its administrative dissolution were permissible actions
6 for a corporation in administrative dissolution status. When it remedied all deficiencies
7 pertaining to its administrative dissolution, Amiga Washington was reinstated effective July 26,
8 2007 under its previous name, Amigo Development Corporation. The reinstatement relates back
9 to the date of dissolution and entitles the corporation to continue its business as if the
10 administrative dissolution had never occurred. The complaint will continue to refer to this
11 Washington corporation as Amiga Washington.
12

13 17. AMIGA OS 3.1 had been followed by the release of two additional
14 versions, OS 3.5 and 3.9, which involved certain upgrades produced by Haage & Partner
15 Computer, GmbH, a German company (“Haage & Partner”). As Amiga Washington
16 increasingly focused its own resources on developing compatible, handheld, wireless and other
17 technologies, loyal enthusiasts clamored for further updates of the Operating System.
18 Meanwhile, disputes arose between Amiga Washington and Haage & Partner, and Amiga
19 Washington began seeking a different developer for the next incremental version of the OS,
20 which Amiga Washington hoped would appeal to its loyal customer base, reinvigorate the
21 AMIGA brand and create a market for new AMIGA products.
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23

24 **THE 2001 AGREEMENT**

25 18. On or about November 3, 2001, Amiga Washington entered into an
26 (OEM) License and Software Development Agreement (the “2001 Agreement”) with Hyperion
27 and Eyetech Group Ltd., a UK corporation (“Eyetech”), which are expressly identified in the

1 2001 Agreement as having partnered with each other and which are defined collectively as the
2 “Amiga One Partners.” A true and correct copy of what Hyperion has alleged is the 2001
3 Agreement is attached hereto as Exhibit A. The 2001 Agreement was drafted by a principal of
4 Hyperion who was and is an attorney licensed to practice law in Belgium.

5 19. A primary focus of the 2001 Agreement was the Amiga One Partners’
6 development of the new version of the AMIGA computer Operating System for Power PC-based
7 computers developed and marketed for the AMIGA platform, to be made available to consumers
8 both as an Original Equipment Manufacturer (“OEM”) version preloaded on new computer
9 hardware sold under the AMIGA brand and also as a standalone version. As a first step,
10 Hyperion was tasked with quickly developing a modest, incremental version of the AMIGA
11 operating system, based on the Source Code of “Amiga OS 3.1” and its existing upgrades,
12 OS 3.5 and 3.9, with no more than “the minimal feature-set set out in Annex I” of the 2001
13 Agreement. This initial, modest, incremental version, designated in the 2001 Agreement as
14 “OS 4.0” was intended to appease AMIGA enthusiasts and pave the way for additional operating
15 system improvements and upgrades in the future, as well as new product introductions, while
16 also providing a source of revenue for Amiga Washington from royalties on sales of the OEM
17 version of OS 4.0.

18 20. Because OS 4.0 was to be only a modest, incremental update of the
19 AMIGA operating system, pursuant to Article 2.02 of the 2001 Agreement, Hyperion undertook
20 to use its best efforts to ensure that the modest AMIGA OS 4.0 would be ready for release within
21 six months – *i.e.*, before March 1, 2002.

22 21. The 2001 Agreement contemplated that following completion and release
23 of OS 4.0 as a commercially saleable product, compatible with new computer hardware and
24

1 incorporating the minimal feature-set prescribed in Annex I, Amiga One Partners would likely
2 develop additional, more ambitious upgraded versions of the AMIGA operating system.

3 22. Accordingly, subject to performance by Hyperion, Eyetech and Amiga
4 One Partners of their respective obligations under the 2001 Agreement, Amiga Washington
5 granted Amiga One Partners among other things, limited licenses relating to Amiga
6 Washington's copyrights in the Source Code of certain existing versions of its computer
7 operating system and also granted Amiga One Partners limited licenses to use certain
8 trademarks, as described below. The Agreement also provided for limited distribution rights by
9 Hyperion after the OS 4.0 was completed.
10

11 **Under The 2001 Agreement, Amiga Washington Granted Amiga One Partners**
12 **A Limited License To Create A Derivative Copyright Work**

13 23. Pursuant to Article 2.01 of the 2001 Agreement, Amiga Washington
14 granted the Amiga One Partners a non-exclusive right and license to use and modify the Source
15 Code of "Amiga OS 3.1" and its existing upgrades to create new versions of the existing
16 operating systems (*i.e.*, derivative works of copyright), including specifically the modest, new
17 version of OS 4.0 based on the Source Code of OS 3.1 and its progeny.

18 24. In Article 2.01 of the 2001 Agreement, Amiga Washington acknowledged
19 that Hyperion was permitted to use third party contractors in connection with the development
20 work; however, Article 2.06 of the 2001 Agreement obligated Hyperion to "use best efforts to
21 secure the widest possible rights from third party contractors."
22

23 **Under The 2001 Agreement, Amiga Washington Retained Existing Copyrights**
24 **And An Option To Acquire All Rights In The Derivative Work**

25 25. Article 2.06 of the 2001 Agreement expressly provided that Amiga
26 Washington, without limitation, retained ownership of the Source Code of AMIGA OS 3.1 and
27 its existing upgrades then in existence. Together, Articles 2.06 and 3.01 also provided Amiga

1 Washington an option to acquire from Hyperion all available rights in the Object Code, Source
2 Code and intellectual property of OS 4.0, subject only to rights retained by third-party
3 contractors.

4 26. Specifically, Article 3.01 of the 2001 Agreement provided that “at any
5 time but no later than six (6) months after the completion of OS 4.0,” Amiga could “elect to pay
6 Hyperion \$25,000 in order to acquire the Object Code, Source Code and intellectual property of
7 OS 4.0, pursuant to and within the limits set out in article 2.06,” which provided, among other
8 things, that “[a]t any time prior to the completion of OS 4.0 and no later than six months
9 thereafter, and provided Amiga [Washington] makes the payment pursuant to article 3.01,
10 Hyperion shall transfer all Source Code, interest and title in OS 4.0 to Amiga [Washington] to
11 the extent it can do so under the agreements concluded with third party contractors.”
12

13 **Under The 2001 Agreement, Amiga Washington Granted Amiga One Partners Certain**
14 **Marketing And Distribution Rights And A Limited Trademark License**

15 27. Pursuant to Article 2.01 of the 2001 Agreement, Amiga Washington
16 granted the Amiga One Partners an exclusive right and license to market and distribute such new
17 versions developed under the 2001 Agreement (designated in the 2001 Agreement as “OS 4”),
18 including the modest OS 4.0 and any progeny, both as (a) a standalone version for Power PC
19 (“PPC”) based computer hardware that was developed and marketed for the AMIGA platform
20 and (b) a pre-installed OEM version for the “Amiga One,” a PPC computer hardware product
21 that had been developed for the Amiga One Partners by a third party.
22

23 28. Pursuant to Article 2.01 of the 2001 Agreement, Amiga Washington also
24 granted the Amiga One Partners a limited right and license to use “the Amiga trademarks,”
25 solely in conjunction with the “Amiga One” computer, which would have an OEM version of
26 one or another OS 4 upgrade preinstalled. No AMIGA trademarks were licensed to Amiga One
27 Partners for use in any other marketing of OS 4.0 or any other OS 4, including in connection for

1 use on any other computer platforms or products other than the “Amiga One” platform. Amiga
2 Washington reserved for itself the exclusive right to market and distribute OS 4.0 and any other
3 OS 4 versions for all other computer platforms and the exclusive right to use its trademarks and
4 control its brand and image in connection with all other platforms and for all other software,
5 hardware or other products.

6 29. Pursuant to Article 2.03(B) of the 2001 Agreement, Amiga Washington
7 would be due a royalty of \$25.00 per unit of OS 4.0 (or any subsequent version of OS 4 that
8 might be developed pursuant to the 2001 Agreement) preinstalled in an “Amiga One” computer.
9 Pursuant to Article 2.03(B), this OEM version royalty would be payable by Eyetech (Hyperion’s
10 partner in Amiga One Partners) and also would be considered payment in full for the Amiga One
11 Partners’ license to use the Amiga trademarks in conjunction with the Amiga One computer, as
12 provided in Article 2.01 of the Agreement.
13

14 30. As consideration for the development of OS 4.0, Article 2.03(A) of the
15 2001 Agreement provided that no royalties would be due Amiga Washington on any licensed
16 sales of the modest OS 4.0 as a standalone version (for Power PC based computer hardware
17 developed and marketed for the AMIGA platform other than the “Amiga One” computer).
18 However, for any succeeding versions of OS 4 that might be developed pursuant to the 2001
19 Agreement, Article 2.03(A) provided that a \$20.00 per unit royalty would be due Amiga
20 Washington, payable by Hyperion.
21

22 31. Article 2.03 (C) also provided for computation of a possible royalty on
23 OS 4 upgrades (as opposed to subsequent, new entire versions of OS 4), under certain
24 circumstances.
25

26 **Itec’s Bailout Of Hyperion And Loans To Amiga Washington Advance Its Acquisition**
27 **Strategy And Lead To A New Agreement Or Novation**

1 32. By early 2003, it had become clear that Amiga One Partners, and
2 particularly its member, Hyperion, were unable to fulfill their obligations under the 2001
3 Agreement. Hyperion had long ago missed its March 1, 2002 “best efforts” target date for the
4 completion of OS 4.0 pursuant to Article 2.02 of the 2001 Agreement and was now facing severe
5 financial difficulties.

6 33. In fact, Hyperion knew or should have known from the outset that it could
7 never meet the March 1, 2002 target date. Moreover, although OS 4.0 was to have included only
8 “the minimal feature-set set out in Annex I” of the 2001 Agreement, pursuant to Article 2.01 of
9 the Agreement, Hyperion, at various times insisted that additional features be added into OS 4.0 .
10 This would, among other things, have had the effect of permitting Hyperion to exploit its
11 royalty-free license for OS 4.0 and circumvent its royalty obligations for future OS 4 versions
12 (e.g., 4.1, 4.2 and so on). Hyperion’s failure to develop and deliver OS 4.0 on a timely basis
13 denied Amiga Washington the ability to commercialize OS 4.0 and subsequent OS 4 versions, to
14 Amiga Washington’s substantial financial detriment.
15

16
17 **Itec Funded Amiga Washington In Anticipation Of An Ultimate Acquisition Of**
18 **Amiga Washington’s Rights And Rescued Hyperion**
19 **From Imminent Bankruptcy In Return For Hyperion’s Rights In OS 4.0**

20 34. In or about March 2003, Ben Hermans (“Hermans”), who was then a
21 principal of Hyperion, informed Amiga Washington that Hyperion was in urgent need of funds
22 to meet its financial obligations, could not proceed with the development of OS 4.0 without such
23 funds, and was in danger of being forced into a receivership or bankruptcy which would result in
24 its losing control of the source code to OS 4 that had been developed so far.

