



03-CV-00003-M

The Honorable Robert Lasnick

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

THENDIC ELECTRONICS COMPONENTS,
a foreign corporation, and GENESI SARL, a
foreign corporation,

Plaintiffs;

vs.

AMIGA INC., a corporation in the state of
Washington,

Defendant.

NO. 003-0003

PLAINTIFFS' MOTION TO MODIFY
THE ORDER GRANTING SPECIFIC
PERFORMANCE I.E., INTEGRATION
OF AMIGA'S DE OPERATING
SYSTEM TO PEGASOS

COME NOW THE PLAINTIFFS, Thendic and Genesi Sarl, (hereinafter "Thendic" when referring to both Plaintiffs) by and through their attorney of record, Richard Hughes and pursuant to FRCP 59(e) moves to modify this Court's Order granting Specific Performance, entered on February 20, 2004.

I. AUTHORITY

Plaintiffs' rely upon the Order and Entry of Judgment dated February 19th and 20th 2004

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1 respectively, the OEM SOFTWARE LICENSE AGREEMENT ("hereinafter AGREEMENT"),
2 excerpts from Amiga's official Website, the Declaration of Bill Buck and attached exhibits thereto.

3 4 II. ISSUE

5 Should the Court grant Plaintiffs' Motion to Modify the Court's Order of Specific
6 Performance incorporating terms of the "AGREEMENT" to best effectuate performance and
7 minimize Amiga's anticipated efforts to evade or delay compliance? Yes.

8 Should the Court change the wording of its ORDER to read:

9
10 Plaintiff's are entitled to specific performance as requested in the
11 complaint, i.e., "integration of Amiga's DE Operating System into
12 "Thendic's" Pegasos and/or other products in question." Defendant
13 shall within thirty days from the date of this Order grant plaintiffs
14 right's and possession to Amiga's DE Operating System and any and
15 all "Documentation", "Source Code", "Object Code"; "Derivative
16 Work," "Enhancements", including improvements, "Updates", and
17 "Upgrades", as of November 10, 2000 (the date the "AGREEMENT
18 was executed) to present and beyond, along with all Amiga systems,
19 programs or software integrated into or otherwise associated with its
20 DE Operating System, for integration into Pegasos and any other
21 present or future "Thendic" product? Yes.

22 III. ARGUMENT

23 Presently, the Order states in part:

24 Plaintiff's are entitled to specific performance as requested in the
25 complaint, i.e., "integration of Amiga's DE Operating System into
26 "Thendic's" Pegasos and/or other products in question." Defendant
27 shall within thirty days from the date of this Order grant plaintiffs
28 rights and possession of the DE Operating System for integration
29 into Pegasos.

30 The added words are all key terminology defined and/or expressly conferred by the
31 "AGREEMENT" as set forth in its Definitions in ¶ 3.1.

32 Specifically, the following terms are defined and/or expressly stated by the AGREEMENT:

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- 1 1. "Derivative Work-shall mean with respect to a software program or any
2 related Documentation (as hereinafter defined), any modification thereof
3 including without limitation all 'derivative works' and 'compilations' within
4 the meaning of such terms as defined in the U.S. Copyright Act (17 U.S.C. §
5 101 et. seq.) as amended."
- 6 2. "Documentation-shall mean the end-user documentation, in written or
7 electronic form, prepared by Amiga that describes the functions, use and
8 operation of the Licensed Software."
- 9 3. "Enhancements-shall mean **changes** or **improvements** made by Amiga, any
10 of its agents or affiliates, or any other part to the Amiga DE Operating
11 System so as to achieve its integration with any "Thendic" product."
- 12 4. "Object Code-shall mean the computer executable binary code derived from
13 compiled Source Code for execution on a computer hardware system."
- 14 5. "Source Code-shall mean a presentation of a computer program, regardless
15 of the form in which it is stored, from which it is possible to discern the
16 logic, algorithms, internal structure, operating features and any other design
17 characteristics of such computer programs, together with related source
18 materials."
- 19 6. "Updates-shall mean all maintenance releases, updates, bug fixes, error
20 corrections, and enhancements to the Licensed Software that do not provide
21 significant functionality, and related Documentation."
- 22 7. "Upgrades-shall mean all new versions, new releases or enhancements to the
23 Licensed Software that provide significant additional functionality to the
24 Licensed Software and related Documentation."

