

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendant.

NO. 003-0003

**DECLARATION OF BILL MCEWEN IN  
SUPPORT OF AMIGA, INC.'S RESPONSE  
TO MOTION TO MODIFY THE ORDER  
GRANTING SPECIFIC PERFORMANCE**

I, Bill McEwen, declare as follows:

1. I am the President and Chief Executive Officer of defendant Amiga, Inc. I have personal knowledge of the facts contained herein and am competent to testify thereto.

2. On March 2, 2004, I sent correspondence to Bill Buck at the Thendic Electronics Components ("Thendic") business address in the OEM Software License Agreement ("License Agreement"), which is the same address currently on Thendic's website (www.thendic.de), via UPS. UPS attempted to deliver the package from March 4 through March 12. I spoke with a UPS representative who informed me UPS had been unable to deliver the package because no

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1 one at that address knew who Mr. Buck was or who Thendic was. Attached as Exhibit 1 is a true  
2 and correct copy of the UPS slip I used to send the package and the UPS tracking information  
3 showing the unsuccessful delivery attempts.

4 3. Attached as Exhibit 2 to my declaration is a true and correct copy of the License  
5 Agreement.

6 4. The License Agreement is entitled "OEM Software License Agreement." OEM is  
7 the standard acronym for Original Equipment Manufacturer. OEM license agreements confer  
8 limited rights to incorporate certain software that one party to the agreement owns onto certain  
9 devices that the other party to the agreement owns. The License Agreement is like typical OEM  
10 license agreements, it conferred limited rights to Thendic to "embed, bundle or otherwise  
11 incorporate the Amiga DE Software in any Thendic Product subject to this agreement." License  
12 Agreement, ¶ 4.2.1.

13 5. Amiga never intended that the License Agreement would give Thendic the right  
14 to possession of or control over AmigaDE or any Amiga product. In fact, provisions in the  
15 License Agreement, like the escrow provision, ¶ 5.2, emphasize that the parties specifically  
16 intended that Thendic would not have possession or control of the source code.

17 6. Thendic has never provided Amiga with any hardware schematics, product  
18 specifications or sample devices that would have allowed Amiga to integrate AmigaDE onto any  
19 Thendic product. To try to dispute this fact, Thendic will likely point to two e-mail messages  
20 Bill Buck sent to me in 2002. Attached as Exhibit 3 are true and correct copies of the e-mails  
21 from Mr. Buck to me. However, Mr. Buck's e-mails did not contain any hardware schematics or  
22 product specifications, just hollow statements.

23 7. In one of his e-mails, Mr. Buck indicated he attempted to deliver a Pegasos to  
24 Amiga's office, but it was vacant. I find it hard to believe that Mr. Buck really attempted to  
25 make such a deliver because even after Amiga vacated its office I prominently placed

1 instructions that deliveries to Amiga should be left with another building tenant. I successfully  
2 received many deliveries from many sources during the time Mr. Buck claimed he was not able  
3 to deliver a Pegasos to Amiga. I picked up Amiga's packages at least on a weekly basis. I never  
4 received a package from Mr. Buck.

5 8. During the course of this litigation Amiga has requested vital information  
6 regarding the device on which Plaintiffs claimed they wanted AmigaDE integrated. Specifically,  
7 the Screen Size, Processor Type and Speed, Input Devices and the version of the operating  
8 system running on the device. Plaintiffs did not provide any of the requested information.  
9 Without at least that information, Amiga cannot begin to perform under the License Agreement.

10 9. Attached as Exhibit 4 is an e-mail I received from Mr. Buck on January 12, 2001  
11 in which he clearly indicates his understanding that AmigaDE and Amiga OS are two entirely  
12 different products. The e-mail refers to "API." API stands for Application Programming  
13 Interface, which is the method used for programmers to write and create applications.

14 10. The only product licensed in the License Agreement is AmigaDE. AmigaDE is a  
15 family of software libraries that when combined with a third party software solution called  
16 intent® (the player) enables applications (games and the like) to be played on multiple mobile  
17 devices without application developers having to rewrite their code for the software applications  
18 for each device. intent and AmigaDE run over the operating system loaded on the device. For  
19 example, AmigaDE works with operating systems such as PocketPC, Windows Mobile,  
20 SmartPhone and Linux. AmigaDE is not an operating system and never was.

21 11. The Amiga Operating System refers to the Classic Amiga Operating System  
22 (Amiga OS 3.1) and any upgrades to OS 3.1, including but not limited to OS 3.5, 3.9 and the  
23 soon to be released OS 4.0. (OS 4.0 is not yet commercially available to the consumer market).  
24 Like any other operating system, Microsoft's Windows for example, the AmigaOS enables a  
25

1 computer to function. Software of varying types is loaded on and must work with the operating  
2 system, whether it is Microsoft's Windows or AmigaOS.

3 12. AmigaDE is separate and distinct from the Amiga Operating System and Amiga  
4 has never represented anything different.

5 13. At Exhibit 3 to his Declaration, Mr. Buck attaches what I believe are promotional  
6 materials from Amiga regarding what it hopes Amiga OS 4.0 and OS 4.2 will include. Mr. Buck  
7 points to these materials as "evidence" that Thendic's license to use AmigaDE also gives him the  
8 right to Amiga OS 4.0. These materials do not indicate AmigaDE is to become Amiga OS 4.0 or  
9 become part of Amiga OS 4.0 as Mr. Buck insinuates. The references to AmigaDE within the  
10 materials highlight Amiga's plan that AmigaDE will be able to be hosted in the upcoming  
11 releases of the Amiga Operating System. Currently, AmigaDE works with many operating  
12 systems, but it does not work with the Amiga Operating System. The references to AmigaDE in  
13 the promotional materials that Mr. Buck relies on simply indicate Amiga's desire to correct that  
14 situation in the new releases of the Amiga Operating System so that AmigaDE will work with  
15 the Amiga Operating System.

16 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE  
17 OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

18  
19 DATED this 15<sup>th</sup> day of March, 2004 at Ravensdale, Washington.

20  
21 See Attached  
22 Bill McEwen