25 35. Hermans thus pleaded with Amiga Washington to pay Hyperion in
26 advance the \$25,000 provided for in Articles 2.06 and 3.01 of the 2001 Agreement. In return for
27 this advance payment, Amiga Washington would acquire the Object Code, Source Code and

1 intellectual property of OS 4.0 (subject only to certain potential rights of third party contractors).
2 Pursuant to Article 2.06 of the 2001 Agreement, Amiga Washington was entitled to make that
3 payment “any time prior to the completion of OS 4.0 and no later than six months thereafter.”
4 Because Hyperion had not completed OS 4.0, the \$25,000 payment was not otherwise due.

5 36. At the time when Hyperion was facing potential bankruptcy and
6 requesting advance payment of this \$25,000, Amiga Washington, by reason, *inter alia*, of
7 Hyperion’s failure to deliver OS 4.0, found itself without funds available to make an advance
8 payment to Hyperion. However, an unrelated entity, Itec LLC (“Itec”), was already
9 contemplating a transaction by which Itec would, among other things, acquire all the intellectual
10 property and other assets of Amiga Washington, giving Amiga Washington appropriate
11 consideration.
12

13 37. In preparation for this acquisition, Itec, a New York limited liability
14 company in the venture capital business, had already made loans to Amiga Washington totaling
15 approximately \$50,000.
16

17 38. In order to avoid the risk that the OS 4.0 would be tied up in bankruptcy
18 proceedings, Itec ultimately agreed to pay the \$25,000 to buy the rights to the OS 4.0 directly
19 from Hyperion. This would ensure that even if Hyperion went bankrupt, the ownership rights
20 would already have been transferred to Itec, and could not go to a third party.
21

22 39. On March 18, 2003, as a down payment for the acquisition of Hyperion’s
23 rights in OS 4.0, Bill McEwen (“McEwen”), then President and Chief Executive Officer of
24 Amiga Washington, wire transferred to Hyperion’s account the sum of \$2,500, which was the
25 amount Hermans had advised was the minimum that Hyperion needed by March 20, 2003 in
26 order to stave off bankruptcy proceedings temporarily, leaving a balance of \$22,500 remaining to
27 be prepaid to Hyperion in connection with the acquisition of the rights to OS 4.0 from Hyperion.

1 40. On or about April 2, 2003, a principal of Itec informed Hermans that an
2 immediate good faith payment would be sent to Hyperion representing 10% of the remaining
3 balance of \$22,500 to be paid to Hyperion for transfer to Itec of Hyperion's rights in OS 4.0,
4 pending completion of legal documents memorializing the acquisition of Hyperion's rights in
5 OS 4.0.

6 41. On or about April 3, 2003, Itec caused an affiliated entity (Tachyon Corp.)
7 to send a \$2,250 wire transfer to Hyperion as a further good faith down payment representing
8 10% of the remaining balance of \$22,500 to be paid to Hyperion for transfer of Hyperion's rights
9 in OS 4.0.

10 42. On or about April 23, 2003, Itec reached a general, overall agreement with
11 Amiga Washington for the transfer and sale of all of Amiga Washington's right, title, and
12 interest in its Operating System, including Source Code and all versions from the "Classic
13 Amiga Operating System" through AMIGA OS 4.0 and all subsequent versions to Itec.

14 43. On or about May 5, 2003, Itec caused an additional \$20,000 to be wire
15 transferred to Hyperion, which was intended to be a tender of payment in full of the remaining
16 balance payable to Hyperion for the transfer of Hyperion's rights in OS 4.0 to Itec.

17 44. Thus, by on or about May 5, 2003, Hyperion had received at least \$24,750
18 in payments relating to OS. 4.0, at least \$20,000 of which had been paid by Itec directly, the rest
19 by third parties on its behalf and/or for its benefit, including the \$2,500 wire transferred by Bill
20 McEwen on or about March 18, 2003 (at a time when McEwen anticipated being a co-purchaser
21 with Itec) and the \$2,250 wire transferred by Itec's affiliate, Tachyon Corp., on or about April 3,
22 2003. That this \$24,750 total was \$250 less than the agreed upon \$25,000 payment amount was
23 a mathematical error, and, upon information and belief, both Itec and Hyperion believed at that
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1 time that it constituted payment of the full agreed upon amount and, in any event, Hyperion
2 received additional amounts which brought the total to \$38,550, as explained in ¶¶ 81-82, *infra*.

3 45. Furthermore, since payment of the \$25,000 had been made to Hyperion,
4 OS 4.0 still had not been completed, and in light of changed circumstances, it was recognized
5 that the 2001 Agreement no longer worked, had effectively expired, and would need to be
6 rewritten.

7
8 46. Subsequent to May 5, 2003, Itec and Hyperion entered into a written
9 agreement, dated as of April 24, 2003 (the "Itec-Hyperion Agreement"), which memorialized the
10 agreement reached on that date between Hyperion and Itec, whereby Itec (with the approval of
11 Amiga Washington) would acquire all of Hyperion's rights in the Source Code, Object Code and
12 intellectual property of the OS 4.0. The Itec-Hyperion Agreement acknowledged Hyperion's
13 receipt of \$25,000 and its obligation to deliver all of Hyperion's rights in OS 4.0 to Itec, stating
14 in relevant part:

15
16 Hyperion confirms that for the receipt of \$25,000 USD, Hyperion shall
17 transfer the ownership of the Object Code, Source Code and intellectual
18 property of OS 4.0 to Itec in accordance with the provisions of the
19 November 1, 2001 agreement between Amiga, Hyperion and Eyetech and
20 to the extent it can do so under existing agreements with third party
21 developers whose work shall be integrated in OS 4.0.

22 A true copy of the Itec-Hyperion Agreement is annexed hereto as Exhibit B.

23 47. In or about March 2004, Hyperion issued a confirming invoice to Itec
24 (dated as of December 31, 2003) for the \$22,500 paid by Itec to Hyperion for Hyperion's rights
25 in OS 4.0. The invoice references Article 3.01 of the 2001 Agreement, and an email from Ben
26 Hermans on behalf of Hyperion dated March 27, 2004 explains that the invoice is "for the
27 \$22,500 paid by Itec to Hyperion [in 2003]." True copies of the invoice and the March 27, 2004
Ben Hermans email are annexed hereto as Exhibits C and D, respectively.

1 48. Hyperion retained the payments made by or on behalf of Itec in
2 connection with Itec's acquisition of Hyperion's rights in OS 4.0 and, upon information and
3 belief, never advised, notified or asserted to Itec that Hyperion was still owed \$250 or that
4 Hyperion would not perform its obligation to transfer its rights in OS 4.0 to Itec unless or until it
5 received an additional \$250.

6 49. When Itec thus acquired all of Hyperion's rights in the Source Code,
7 Object Code and intellectual property of OS 4.0, Itec contemplated that if Hyperion were
8 successful in avoiding bankruptcy, Hyperion would coordinate the third party developers with
9 which Hyperion had contracted under the 2001 Agreement and that Itec and Hyperion would
10 work together in a manner generally consistent with what had been contemplated by the 2001
11 Agreement on the distribution side, modified as necessary to take into account that Itec had
12 become the owner of OS 4.0.

13
14 **Amiga Washington Obtained Additional Funding From Itec Secured**
15 **By Amiga Washington's Intellectual Property Pursuant To A**
16 **Loan Facility Agreement And Security Agreement**

17 50. Thereafter, Itec and Amiga Washington entered into a Loan Facility
18 Agreement, dated as of May 22, 2003 (the "Loan Facility Agreement"), in which Itec agreed to
19 provide a loan facility totaling \$175,000 to Amiga Washington, and incorporated therein monies
20 previously advanced totaling \$75,750. The Loan Facility Agreement, among other things,
21 provided that Itec would provide additional loans upon request up to the \$175,000 total during
22 the period from May 22, 2003 to the due date of May 22, 2004. A true copy of the Loan Facility
23 Agreement is annexed hereto as Exhibit E.

24
25 51. Paragraph 8 of the Loan Facility Agreement further provided, among other
26 things, that all monies loaned to Amiga Washington pursuant to the Loan Facility Agreement
27 would be "fully secured by a first security interest in all the intellectual property of Amiga

1 [Washington], including but not limited to the source code, object code and software of the so-
2 called Amiga Content Engine, various titles of games and other titles of content owned by Amiga
3 [Washington], as well as the name, the trademark and the brand Amiga, and the Amiga logo, as
4 further specified in a separate Security Agreement between the parties.”

5 52. In addition, paragraph 14 of the Loan Facility Agreement provided: “If
6 the borrower [Amiga Washington] does not pay the full amount owed on or before May 22,
7 2004, it is agreed that the Lender [Itec] can at its sole discretion foreclose on all the assets that
8 secure the loan pursuant to the loan agreement and the security agreement.”

9 53. On or about July 3, 2003, Itec and Amiga Washington entered into a
10 Security Agreement, in accordance with the terms of the Loan Facility Agreement. Pursuant to
11 paragraph 1 of the Security Agreement, Amiga Washington granted Itec a security interest in
12 various enumerated intellectual property assets, including all of Amiga Washington’s trademarks
13 and all of its software, including all versions of the Amiga Operating System and all software
14 copyrights and registrations. A true copy of the Security Agreement, without exhibits, is
15 annexed hereto as Exhibit F.

16 54. Paragraph 6 of the Security Agreement further provided that upon Amiga
17 Washington’s failure to pay the full amount owed under the Loan Facility Agreement on or
18 before May 22, 2004, “the Lender [Itec] can at its sole discretion foreclose on all the assets that
19 secure the loan pursuant to the Loan Facility Agreement and the Security Agreement.”

20
21
22 **KMOS (Amiga) Acquired Itec’s Rights In OS 4.0**

23 55. Itec ultimately decided that rather than acquire the other assets of Amiga
24 Washington in its own name, it would create a new company to do so. Thus, on October 7,
25 2003, Amiga was incorporated in Delaware under the name KMOS, Inc., with the intention that
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27

1 it would become the ultimate acquirer of all intellectual property and other assets of Amiga
2 Washington.