25 These terms and their definition(s) are in addition to the term "Licensed Software" which
26 specifically refers to Amiga's DE Operating System and inclusion of each would increase the scope
27 and clarity of the Order and put Amiga on notice that it is not to play games with this Court's Order
28 for Specific Performance. The "AGREEMENT" expressly reiterates the necessity to provide for the
29 information as requested to complete the total integration of Amiga's DE Operating System when it

1 states "[a]ll versions, Updates to the Licensed Software shall be available at "Thendic's" request for
2 integration into the Licensed Products." See "AGREEMENT" ¶ 10.2.5

3
4 Had Amiga not demonstrated a history of hostility and defiance to repeated requests for
5 integration of the Amiga DE Operating System, "Thendic" might be more relaxed and rely on the
6 current language of the Order granting Specific Performance. Unfortunately, due to the time
7 constraints posed by FRCP 59 (Motion to be made within 10 days from entry of judgment),
8 "Thendic" can ill-afford to wait and see whether Amiga follows the tenor and spirit of this Court's
9 Order for Specific Performance and allows for integration of Amiga DE as a comprehensive operating
10 system.
11

12 As recently as February 25, 2004, less than seven days following entry of the Court's Order
13 for Specific Performance, Bill Buck was provided with a copy of an email from Fleecy Moss,
14 Amiga's Chief Technology Officer (CTO), where Mr. Moss states, in essence, that Amiga's DE
15 Operating System is going to be marginalized and minimized. A copy of the pertinent email follows
16 in its entirety:
17

18 From: Fleecy Moss <fleecy@amiga.com>
19 To: John Burgess <j.burgess@telstra.com.au>
20 Subject: Long Term Amiga Ball Game?

21 hey there ;)

22 A team here in Britain is already laying the foundations to the AG3 feature set
23 which has already received wide spread support from our B2B partners and
24 suppliers.

25 Amiga Inc is moving full steam ahead, despite recent adversities, AOS4 is close
26 to completion and we are moving forward with a new implementation of the
27 Amiga Digital Content Engine. *The legacy Amiga Digital Environment*
28 *(AmigaDE) will be available only to the Bplan Pegasos demographic (as well as*
PocketPC Devices) and will constitute the first phase of Amiga Digital Living
Tangent Development. A wide variety of content driven products will contain

1 different implementation subsets of Tao's intent , targeted at the unique usability
2 matrix of each target demographic.

3 While Amiga inc has faced great adversity this year, from competing operating
4 systems that seek to steal the consistant effort we have poured into the Amiga
5 operating system since the gateway days, 2004 looks to be an exciting year for the
6 amiga community with the impending rollout of AmigaOS4 and shortly after the
7 integration of the AG2 feature set into the OS. 2005 will see a whole new
8 operating system based on AG3 released in pararel to AOS4.5/AG2.

9 hope this helps ;)

10 Fleecy Moss
11 CTO Amiga Inc

12 *Declaration of B. Buck Ex. 2 (P. 2, L. 17-20)(Email from Fleecy Moss).*

13 When the parties executed the "AGREEMENT" Amiga's DE Operating System was intended
14 to be Amiga's Operating System for the future. Amiga's prior operating system OS 3.9 was
15 antiquated and future development of Amiga's OS was conditioned on robust sales of OS 3.9, which
16 did not happen. To the contrary, sales of OS 3.9 were a bust. *See Declaration of B. Buck Ex. 1, (P. 2,*
17 *L 1-5)(Amiga's Executive Update dated November 22, 2000).* Soon after the "Agreement" was
18 executed Amiga stopped referring to Amiga DE as an "Operating System" and began referring to it as
19 a content based program. "Thendic" contracted for an "Operating System", not a content based
20 program. Subsequently, Amiga introduced another "Operating System" OS 4.0 and its progeny, an
21 entirely different operating system from OS 3.9 and much more akin to what was promised as
22 Amiga's DE Operating System. *Declaration of B. Buck (P. 2, L 6-10).*

23 On November 10, 2000, when the "AGREEMENT" was executed, Amiga promised to grant
24 "Thendic" a License to integrate Amiga's DE Operating System into present and future "Thendic"
25 products." *See "AGREEMENT", pg. 1, Fifth Whereas. See Also, Court's Order for Specific*
26 *Performance. At that time, Amiga DE was touted as a comprehensive operating system that was to*
27
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1 be mutually enhanced by way of its integration into "Thendic" products-like Pegasos. See
2 "AGREEMENT" p. 5, ¶ 4.2.3 ("Thendic agrees that the marketing and distribution rights granted for
3 the Amiga DE Software are conditioned on the obligation of Thendic to add value to the Amiga DE
4 Software...."). To that end, "Thendic" was prepared to develop and did develop products to utilize
5 Amiga DE only to meet with Amiga's continued refusal to integrate. *Dec. B. Buck* (P. 2, L. 11-16).