3 56. In furtherance of this decision, Itec and KMOS entered into a Stock
4 Purchase and Sale Agreement of Assignment of Intellectual Property Rights. A true copy of the
5 final version of this agreement, dated as of October 10, 2003 (the “October 10, 2003 Itec-KMOS
6 OS 4.0 Agreement”) is annexed hereto as Exhibit G.

7
8 57. Pursuant to the October 10, 2003 Itec-KMOS Agreement, in return for
9 6,999,000 shares of KMOS, Inc. stock, Itec assigned to KMOS all of Itec’s rights in the Object
10 Code, Source Code and intellectual property of what was defined in the 2001 Agreement and the
11 Itec-Hyperion Agreement as OS 4.0 (but which is referenced in the October 10, 2003 Itec-
12 KMOS OS 4.0 Agreement as “OS4.”), which Itec had owned outright since April 2003.

13 58. Itec and KMOS further agreed in the October 10, 2003 Itec-KMOS OS 4.0
14 Agreement that:

15
16 All business enabled by OS4 and all possible future acquisitions of related
17 business assets, including but not limited to the content engine, the content
18 rights, the scripting tools, the Amiga brand name, and contracts with the
19 Amiga development community, whether by means of purchase by cash or
20 shares, or merger, will hence forth be effected by KMOS Inc. It is further
21 agreed that KMOS Inc. will raise such funding, and will hire such
22 management, marketing and software engineering resources as is
23 necessary to build and expand the business enabled by ownership of OS4.

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27
THE 2004 ARRANGEMENT

**KMOS (Amiga) Acquired Amiga Washington’s Rights In All
Versions Of The AMIGA Operating Systems And Entered
Into A New Arrangement With Amiga One Partners**

28 59. In 2004, Amiga Washington agreed to sell and transfer all of its remaining
29 right, title, and interest in its operating system (including all versions from the “Classic Amiga
30 Operating System” through AMIGA OS 4.0 and all subsequent versions) to KMOS.

1 60. On February 9, 2004, Bill McEwen of Amiga Washington wrote to Ben
2 Hermans of Hyperion to confirm the status of matters in light of the sale of the OS 4.0 by
3 Hyperion to Itec; the subsequent creation of KMOS; KMOS's acquisition of the OS 4.0 from
4 Itec, and KMOS's anticipated acquisition of Amiga Washington's other intellectual property
5 assets. See Exhibit H. In pertinent part, under the heading "Distribution Agreement," McEwen
6 stated:

7 Here is my understanding of what you have happening:

8 * * * *

9 You have a desire to continue a business relationship with KMOS into the
10 future.

11 You need to know that in the next two to three days, KMOS will be taking
12 over all that was Amiga. When this happens, you will no longer be
13 negotiating with me, but with KMOS. They already own the IP and all
14 source code as outlined in the Agreement

15 * * * *

16 As of right now, there is no contract in place for the distribution of the
17 operating system with KMOS, the owners of the product. So we need to
18 get a contract in place that is beneficial to both sides, and I have been
19 asked to work with you in getting this taken care of before they take over.

20 * * * *

21 The \$25,000.00 was paid, source code is not in hand which the contract
22 states that it will be in hand. The product is now owned by a third party
23 and we need to reach an agreement by tomorrow that makes sense.

24 61. Thereafter such an agreement was reached (the "2004 Arrangement"), and
25 consistent therewith, on March 15, 2004, in a joint press release, which was drafted by McEwen
26 after consultation with Hermans and Garry Hare, then CEO of KMOS, and which was approved
27 by Hyperion, Amiga Washington, and KMOS, these three entities joined in the announcement
that Amiga Washington had "sold the Amiga Operating System to KMOS." The March 15,
2004 press release refers to the general, overall agreement (described in paragraph 42 above) that

1 had been reached by Itec and Amiga Washington on April 23, 2003 for the transfer and sale of
2 all of Amiga Washington's right, title, and interest in its operating system.

3 62. The March 15, 2004 joint press release also quotes Hare as stating: "At
4 Amiga's [*i.e.*, Amiga Washington's] insistence, to which we totally agreed, we will honor the
5 terms of the November 2001, agreement with Amiga One Partners: Hyperion VOF and Eyeteck
6 Group Ltd., in their entirety." This statement was a reference to KMOS's intention to honor the
7 distribution rights provided to Amiga One Partners as set forth in the 2001 Agreement, taking
8 into account that KMOS was the owner of the OS 4.0, that Amiga Washington was out of the
9 picture, and that Hyperion's role was as coordinator of the third-party developer-subcontractors
10 rather than as having any claim of ownership in OS 4.0.

12 63. Thus, under the 2004 Arrangement, once the OS 4.0 was completed,
13 KMOS would provide Hyperion, as distributor, with the rights and benefits described in
14 paragraphs 27-30 above, which Hyperion would have received from Amiga Washington had the
15 2001 Agreement not been abandoned by the parties and substituted with the 2004 Arrangement
16 with KMOS.

18 64. A true copy of this March 15, 2004 press release, which has been posted
19 on Hyperion's website and remains posted there as of the date of this Amended Complaint at
20 <http://www.hyperion-entertainment.biz:8080/amiga> (under 2004 press releases) is annexed
21 hereto as Exhibit I

23 65. Prior to KMOS's termination of the relationship with Hyperion as of
24 December 2006 described in paragraphs 86-89 below, KMOS and Hyperion operated in
25 accordance with the 2004 Arrangement and in a manner that mirrored the essential terms of the
26 2001 Agreement, taking into account that KMOS was the owner of the OS 4.0, that Amiga
27

1 Washington was out of the picture, and that Hyperion's role was as coordinator of the third-party
2 developer-subcontractors rather than as having any claim of ownership in OS 4.0.

3 **Hyperion's Initial Developer Pre-Release Version Of OS 4.0**

4 66. In or about April 2004 Hyperion announced that an initial "Developer Pre-
5 Release" of OS 4.0 was ready for copying for use by software developers working on creating or
6 adapting software applications to run on OS 4.0 and limited numbers of test users. This initial
7 Developer Pre-Release was incomplete, unfinished, and unready for general commercial release
8 or consumer use.

9
10 67. In or about May 2004 Hyperion announced that the Developer Pre-release
11 of OS 4.0 was tentatively scheduled for May 21, 2004.

12 68. Neither Hyperion nor Amiga One Partners notified Amiga Washington,
13 Itec or KMOS (Amiga) that this initial Developer Pre-Release constituted "the completion of
14 OS 4.0" within the meaning of Articles 2.06 or 3.01 of the 2001 Agreement (or any subsequent
15 agreement or novation containing those provisions, including the 2004 Arrangement), nor did
16 that initial Developer Pre-Release in fact constitute "the completion of OS 4.0." Hyperion has
17 asserted that the distribution of copies of the initial Developer Pre-Release commenced in June
18 2004.

19
20 **KMOS'S ULTIMATE ACQUISITION OF AMIGA WASHINGTON'S ASSETS**

21
22 **Itec's Additional Secured Loans To Amiga Washington**

23 69. By May 10, 2004, by mutual agreement the original \$175,000 cap under
24 the Loan Facility Agreement and Security Agreement had been raised, and Itec and persons
25 affiliated with and/or acting on behalf of Itec had advanced, to or for the benefit of Amiga
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27

1 Washington and persons affiliated with and/or acting on behalf of Amiga Washington, a total of
2 \$198,950, not including accrued interest.

3 70. On or about May 12, 2004, Amiga Washington requested that Itec
4 advance an additional \$50,000, which would have brought the total amount of interest and
5 principal payable by May 22, 2004 to \$267,159. A true copy of a May 12, 2004 letter
6 confirming this request is annexed hereto as Exhibit J.
7

8 71. By agreement between Itec and KMOS, the additional \$50,000 was paid
9 on May 13, 2004 by KMOS.

10 **KMOS's Acquisition Of Itec's Rights In Amiga Washington's Debt And Collateral**

11 72. On or about May 14, 2004, Itec and KMOS entered into a Purchase and
12 Sale Agreement and Agreement of a Secured Note (the "May 14, 2004 Itec-KMOS Purchase
13 Agreement"). A true copy of this May 14, 2004 Itec-KMOS Purchase Agreement is annexed
14 hereto as Exhibit K
15

16 73. Pursuant to the May 14, 2004 Itec-KMOS Purchase Agreement, KMOS
17 acquired all of Itec's rights in the Loan Facility Agreement and Security Agreement and Amiga
18 Washington's debt.

19 **KMOS's Acquisition Of Amiga Washington's Intellectual Property**
20 **Including Operating Systems And Trademarks**

21 74. As of August 30, 2004, Amiga Washington was in default of the Loan
22 Facility Agreement and Security Agreement, having failed to pay any of the amounts that were
23 due on May 22, 2004 or any amounts thereafter.

24 75. On or about August 30, 2004, KMOS and Amiga Washington entered into
25 an Agreement on Acquisition of Software, Content, Corporate Name and Brand, Logo,
26 Trademarks, Domain Names, Patent Rights and Other Intellectual Property (the "August 30,
27 2004 KMOS-Amiga Washington Intellectual Property Acquisition Agreement"). A true copy of

1 this August 30, 2004 KMOS-Amiga Washington Intellectual Property Acquisition Agreement,
2 without schedules, is annexed hereto as Exhibit L

3 76. Pursuant to the August 30, 2004 KMOS-Amiga Washington Intellectual
4 Property Acquisition Agreement, for good and valuable consideration, KMOS finalized and
5 memorialized its acquisition all of Amiga Washington's right title and interest in any intellectual
6 property of Amiga Washington, including, but not limited to, all rights in "all software,
7 applications and services for the Amiga Operating System versions 1.0 through and including
8 version 4.0" and "the corporate and brand name 'Amiga' the Amiga Logo, all 'Amiga'
9 trademarks, all 'Amiga' domain names" and "all and any other tangible rights, goodwill and
10 intellectual property of Amiga [Washington]."

12 77. Pursuant to paragraph 2 of the August 30, 2004 KMOS-Amiga
13 Washington Intellectual Property Acquisition Agreement, payment in full for KMOS's purchase
14 consisted of "(a) Cash advances made to Amiga [Washington] under the Loan Facility
15 Agreement, totaling Two Hundred Seventy Four Thousand Four Hundred Twenty Two Dollars
16 (US \$270,422.00) as of the effective date of this Agreement, and (b) four million (4,000,000)
17 shares of KMOS common stock." The total value of the consideration paid by KMOS was over
18 \$2,500,000.
19

20 78. On January 26, 2005, a Certificate of Amendment of Certificate of
21 Incorporation was filed with the Delaware Secretary of State, changing the name of KMOS, Inc.
22 to Amiga, Inc. A true copy of that Certificate of Amendment of Certificate of Incorporation is
23 annexed hereto as Exhibit M
24

25 79. Through the transactions, agreements and conduct described in
26 paragraphs 59-65 and 69-78 above, (a) Amiga acquired, among other things, all of Amiga
27 Washington's rights, title and interest in any and all copyrights, trademarks and other intellectual

1 property rights relating to hardware, software, software applications and operating systems
2 including the "Classic Amiga OS" through 4.0 and all of Hyperion's rights, title and interest in
3 OS 4.0 and (b) Amiga agreed with Hyperion individually and on behalf of Amiga One Partners
4 to continue the development, marketing and distribution of OS 4.0 and potentially future
5 versions of OS 4 pursuant to the terms of the 2004 Arrangement.

6 **Ongoing Breaches By Hyperion And Termination By Amiga**

7
8 80. Following the completion of this acquisition by Amiga, Hyperion
9 represented to Amiga that work was continuing on the development of OS 4.0. However,
10 Hyperion had long been disregarding various of its contractual obligations and continued to
11 disregard those obligations.

12 81. After continuing demands by Amiga that Hyperion turn over the Source
13 Code, Object Code, intellectual property rights, interest and title to OS 4.0, and continuing
14 failure by Hyperion to do so, Hyperion asserted for the first time, baselessly, that Amiga owed an
15 additional \$7,134. Amiga, reserving its rights, wire transferred an additional \$7,200 to Hyperion
16 on or about September 18, 2006. Nevertheless, Hyperion continued to refuse to turn over the
17 Source Code, Object Code, intellectual property rights, interest and title to OS 4.0, this time
18 claiming in a letter dated October 10, 2006 that another \$8,850 was owed. Again reserving its
19 rights, Amiga wire transferred another \$8,850 on November 21, 2006.

20
21 82. By November 21, 2006, Hyperion had been paid a total of at least \$38,550
22 by and on behalf of Itec and Amiga for Hyperion's rights in OS 4.0; however, by that time it had
23 become apparent that Hyperion was unwilling to comply with its contractual obligations and, as
24 of that date, had breached numerous obligations to Amiga. For example, Hyperion had breached
25 its obligations to Amiga by continuing to delay the completion and release of OS 4.0, while
26 Hyperion attempted to pack excessive features into OS 4.0, apparently in hopes of unfairly
27

1 exploiting a royalty-free license for OS 4.0 and circumventing royalty obligations for future
2 OS 4 versions. There is still no complete OS 4.0 in a form suitable for commercial release or
3 general consumer use, despite the original “best efforts” target date for release by March 1, 2002,
4 and Hyperion has never delivered the Source Code, Object Code or other intellectual property of
5 OS 4.0 to Amiga or its predecessors-in-interest.

6 83. In addition, Hyperion had failed to turn over to Itec or Amiga the Source
7 Code, Object Code, intellectual property rights, interest and title to OS 4.0, although Hyperion
8 had now received far more than the prescribed \$25,000 payment for that transfer pursuant to the
9 Itec-Hyperion Agreement of April 24, 2003, the 2001 Agreement or any subsequent agreement
10 or novation, including the 2004 Arrangement.

11 84. Hyperion had also been marketing what it claimed to be OS 4.0 beyond
12 the limited marketing and distribution licenses granted to Amiga One Partners. These limited
13 licenses permitted Hyperion to market OS 4.0 only as (a) a stand alone version for Power PC
14 (“PPC”) based computer hardware that was developed and marketed for the AMIGA platform
15 and (b) a pre-installed OEM version on the “Amiga One,” computer. Instead, Hyperion’s was
16 advertising OS 4.0 on its website for use with items ranging from kiosks, set-top boxes and
17 cellphones to servers and unspecified OEM devices on which “OS 4.0” apparently would be pre-
18 installed. A true copy of a printout of a page from Hyperion’s website containing such
19 advertising is annexed hereto as Exhibit N.
20

21 85. Hyperion had also failed to use best efforts to secure the widest possible
22 rights to all Source Code and Object Code. Hyperion had engaged third party contractors as
23 software developers without negotiating, safeguarding and/or ensuring that the widest possible
24 rights could be transferred upon tender of payment to Hyperion for transfer the ownership of the
25 Object Code, Source Code and intellectual property of OS 4.0 in accordance with the Itec-
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1 Hyperion Agreement and/or Articles 2.06 and 3.01 of the 2001 Agreement or any subsequent
2 agreement or novation containing those provisions, including the 2004 Arrangement. Upon
3 information and belief, Hyperion had entered into agreements with certain third party
4 contractors, allowing those third party contractors to retain rights in their work on OS 4.0. In
5 addition, upon information and belief Hyperion had otherwise impaired the ownership and
6 access rights to portions of the Source Code and Object Code of OS 4.0.
7

8 86. On November 21, 2006, counsel for Amiga gave formal written notice to
9 Hyperion's Belgian counsel, including specifically Ben Hermans, who was also a principal or
10 former principal of Hyperion, that Amiga was terminating the parties' agreement based on
11 material breaches of terms that had been mirrored in the 2004 Arrangement. Citing Article 6.02
12 of the 2001 Agreement, which was mirrored in the 2004 Arrangement, the letter provided
13 30 days from Hyperion's receipt of the letter to cure various breaches enumerated in the letter
14 and stated that if each and every breach were not cured by December 21, 2006 the parties'
15 agreement would be terminated as of that date. A true copy of the November 21, 2006 letter is
16 annexed hereto as Exhibit O.
17

18 87. The ongoing breaches by Hyperion referenced in the November 21, 2006
19 letter, none of which has been cured to date, include the following:

- 20 (a) Hyperion had failed to use best efforts to ensure that AMIGA
21 OS 4.0 was complete and ready for release before March 2, 2002.
22 (b) Hyperion had failed ever to complete and release or facilitate the
23 completion of OS 4.0 in a form for release suitable for commercial release.
24 (c) Hyperion had failed to turn over the source code, object code,
25 intellectual property rights, interest and title in OS 4.0 pursuant to the Itec-
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1 Hyperion Agreement of April 24, 2004 (the rights to which Amiga had
2 subsequently acquired, as Hyperion well knew).

3 (d) Hyperion had been marketing “OS 4.0” beyond the limited
4 marketing and distribution licenses granted to Amiga One Partners, which
5 permitted Hyperion to market OS 4.0 only as a stand alone version for
6 PPC based computer hardware for the AMIGA platform and as a pre-
7 installed OEM version on the “Amiga One,” computer. Instead,
8 Hyperion’s website was advertising “OS 4.0” for use with various items
9 ranging from kiosks, set-top boxes and cellphones to servers and
10 unidentified OEM devices.

11
12 (e) Hyperion had also failed to use best efforts to secure the widest
13 possible rights to all Source Code and Object Code of OS 4.0 by engaging
14 third party contractors as software developers without ensuring that the
15 widest possible rights could be transferred, and Hyperion had otherwise
16 caused or allowed the ownership and access rights to portions of the
17 Source Code and Object Code to be impaired.
18

19 88. The November 21, 2006 letter also made a formal demand for mediation
20 regarding each of the enumerated breaches by Hyperion in accordance with Article 7.07 of the
21 2001 Agreement which was mirrored in the 2004 Arrangement. Hyperion failed and refused to
22 mediate in further breach of the parties’ agreement.
23

24 89. Upon Hyperion’s failure to cure the breaches enumerated in the
25 November 21, 2006 letter by December 21, 2006, the 2004 Arrangement terminated along with
26 any and all licenses granted by Amiga or its predecessors-in-interest that were exercisable by
27 Hyperion individually or as a member of Amiga One Partners, subject only to certain provisions

1 which survived termination, *i.e.*, Articles IV, V, VI and VII of the 2001 Agreement (which were
2 mirrored in the 2004 Arrangement), as specified in Article 6.03 of the 2001 Agreement (which
3 was mirrored in the 2004 Arrangement).

4 90. Thereafter, on or about December 24, 2006, Hyperion purported to
5 publicly announce “the immediate availability (for registered AmigaOne customers) of Amiga
6 OS 4.0, The Final Update” and asserted for the first time that “Amiga OS 4.0” had been
7 “[o]riginally released in May of 2004.” A copy of this purported announcement is posted on
8 Hyperion’s website at www.hyperion-entertainment.biz:8080/amiga, and a print-out is annexed
9 hereto as Exhibit P. However, this purported “Final Update” is merely the latest in a series of
10 updates of the April 2004 initial Developer Pre-release of OS 4.0, still was and is incomplete,
11 unfinished, and unready for general commercial release or consumer use, and therefore does not
12 constitute “the completion of OS 4.0” required by Articles 2.06 and 3.01 of the 2001 Agreement
13 (or any subsequent agreement or novation containing those provisions, including the 2004
14 Arrangement).

15 91. Neither Hyperion, nor Amiga One Partners notified Amiga Washington,
16 Itec or KMOS (Amiga) that this “Final Update” of the Developer Pre-Release constituted “the
17 completion of OS 4.0” within the meaning of Articles 2.06 and 3.01 of the 2001 Agreement (or
18 any subsequent agreement or novation containing those provisions, including the 2004
19 Arrangement), nor does that “Final Update” of the Developer Pre-Release in fact constitute “the
20 completion of OS 4.0” within the meaning of these provisions of such Agreements.

21 **HYPERION’S CONTINUING POST-TERMINATION WRONGFUL CONDUCT**

22 92. Despite the termination of any and all licenses for Hyperion to use any
23 copyrights in any version of the AMIGA Operating System or any AMIGA formative
24 trademarks or any other trademarks owned by Amiga, Hyperion nevertheless continued to use
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1 those copyrights and trademarks without authorization and in violation of Amiga’s rights. For
2 example, to date, Hyperion continues to advertise, offer for sale and may be selling and
3 distributing what it purports to be OS 4.0 for a wide variety of platforms and products using
4 various AMIGA formative and related trademarks belonging to Amiga.

5 93. On or about March 25, 2007, Hyperion announced, purportedly on behalf
6 of itself and ACube Systems Srl., an Italian entity (“ACube”), that these two companies had
7 entered into a “strategic partnership” and that ACube would be acting as “a worldwide
8 distributor of Hyperion’s Amiga 4.0 operating system for a range of PPC hardware platforms
9 including Amiga One (MicroA1, SE/XE) and Classic Amiga.”

10 94. Neither the 2001 Agreement, nor any subsequent agreement or novation
11 gave Hyperion or Amiga One Partners any unilateral right to sublicense any rights to any third
12 party including ACube, to act as a distributor of OS 4.0 or to use any of Amiga’s trademarks.