7 This Court correctly ruled that "Thendic" is entitled to integration of Amiga's DE
8 Operating System. Based on Amiga's prior conduct and the email of Fleecy Moss, "Thendic" has
9 legitimate concerns over how Amiga might interpret its duty of integration. By adding the
10 language proposed by "Thendic", the parties and the Court can be assured that it has taken the
11 appropriate steps to thwart or caution against Amiga's attempts to circumvent its duty to integrate
12 the Amiga DE Operating System into "Thendic's" products.

15 Ironically, despite Amiga's shenanigans and attempts to marginalize its DE Operating
16 System, it has elected to fully integrate OS 4.0 and its progeny with Amiga DE. This is confirmed
17 by Amiga's official website. **"The feature set for Amiga OS 4.2 includes Amiga DE integration-**
18 **AmigaDE hosted directly in the Amiga OS."** *Declaration of B. Buck*, Ex. 3 (P. 2, L. 21-
19 23)(Portion of Amiga Website Tech Update dated April 12, 2001). Amiga's website also ran a
20 promotion stating "[t]his promotion is about bringing the Amiga family back together again,
21 reforming the ranks if you will, and preparing us all for the great successes we can create together, as
22 we make the necessary moves towards the merging of the DE and OS technologies in Amiga OS
23 5.0 and beyond." *Declaration of B. Buck*, Ex. 4 (P. 2, L. 24-26)(Excerpt of Amiga Website Posting
24 dated July 1, 2002).

1 "There is in every contract an implied duty of good faith and fair dealing. This duty
2 obligates the parties to cooperate with each other so that each may obtain the full benefit of
3 performance." *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).
4

5 If the Court focuses on either the term "Enhancements" and the included language of
6 improvements or changes or "Upgrades" along with the language within ¶ 10.2.5 as defined in the
7 "AGREEMENT" it should find that any improvements, new versions, and/or new releases that
8 provide additional functionality to the DE Operating System are encompassed within the overall
9 meaning of the DE Operating System. *See Also*, AGREEMENT, P. 3, ¶ 3.1 and the term
10 "Licensed Software" as defined. Clearly, the mutated OS 4.0 through its progeny reflects the type
11 of improvements, new versions, changes and/or releases envisioned by the "AGREEMENT".
12

13 Moreover, the Amiga Website strongly suggests that Amiga's DE Operating System
14 capabilities and functionalities are being stripped away from the Operating and added to Amiga
15 OS. Accordingly, the Court should take appropriate measures to ensure that "Thendic's" rights are
16 not being trammled and it can do so by modifying the Order for Specific Performance and adopt
17 the language proposed by "Thendic." If Amiga's DE Operating System is being stripped down,
18 the Court should Order integration of its component parts prior to Amiga's ongoing attempt(s) to
19 minimize its DE Operating System. After all, any attempt by Amiga to minimize its DE Operating
20 System runs afoul of its contractual promises that neither "Thendic" nor Amiga would transfer or
21 assign the rights conferred by the "AGREEMENT". See "AGREEMENT" ¶ 13.4
22
23

24 If the Amiga DE Operating System is being changed, improved, upgraded, updated or
25 otherwise enhanced, "Thendic" should receive integration of the entire DE Operating System but
26 only if the language as proposed is added in a modified Order for Specific Performance.
27

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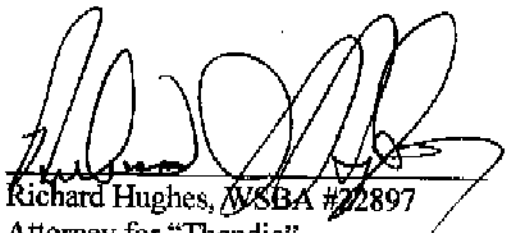
1 This Court may not yet be able to determine whether Amiga's OS system and its progeny
2 should be specifically identified in a modified Order for Specific Performance. To that end,
3 "Thendic" has not proposed adding language that would specifically address Amiga's OS. Rather,
4 "Thendic" merely proposes to add language utilizing only the words and promises made by the parties
5 within the "AGREEMENT" to better minimize Amiga's chicanery.
6

7 **IV. CONCLUSION**

8 The Court should grant Plaintiffs' Motion to Modify the Order for Specific Performance
9 commensurate with the language proposed in their brief and Proposed Order for Specific
10 Performance. Otherwise, it appears nearly certain that Amiga will play games and thwart and/or delay
11 integration which has already been delayed far too long.
12

13 Dated this 1st day of March, 2004.
14

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16 **Law Office of Richard Hughes**

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21 Richard Hughes, WSBA #22897
22 Attorney for "Thendic"
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