13 95. Amiga has not consented to or licensed such use of Amiga’s intellectual
14 property rights, including copyrights in OS 4.0 and AMIGA formative or other trademarks.

15 96. By purporting to enter into a “strategic partnership” with ACube for
16 worldwide distribution of OS 4.0 “for a range of PPC hardware platforms” without Amiga’s
17 consent or license, Hyperion has compounded its breaches of the 2001 Agreement or any
18 subsequent agreement or novation, including the 2004 Arrangement and is directly,
19 contributorily and by inducement (a) infringing Amiga’s copyright, (b) infringing and diluting
20 Amiga’s trademarks and (c) engaging in unfair competition under federal and state law.

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23
24 **FIRST CLAIM FOR RELIEF**
(Breach of Contract, 2004 Arrangement)

25 97. Amiga repeats and re-alleges each and every allegation in the foregoing
26 paragraphs as though fully set forth herein.
27

1 98. Amiga has performed all conditions, covenants and promises required to
2 be performed by it in accordance with the terms and conditions of all relevant agreements with
3 Hyperion and Amiga One Partners, except as to those conditions which have been excused.

4 99. Hyperion has materially breached its obligations under the 2004
5 Arrangement by reason of Hyperion's foregoing acts and omissions and other past and present
6 acts and omissions, including but not limited to: (a) Hyperion's failure and refusal to relinquish
7 its rights in the Source Code, Object Code and intellectual property of AMIGA OS 4.0 despite
8 timely payment and demand; (b) Hyperion's ongoing delay of the completion and release of
9 OS 4.0, despite the original "best efforts" target date for release by March 1, 2002;
10 (c) Hyperion's failure to complete and release OS 4.0 in a form suitable for commercial release
11 or general consumer use OS 4.0 at all during the license term; (d) Hyperion's development and
12 marketing of "Amiga OS 4" and OS 4.0 for sales outside the licensed market, platform and term;
13 and (e) failure to secure the widest possible rights to the Source Code, Object Code and
14 intellectual property of OS 4.0, and specifically all rights necessary to effectuate the full and
15 complete purpose of the 2004 Arrangement.
16

17 100. As a consequence of these breaches by Hyperion, Amiga has been
18 deprived of having the next generation of the AMIGA Operating System available for release to
19 consumers. It has lost enormous business opportunities, including the opportunity to create
20 marketing "buzz" and to pave the way for additional Operating System improvements, and
21 product introductions. It has also lost a source of revenue from royalties on OEM sales of
22 OS 4.0 and additional royalties from sales of future versions.
23

24 101. The damages suffered by Amiga were foreseeable and within the
25 contemplation and anticipation of Hyperion when it entered into the 2004 Arrangement.
26
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1 102. Hyperion’s material breaches of the 2004 Arrangement have irreparably
2 injured Amiga, and, unless enjoined, will continue to do so. Damages alone are inadequate to
3 compensate Amiga for Hyperion’s wrongful conduct, and Amiga is entitled to injunctive relief.
4 Among other things, Hyperion should be ordered to provide to Amiga all of Hyperion’s rights in
5 the Source Code, Object Code and intellectual property of OS 4.0 including any rights that
6 Hyperion may have under any agreements with third-party developers. In addition, Hyperion
7 should be enjoined from continuing to develop and market “Amiga OS 4” and OS 4.0 and from
8 interfering with Amiga’s development or use of “Amiga OS 4” and OS 4.0.
9

10 103. In addition, and/or in the alternative, as a direct and proximate result of
11 Hyperion’s breaches of the 2004 Arrangement, Amiga has incurred extensive monetary damages
12 in an amount to be proven at the time of trial but in all events in excess of \$75,000, exclusive of
13 interest and costs. Pursuant to the 2004 Arrangement, Amiga seeks an award of its reasonable
14 attorneys and expert witness costs, fees and expenses.
15

16 WHEREFORE, Amiga prays for relief as set forth below.

17 **SECOND CLAIM FOR RELIEF**
18 (Breach of Contract, 2001 Agreement)

19 104. Amiga repeats and re-alleges each and every allegation in the foregoing
20 paragraphs as though fully set forth herein.

21 105. In the alternative, if this Court were to find that KMOS did not, with the approval
22 and/or acquiescence of Hyperion (acting individually and/or on behalf of Amiga One Partners)
23 enter into a new, substituted agreement with Hyperion and/or Amiga One Partners, or a novation
24 of the 2001 Agreement, then this Court should find that KMOS became Amiga Washington’s
25 successor-in-interest under the 2001 Agreement by assignment or otherwise, with the approval,
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1 consent, and/or acquiescence of Hyperion (individually and/or on behalf of Amiga One Partners)
2 and that Hyperion and Amiga One Partners are estopped from asserting otherwise.

3 106. In addition, Amiga and its predecessors-in-interest have performed all
4 covenants and promises required to be performed by them in accordance with the terms and
5 conditions of all relevant agreements, except as to those conditions which have been excused.

6 107. Hyperion has materially breached its obligations under the 2001
7 Agreement by reason of Hyperion's foregoing acts and omissions and other past and present acts
8 and omissions, including but not limited to (a) Hyperion's failure and refusal to relinquish its
9 rights in the Source Code, Object Code and intellectual property of AMIGA OS 4.0 despite
10 timely payment and demand; (b) Hyperion's failure to exercise its best efforts to ensure that
11 OS 4.0 was ready for release before March 1, 2002; (c) Hyperion's failure to complete and
12 release OS 4.0 in a form suitable for commercial release or general consumer use OS 4.0 at all
13 during the license term; (d) Hyperion's development and marketing of "Amiga OS 4" and OS 4.0
14 for sales outside the licensed market, platform and term; and (e) failure to secure the widest
15 possible rights to the Source Code, Object Code and intellectual property of OS 4.0, and
16 specifically all rights necessary to effectuate the full and complete purpose of the 2001
17 Agreement.
18

19
20 108. As a consequence of these breaches by Hyperion, Amiga has been
21 deprived of having the next generation of the AMIGA Operating System available for release to
22 consumers. It has lost enormous business opportunities, including the opportunity to create
23 marketing "buzz" and to pave the way for additional Operating System improvements, and
24 product introductions. It has also lost a source of revenue from royalties on OEM sales of
25 OS 4.0 and additional royalties from sales of future versions.
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1 109. The damages suffered by Amiga were foreseeable and within the
2 contemplation and anticipation of Hyperion when it entered into the 2001 Agreement.

3 110. Hyperion's material breaches of the 2001 Agreement have irreparably
4 injured and, unless enjoined, will continue to irreparably injure, Amiga. Damages alone are
5 inadequate to compensate Amiga for Hyperion's wrongful conduct, and Amiga is entitled to
6 injunctive relief. Among other things, Hyperion should be ordered to provide to Amiga all of
7 Hyperion's rights in the Source Code, Object Code and intellectual property of OS 4.0 including
8 any rights that Hyperion may have under any agreements with third-party developers. In
9 addition, Hyperion should be enjoined from continuing to develop and market "Amiga OS 4"
10 and OS 4.0 and from interfering with Amiga's development or use of "Amiga OS 4" and OS 4.0

11
12 111. In addition, and/or in the alternative, as a direct and proximate result of
13 Hyperion's breaches of the 2001 Agreement, Amiga has incurred extensive monetary damages in
14 an amount to be proven at the time of trial but in all events far in excess of \$75,000, exclusive of
15 interest and costs. Pursuant to the 2001 Agreement, Amiga seeks an award of its reasonable
16 attorneys and expert witness costs, fees and expenses.
17

18 WHEREFORE, Amiga prays for relief as set forth below.

19 **THIRD CLAIM FOR RELIEF**

20 (Declaratory Judgment Relating to 2004 Arrangement)

21 112. Amiga repeats and re-alleges each and every allegation in the foregoing
22 paragraphs as though fully set forth herein.

23 113. An actual controversy has arisen and now exists between Amiga and
24 Hyperion concerning their respective rights in that Amiga contends that (a) Amiga has
25 performed all conditions, covenants and promises required to be performed by it in accordance
26 with the terms and conditions of the 2004 Arrangement, except as to those conditions which have
27

1 been excused, (b) Hyperion committed at least one or more material breaches of the 2004
2 Arrangement that Hyperion failed to cure in a timely manner, (c) Amiga properly terminated the
3 2004 Arrangement, (d) except as to those obligations and rights that survive termination of the
4 2004 Arrangement, the 2004 Arrangement is terminated; and (e) Amiga is the owner, subject to
5 any valid third-party claims or rights, of all intellectual property rights in AMIGA OS 3.1, and
6 any and all of Hyperion's rights in any derivative works developed and paid for under the 2004
7 Arrangement, and the Itec-Hyperion Agreement including the Object Code, Source Code and
8 intellectual property of "Amiga OS 4" and OS 4.0.

10 114. Upon information and belief, Hyperion contests each of the allegations contained
11 in the immediately preceding paragraph.

12 115. Amiga seeks a judicial declaration to the effect of each of Amiga's
13 contentions in paragraph 113, above.

14 WHEREFORE, Amiga prays for relief as set forth below.

15 **FOURTH CLAIM FOR RELIEF**

16 (Declaratory Judgment Relating to 2001 Agreement)

17 116. Amiga repeats and re-alleges each and every allegation in the foregoing
18 paragraphs as though fully set forth herein.

19 117. In the alternative, if this Court were to find that KMOS did not, with the approval
20 and/or acquiescence of Hyperion (acting individually and/or on behalf of Amiga One Partners)
21 enter into a new, substituted agreement with Hyperion and/or Amiga One Partners, or a novation
22 of the 2001 Agreement, then this Court should find that KMOS became Amiga Washington's
23 successor-in-interest under the 201 Agreement by assignment or otherwise, with the approval,
24 consent, and/or acquiescence of Hyperion (individually and/or on behalf of Amiga One Partners)
25 and that Hyperion and Amiga One Partners are estopped from asserting otherwise.
26
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1 118. In that case, an actual controversy has arisen and now exists between Amiga and
2 Hyperion concerning their respective rights in that Amiga contends that (a) Amiga has
3 performed all conditions, covenants and promises required to be performed by it in accordance
4 with the terms and conditions of the 2001 Agreement, except as to those conditions which have
5 been excused, (b) Hyperion committed at least one or more material breaches of the 2001
6 Agreement that Hyperion failed to cure in a timely manner, (c) Amiga properly terminated the
7 2001 Agreement, (d) except as to those obligations and rights that survive termination of the
8 2001 Agreement, the 2001 Agreement is terminated; and (e) Amiga is the owner, subject to any
9 valid third-party claims or rights, of all intellectual property rights in AMIGA OS 3.1, and any
10 and all of Hyperion's rights in any derivative works developed and paid for under the 2001
11 Agreement, and the Itec-Hyperion Agreement including the Object Code, Source Code and
12 intellectual property of "Amiga OS 4" and OS 4.0.
13

14 119. Upon information and belief, Hyperion contests each of the allegations contained
15 in the immediately preceding paragraph.
16

17 120. Amiga seeks a judicial declaration to the effect of each of Amiga's
18 contentions in paragraph 118, above.
19

20 WHEREFORE, Amiga prays for relief as set forth below.

21 **FIFTH CLAIM FOR RELIEF**
(Trademark Infringement –15 U.S.C. § 1114)

22 121. Amiga repeats and re-alleges each and every allegation in the foregoing
23 paragraphs as though fully set forth herein.
24

25 122. Amiga (successor-in-interest to the initial registrant, Commodore-Amiga,
26 Inc.), to the exclusion of all third parties, owns a federal registration for the mark AMIGA in the
27 United States, registered in the United States Patent and Trademark Office ("USPTO") under

1 Registration No. 1,401,045 for computers, computer disk drives, RAM expansion cartridges,
2 computer monitors and computer modems, in Class 9. This registration for the AMIGA mark,
3 which confers nationwide rights to the mark in connection with the listed goods in Class 9, was
4 issued on July 15, 1985, is valid and subsisting, unrevoked, and uncancelled, has achieved
5 incontestable status pursuant to 15 U.S.C. § 1065 and was timely renewed on September 26,
6 2006. Through a series of assignments, this registration has come to be owned currently by
7 Amiga. A true and correct copy of the Certificate of Registration together with a true and correct
8 copy of the Trademark Assignment Abstract of Title for this Registration from the files of the
9 USPTO is attached hereto as Exhibit Q.

11 123. Amiga (successor-in-interest to the initial registrant, Amiga Development
12 LLC, to the exclusion of all third parties, owns a federal registration for the mark POWERED
13 BY AMIGA & "Boing Ball" Logo Design in the United States, registered in the USPTO under
14 Registration No. 2,369,059 for computers, computer peripherals, and computer operating
15 systems, in Class 9. This registration for the POWERED BY AMIGA & "Boing Ball" Logo
16 Design mark, which confers nationwide rights to the mark in connection with the goods listed in
17 Class 9, was issued on July 18, 2000, is valid, subsisting, unrevoked, uncancelled, and has
18 achieved incontestable status pursuant to 15 U.S.C. § 1065. Through a series of assignments,
19 this registration has come to be owned currently by Amiga. A true and correct copy of the
20 Certificate of Registration together with a true and correct copy of the Trademark Assignment
21 Abstract of Title for this Registration from the files of the USPTO is attached hereto as
22 Exhibit R.

25 124. Amiga (successor-in-interest to the initial registrant, Amiga Washington),
26 to the exclusion of all third parties, owns a federal registration for the mark AMIGA in the
27 United States, registered in the USPTO under Registration No. 2,802,748 for computer software

1 used to facilitate development of software applications capable of running on multiple platforms
2 and other electronic devices and for operating system software for personal computers and other
3 electronic devices, in Class 9. This registration for the AMIGA mark, which confers nationwide
4 rights to the mark in connection with the listed goods in Class 9, was issued on January 6, 2004,
5 is valid and subsisting, unrevoked and uncancelled. Through a series of assignments, this
6 registration has come to be owned currently by Amiga, Inc. A true and correct copy of the
7 Certificate of Registration together with a true and correct copy of the Trademark Assignment
8 Abstract of Title for this Registration from the files of the USPTO is attached hereto as
9 Exhibit S.
10

11 125. Amiga is the owner of a pending federal application for the mark AMIGA
12 (stylized), filed with the USPTO on July 28, 2006 under Application Serial No. 78/940,426 for
13 various goods and services in Classes 9, 16, 35, 38, and 42, including numerous computer and
14 software related goods and services. The USPTO has already published this application for
15 opposition. A true and correct copy of the Trademark Electronic Search System records from the
16 USPTO website for this application is attached hereto as Exhibit T.
17

18 126. Amiga is the owner of a pending federal application for the mark "Boing
19 Ball" Logo Design, filed with the USPTO on July 28, 2006 under Application Serial No.
20 78/940,434 for various goods and services in Classes 9, 16, 35, 38, and 42, including numerous
21 computer and software related goods and services. The USPTO has already published this
22 application for opposition. A true and correct copy of the Trademark Electronic Search System
23 records from the USPTO website for this application is attached hereto as Exhibit U.
24

25 127. Amiga and its predecessors-in-interest have expended substantial time,
26 effort and money in the marketing and promotion of computer software and hardware products
27 under each of Amiga's famous trademarks described above. Amiga and its predecessors-in-

1 interest have continually used these marks on and in connection with the promotion advertising
2 and marketing of the goods associated with these marks and the marks represent substantial
3 goodwill. As a result of this longstanding use and promotion, Amiga's marks have achieved
4 broad national recognition as identifying Amiga as the exclusive source of high quality computer
5 software and hardware products.

6 128. Upon information and belief, Hyperion has produced, promoted, marketed
7 and offered for sale, and is still producing, promoting, marketing and offering for sale, software
8 products bearing Amiga's trademarks, both beyond the scope of its licenses under the 2001
9 Agreement or any subsequent agreement or novation, including the 2004 Arrangement when
10 such agreements were in effect and after Amiga terminated all licenses to produce, promote,
11 market and sell goods under the Amiga trademarks. Hyperion's use of identical trademarks to
12 promote, market and sell certain of their computer software products in interstate commerce is
13 likely to confuse consumers and actually dilute the distinctive quality of the Amiga's famous
14 trademarks. Amiga is further informed and believes and thereon alleges that Hyperion has
15 produced, promoted, marketed and distributed, and, on information and belief, continues, to
16 produce, promote, market and distribute computer software products bearing Amiga's
17 trademarks in interstate commerce that are directly competitive with, or at least highly related to,
18 Amiga's computer software and hardware products. Moreover, under the recently discovered
19 "strategic partnership" between Hyperion and ACube, Hyperion purports to grant ACube rights
20 to distribute OS 4.0 on a worldwide basis for "a range of PPC hardware platforms" under
21 Amiga's trademarks.
22
23
24

25 129. Amiga has not consented to Hyperion's use of the Amiga's trademarks
26 beyond the scope of the licenses granted in the Agreement, nor at all following Amiga's
27 termination of the Agreement. Amiga has not sponsored, endorsed, or approved the goods

1 offered by Hyperion. Hyperion's actions have caused and threaten to continue to cause
2 irreparable harm to Amiga.

3 130. Hyperion's activities complained of herein constitute unauthorized use in
4 commerce of a name and mark confusingly similar or virtually identical to Amiga's federally
5 registered AMIGA and/or POWERED BY AMIGA marks, in connection with the advertising,
6 promotion, marketing, offering for sale, and potentially the actual sale, of computer software
7 products, which is likely to cause confusion and mistake and deceive members of the public and
8 trade as to the origin, sponsorship and affiliation of Hyperion's products and business, in
9 violation of 15 U.S.C. § 1114.
10

11 131. In addition, through its "strategic partnership" with ACube for ACube to act as a
12 worldwide distributor of OS 4.0 Hyperion is directly causing, encouraging and assisting ACube's
13 unauthorized use of Amiga's registered trademarks and is infringing, directly, contributorily or
14 by inducement, Amiga's registered trademarks in violation of 15 U.S.C. § 1114.
15

16 132. Amiga is informed and believes and thereon alleges that the foregoing actions of
17 Hyperion have been knowing, deliberate, willful, and in utter disregard of Amiga's rights and
18 with knowledge of Amiga's federally registered trademarks.

19 133. Hyperion's conduct has deceived and unless restrained and enjoined by this Court
20 will continue to deceive the public, including consumers, and has injured and unless restrained
21 and enjoined will continue to injure Amiga and the public, including consumers, causing
22 damages to Amiga in an amount to be determined at trial and other irreparable injury to Amiga's
23 trademarks, business reputation and goodwill.
24

25 134. Amiga has no adequate remedy at law to compensate it fully for the damages that
26 have been caused and which will continue to be caused by Hyperion's unlawful acts, unless they
27 are enjoined by this Court.

1 135. Hyperion's continuing infringement of Amiga's federally registered AMIGA
2 and/or POWERED BY AMIGA marks, directly, contributorily or by inducement, is knowing,
3 intentional, malicious, fraudulent, deliberate, willful, wanton, reckless and egregious and is being
4 carried out with the intent to cause confusion, mistake or deception.

5 136. Hyperion's acts of infringement are willful, intentional and egregious and make
6 this an exceptional case within the meaning of 15 U.S.C. § 1117(a).
7

8 WHEREFORE, Amiga prays for relief as set forth below.

9 **SIXTH CLAIM FOR RELIEF**
10 (Trademark Dilution – Federal Law)

11 137. Amiga repeats and re-alleges each and every allegation in the foregoing
12 paragraphs as though fully set forth herein.

13 138. By virtue of the inherent distinctiveness of Amiga's federally registered AMIGA
14 and/or POWERED BY AMIGA marks, as well as its "AMIGA" and stylized "AMIGA" word
15 marks and "Boing Ball" logo design, the extent and duration of the use of all of these marks by
16 Amiga and/or its predecessors-in-interest, the geographic scope and extent of advertising and
17 sales by Amiga and/or its predecessors-in-interest, the media publicity and exposure of the
18 marks, and their consumer recognition, all of these AMIGA formative and related marks are
19 famous and became famous prior to Hyperion's adoption and first unauthorized use of
20 substantially similar and/or identical marks.
21

22 139. Hyperion's commercial use in commerce of marks that are substantially similar or
23 identical to Amiga's AMIGA formative and related marks causes dilution of the distinctive
24 quality of Amiga's AMIGA formative and related marks. Said use has also tarnished and likely
25 will continue to tarnish the reputation of Amiga and its AMIGA formative and related marks in
26 the minds of consumers by linking the marks to products of inferior or unknown quality,
27

1 including Developer Pre-releases that are incomplete, unfinished, and unready for general
2 commercial release or consumer use.

3 140. Hyperion's aforesaid use marks that are substantially similar or identical to
4 Plaintiff's AMIGA formative and related marks violates the dilution laws of the United States,
5 15 U.S.C. § 1125(c).

6 141. In addition, through its "strategic partnership" with ACube for ACube to act as a
7 worldwide distributor of OS 4.0 Hyperion is directly causing, encouraging and assisting ACube's
8 unauthorized use of Plaintiff's AMIGA formative and related marks and is diluting these marks,
9 directly, contributorily or by inducement, in violation of 15 U.S.C. § 1125(c).

10 142. Hyperion's conduct has deceived and unless restrained and enjoined by this Court
11 will continue to deceive the public, including consumers, and has injured and unless restrained
12 and enjoined will continue to injure Plaintiff and the public, including consumers, causing
13 damages to Amiga in an amount to be determined at trial and other irreparable injury to Amiga's
14 trademarks, business reputation and goodwill.

15 143. Amiga has no adequate remedy at law to compensate it fully for the damages that
16 have been caused and which will continue to be caused by Hyperion's unlawful acts, unless they
17 are enjoined by this Court.

18 144. Hyperion's continuing dilution of Amiga's AMIGA formative and related marks
19 is knowing, intentional, malicious, fraudulent, deliberate, willful, wanton, reckless and egregious
20 and is being carried out with the intent to cause confusion, mistake or deception.

21 145. Hyperion's acts of dilution are willful, intentional and egregious and make this an
22 exceptional case within the meaning of 15 U.S.C. § 1117(a).

23
24 WHEREFORE, Amiga prays for relief as set forth below.
25
26
27

SEVENTH CLAIM FOR RELIEF

(False Designation of Origin, 15 U.S.C. § 1125(a))

1
2 146. Amiga repeats and re-alleges each and every allegation in the foregoing
3 paragraphs as though fully set forth herein.
4

5 147. Hyperion’s use of Amiga’s “AMIGA” and stylized “AMIGA” word marks and
6 “Boing Ball” logo design to promote computer software products outside the licensed market,
7 platform or term constitutes unfair competition, passing off and false designation of the origin as
8 to the goods and services made available by Hyperion and false and misleading representations
9 in violation of §43(a) of the Lanham Act, 15 U.S.C. §1125(a). Upon information and belief,
10 Hyperion continues to falsely designate the origin of such products and does so with actual
11 knowledge of these Amiga marks.
12

13 148. In addition, through its “strategic partnership with ACube for ACube to act as a
14 worldwide distributor of OS 4.0 Hyperion is directly causing, encouraging and assisting ACube’s
15 unauthorized use of Amiga’s “AMIGA” and stylized “AMIGA” word marks and “Boing Ball”
16 logo design and is diluting these marks, directly, contributorily or by inducement, in violation of
17 15 U.S.C. § 1125(a).
18

19 149. Amiga is informed and believes and thereon alleges that the foregoing actions of
20 Hyperion have been knowing, deliberate, willful, and in utter disregard of Amiga’s rights.

21 150. Hyperion’s conduct has deceived and unless restrained and enjoined by this Court
22 will continue to deceive the public, including consumers, and has injured and unless restrained
23 and enjoined will continue to injure Amiga and the public, including consumers, causing
24 damages to Amiga in an amount to be determined at trial and other irreparable injury to Amiga’s
25 trademarks, business reputation and goodwill.
26
27

1 151. Amiga has no adequate remedy at law to compensate it fully for the damages that
2 have been caused and which will continue to be caused by Hyperion's unlawful acts, unless they
3 are enjoined by this Court.

4 152. Hyperion's continuing unfair competition relating to the Amiga's "AMIGA" and
5 stylized "AMIGA" word marks and "Boing Ball" logo design, directly, contributorily or by
6 inducement, is knowing, intentional, malicious, fraudulent, deliberate, willful, wanton, reckless
7 and egregious and is being carried out with the intent to cause confusion, mistake or deception.
8

9 153. Hyperion's acts of unfair competition, passing off, false designation of origin and
10 deception are willful, intentional and egregious and make this an exceptional case within the
11 meaning of 15 U.S.C. § 1117(a)

12 WHEREFORE, Amiga prays for relief as set forth below.

13 **EIGHTH CLAIM FOR RELIEF**

14 (Unfair Competition – Rev. Code Wash Section 19.86.20)

15 154. Amiga repeats and re-alleges each and every allegation in the foregoing
16 paragraphs as though fully set forth herein.

17 155. By producing promoting, marketing and offering for sale software products
18 bearing Amiga's trademarks, beyond the scope of its licenses and after the licenses had been
19 terminated, and to the extent that it continues to do so, Hyperion is in competition with Amiga in
20 the market for software products.
21

22 156. Hyperion's wrongful appropriation and use of Amiga's trademarks is an unfair
23 method of competition and/or an unfair or deceptive act or practice with the capacity to mislead
24 people of ordinary caution into believing that they are dealing with one concern, Amiga, when in
25 fact they are dealing with another.
26
27

1 157. Hyperion's acts perpetuate a fraud on the public, misappropriate benefits
2 belonging to Amiga, and are contrary to the ethical standards of business. Hyperion's acts are an
3 unfair method of competition and/or an unfair or deceptive act or practice.

4 158. Given the substantial market for software products in Washington, Hyperion's
5 wrongful acts have the capacity to deceive a substantial portion of the public.

6 159. Hyperion's acts occurred in the course of trade and commerce, and took place or
7 caused injury, in part, within the State of Washington.

8 160. Hyperion's acts affect the public interest, because, as one example, the acts are
9 likely to confuse and mislead the public into thinking that they are dealing with one concern
10 when they are in fact dealing with another.

11 161. The harm and potential harm to Amiga and the general public from Hyperion's
12 conduct far outweighs the utility of such conduct.

13 162. Hyperion's wrongful acts have proximately caused and will continue to cause
14 injury to Amiga's business reputation, goodwill, and ability to sell its own products.

15 163. Hyperion's wrongful acts constitute an unfair or deceptive act or practice and/or
16 an unfair method of competition within the meaning of RCW 19.86.020.

17 164. Pursuant to Section 19.86.020, injunctive relief is necessary to prevent Hyperion
18 from engaging in the unlawful, unfair and fraudulent business acts and practices alleged herein.
19 Hyperion is now engaging in and will continue to engage in the above-described acts and
20 practices unless enjoined. Amiga has been and will continue to be irreparably harmed by
21 Hyperion's acts and practices. Amiga has no adequate remedy at law.

22 165. Pursuant to RCW 19.86.095, Amiga has served the Attorney General of the State
23 of Washington with the initial Complaint in this action.

24 WHEREFORE, Amiga prays for relief as set forth below.

NINTH CLAIM FOR RELIEF

(Copyright Infringement, 17 U.S.C. § 101, *et seq.*)

1
2 166. Amiga repeats and re-alleges each and every allegation in the foregoing
3 paragraphs as though fully set forth herein.
4

5 167. Amiga is the owner of all right, title and interest, including all copyrights, in and
6 to the “AMIGA Operating System (OS) and software Version 3.1,” also referred to as “Amiga
7 OS 3.1,” including all Source Code and Object Code relating thereto (the “Work”).

8 168. The Work contains wholly original material and constitutes copyrightable subject
9 matter under the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*, as amended (the “Copyright
10 Act”).
11

12 169. The Work is the subject of a Certificate of Copyright Registration issued by the
13 Register of Copyrights and effective as of April 27, 2007, bearing registration number TX-6-
14 587-397. A true copy of this Certificate of Copyright Registration is annexed hereto as
15 Exhibit V.

16 170. Amiga has complied in all respects with the Copyright Act and all other laws
17 covering copyright and has secured the exclusive rights and privileges under the copyright in and
18 to the Work.
19

20 171. Hyperion has infringed, and will likely continue to further infringe, Amiga’s
21 rights in and to the Work by, among other things, manufacturing, selling, offering for sale or
22 otherwise distributing goods incorporating unauthorized copies of the Work and creating, selling
23 and distributing unauthorized derivative works.

24 172. In particular, upon information and belief, Hyperion has, without authorization,
25 manufactured, offered for sale, sold, and otherwise distributed copies of a Developer Pre-Release
26
27

1 of “Amiga OS 4.0,” as well as updates available for download from Hyperion’s website via the
2 Internet, including what Hyperion now contends is the “Final Update” of OS 4.0.

3 173. Upon information and belief, the Developer Pre-Release and all updates,
4 including the so-called “Final Update” and any and all versions of “Amiga OS 4.0” are
5 derivative works of the Work and incorporate and are based and built upon all or parts of the
6 Work.

7
8 174. In addition, through its “strategic partnership” with ACube for ACube to act as a
9 worldwide distributor of OS 4.0, Hyperion is causing, encouraging and assisting ACube’s
10 unauthorized use and distribution of unauthorized derivative works based on the Work and is
11 infringing directly, contributorily or by inducement, Amiga’s exclusive rights in the Work under
12 the Copyright Act.

13 175. This wrongful conduct by Hyperion violates Amiga’s exclusive rights under
14 Section 106 of the Copyright Act (17 U.S.C. §106) to use, reproduce, distribute, and prepare
15 derivative works based on the Work.

16
17 176. Amiga has notified Hyperion that its unauthorized use of the Work and “strategic
18 partnership” with ACube are unlawful and has directed Hyperion to cease and desist its
19 infringing activities, but Hyperion has refused to cease and desist.

20 177. Hyperion’s infringement of Amiga’s rights in and to the Work, including the
21 copyright in and to the Work, directly, contributorily or by inducement, has been and continues
22 to be knowing, willful and egregious and constitutes intentional or reckless disregard of Amiga’s
23 rights as copyright holder in and to the Work.

24
25 178. Hyperion’s wrongful conduct has caused and is continuing to cause Amiga to
26 suffer monetary damages in an amount to be determined at trial.

1 179. In addition, Hyperion's wrongful conduct is causing Amiga immediate and
2 irreparable injury and will continue to cause Amiga irreparable injury and unfairly benefit
3 Hyperion unless enjoined by this Court.

4 180. Amiga has no adequate remedy at law.

5 WHEREFORE, Amiga prays for relief as set forth below.

6 **TENTH CLAIM FOR RELIEF**

7 (Indemnification)

8 Amiga repeats and re-alleges each and every allegation in the foregoing paragraphs as though
9
10 fully set forth herein.

11 181. Article 4.03 of the 2001 Agreement, which was mirrored in the 2004 Arrangement
12 provides as follows:

13 4.03 **Indemnification.** Hyperion shall indemnify and hold Amiga
14 harmless from and against all claims, suits, demands, actions, judgments,
15 penalties, damages, costs and expenses (including attorney's fees and
16 costs), losses or liabilities of any kind arising from a claim that OS 4.0 or
17 any other version of the Classic Amiga OS developed pursuant to this
18 Agreement infringes a patent, copyright or other intellectual property right
19 of any other person anywhere in the world.

20 182. Furthermore, Article 6.03 of the 2001 Agreement (which was mirrored in the
21 2004 Arrangement) provides, among other things, that Article 4.03 remains in effect, regardless
22 of any termination of such agreement for material breach pursuant to Article 6.02 of the 2001
23 Agreement (which was mirrored in the 2004 Arrangement), as follows:

24 6.03 **Consequences of Termination.** In the event this Agreement is
25 terminated in accordance with article 6.02 hereof ["Termination for
26 Material Breach"], this Agreement shall remain in force with respect to the
27 parties other than the party found in material breach of this Agreement
pursuant to article 6.02 hereof. Articles IV, V, VI and VII shall in any
event survive termination of this Agreement.

183. Upon information and belief, a legal proceeding has been commenced in Belgium
by Messrs. Thomas Frieden, Hans-Joerg Frieden and Andrea Vallinotto, as "petitioners," against

1 Hyperion and Amiga, as “summoned parties” (the “Belgian Proceeding”), alleging, among other
2 things that the “petitioners” hold copyrights in portions of the AMIGA OS 4.0 that Hyperion
3 purports to have developed pursuant to agreements with Amiga and that “the summoned parties
4 [Hyperion and Amiga] make claims on the software developed by the petitioners that go further
5 than the restricted rights granted them on the basis of the respective agreements between the first
6 summoned party [Hyperion] and the petitioners.” A copy of an English translation of a
7 “Summons as in Summary Proceedings” in the Belgian Proceeding dated May 24, 2007 as well
8 as a Dutch language version are annexed hereto as Exhibit W.
9

10 184. Amiga denies any wrongdoing or liability in connection with matters alleged in
11 the Belgian Proceeding.

12 185. The indemnification provision in Article 4.03 of the 2001 Agreement, as mirrored
13 in the 2004 Arrangement, was in full force and effect as of the date on which Belgian Proceeding
14 was commenced.
15

16 186. Amiga has demanded that Hyperion indemnify and hold Amiga harmless from
17 and against all claims, suits, demands, actions, judgments, penalties, damages, costs and
18 expenses (including attorney’s fees and costs), losses or liabilities of any kind arising from the
19 claims asserted in the Belgian Proceeding.

20 187. By letter dated July 1, 2007, Hyperion purported to reject Amiga’s demand for
21 indemnification.
22

23 188. In connection with defending the Belgian proceeding, Amiga has incurred and
24 continues to incur obligations to pay substantial, necessary legal expenses in an amount to be
25 determined at trial.

26 189. If a judgment is rendered in favor of the “petitioners” in the Belgian Proceeding
27 and against Amiga by virtue of the matters alleged by the “petitioners” in the Belgian

1 Proceeding, Amiga will be entitled, by virtue of the agreement to indemnify described above, to
2 indemnification and judgment against Hyperion for the full amount of any judgment, including
3 costs, disbursements and interest, if any, plus the expenses incurred by Amiga in defense of the
4 Belgian Proceeding, including attorneys' fees.

5 190. The failure of Hyperion to comply with its indemnification obligations to Amiga
6 has caused and will cause Amiga to be put to great expense and financial loss unless this Court,
7 by its declaratory judgment, declares the rights of Amiga with respect to its right to
8 indemnification by Hyperion.
9

10 WHEREFORE, Amiga prays for relief as set forth below.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Amiga prays for relief as follows:

13 1. That judgment be entered in favor of Amiga and against Hyperion on all claims;
14 and

15 2. For an Order declaring that (a) Amiga has performed all conditions, covenants
16 and promises required to be performed by it in accordance with the terms and conditions of the
17 2004 Agreement, except as to those conditions which have been excused, (b) Hyperion
18 committed at least one or more material breaches of the 2004 Agreement that Hyperion failed to
19 cure in a timely manner, (c) Amiga properly terminated the 2004 Agreement, (d) except as to
20 those obligations and rights that survive termination of the 2004 Agreement, the 2004 Agreement
21 is terminated; and (e) Amiga is the owner, subject to any valid rights or claims of third parties, of
22 all intellectual property rights in AMIGA OS 3.1, and any and all of Hyperion's rights in any
23 derivative works developed and paid for under the 2004 Agreement and the Itec-Hyperion
24 Agreement including the Object Code, Source Code and intellectual property of "Amiga OS 4"
25 and OS 4.0; and
26
27

1 3. For an order, in the alternative to the immediately preceding paragraph, declaring
2 that (a) Amiga has performed all conditions, covenants and promises required to be performed
3 by it in accordance with the terms and conditions of the 2001 Agreement, except as to those
4 conditions which have been excused, (b) Hyperion committed at least one or more material
5 breaches of the 2001 Agreement that Hyperion failed to cure in a timely manner, (c) Amiga
6 properly terminated the 2001 Agreement, (d) except as to those obligations and rights that
7 survive termination of the 2001 Agreement, the 2001 Agreement is terminated; and (e) Amiga is
8 the sole owner, subject to any valid rights or claims of third parties, of all intellectual property
9 rights in AMIGA OS 3.1, and any and all of Hyperion's rights in any derivative works developed
10 and paid for under the 2001 Agreement and the Itec-Hyperion Agreement including the Object
11 Code, Source Code and intellectual property of "Amiga OS 4" and OS 4.0; and
12

13 4. For an Order directing Hyperion to convey forthwith to Amiga the Source Code,
14 Object Code and intellectual property of AMIGA OS 4.0 and all of Hyperion's rights therein and
15 remedy any impairment of such rights caused or permitted by Hyperion; and
16

17 5. For an Order temporarily restraining and preliminarily and permanently enjoining
18 Hyperion, its officers, directors, principals, agents, servants, employees, successors and assigns,
19 and all other persons in active concert, privity or in participation with Hyperion, from using,
20 modifying, licensing, advertising, marketing, distributing or selling, directly or indirectly, the
21 whole or any part of the Work comprising the "AMIGA Operating System (OS) and software
22 Version 3.1," including all Source Code and Object Code relating thereto, and specifically
23 enjoining them from using, modifying, licensing, advertising, marketing, distributing or selling,
24 directly or indirectly, in whole or in part Amiga OS 4.0 and its Source Code and Object Code;
25 and
26
27

1 6. For an Order temporarily restraining and preliminarily and permanently enjoining
2 Hyperion, its officers, directors, principals, agents, servants, employees, successors and assigns,
3 and all other persons in active concert, privity or in participation with Hyperion, from using any
4 trademark belonging to Amiga, including but not limited to Amiga's federally registered
5 AMIGA and/or POWERED BY AMIGA marks, and/or its "AMIGA" and stylized "AMIGA"
6 word marks and/or "Boing Ball" logo design, and/or any mark, word or name or design
7 confusingly similar to any such marks, words, names or designs; and
8

9 7. For an Order compelling Hyperion, its officers, directors, principals, agents,
10 servants, employees, successors and assigns, and all other persons in active concert, privity or in
11 participation with Hyperion, to destroy and/or deliver to Amiga for destruction all unauthorized
12 items in their possession, custody or control bearing Amiga's federally registered AMIGA and/or
13 POWERED BY AMIGA marks, and/or its "AMIGA" and stylized "AMIGA" word marks and/or
14 "Boing Ball" logo design, and/or any mark, word or name or design confusingly similar to any
15 such marks, words, names or designs; and
16

17 8. For an Order compelling Hyperion, its officers, directors, principals, agents,
18 servants, employees, successors and assigns, and all other persons in active concert, privity or in
19 participation with Hyperion, to deliver to Amiga all items containing or comprising, in whole or
20 in part (a) the Work comprising the "AMIGA Operating System (OS) and software Version 3.1,"
21 or any Source Code or Object Code relating thereto, or (b) Amiga OS 4.0 or its Source Code or
22 Object Code; and
23

24 9. For an Order temporarily restraining and preliminarily and permanently enjoining
25 Hyperion, its officers, directors, principals, agents, servants, employees, successors and assigns,
26 and all other persons in active concert, privity or in participation with Hyperion, from engaging
27 in the unlawful, unfair and fraudulent business acts and practices described herein; and

1 10. For an accounting of all profits received by Hyperion from the sale of any
2 products using in whole or in part (a) the Work comprising the “AMIGA Operating System (OS)
3 and software Version 3.1,” including all Source Code and Object Code relating thereto, or
4 (b) Amiga OS 4.0 and its Source Code and Object Code; or (c) Amiga’s federally registered
5 AMIGA and/or POWERED BY AMIGA marks, and/or its “AMIGA” and stylized “AMIGA”
6 word marks and/or “Boing Ball” logo design, and/or any mark, word or name or design
7 confusingly similar to any such marks, words, names or designs; and
8

9 11. For actual and consequential damages in an amount to be determined at trial; and

10 12. For a trebling of Amiga’s damages recovery, pursuant to Lanham Act § 35 (15
11 U.S.C. § 1117), as a result of willful and intentional violations by Hyperion; and

12 13. For enhanced exemplary and punitive damages on the basis of Hyperion’s willful,
13 intentional and egregious conduct; and

14 14. For an award of Amiga’s reasonable attorneys’ fees and costs incurred in
15 prosecuting this action, pursuant to Lanham Act § 35 (15 U.S.C. § 1117), as well as its
16 disbursements.

17 15. For Amiga’s reasonable attorneys and experts’ fees and costs as provided by the
18 Agreement or otherwise available by statute; and

19 16. For pre-judgment interest according to proof; and

20 17. For an Order declaring that Amiga is entitled to have Hyperion indemnify and
21 hold Amiga harmless from and against all claims, suits, demands, actions, judgments, penalties,
22 damages, costs and expenses (including attorney’s fees and costs), losses or liabilities of any
23 kind arising from the claims asserted in the Belgian Proceeding described above; and

24 18. For such other relief as the Court deems just and proper.
25
26
27

DATED this the ____ day of December 2007.

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Attorneys for Plaintiff Amiga, Inc.

[CONFORM SIGNATURE BLOCKS TO RULES]

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Amiga, Inc. hereby demands a jury trial on all issues triable by a jury.

DATED this the ____ day of September 2007.

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CERTIFICATE OF SERVICE

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

William A. Kinsel
Law Offices of William A. Kinsel, PLLC
Market Place Tower
2025 First Avenue, Suite 440
Seattle, WA 98121

A copy was also served by hand delivery on December 12, 2007.

/s/ Lawrence R. Cock
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