

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLOANTO CORPORATION, AMIGA, INC.,
ITEC, LLC and AMINO DEVELOPMENT
CORPORATION,

Plaintiffs,

- against -

HYPERION ENTERTAINMENT CVBA,

Defendant.

HYPERION ENTERTAINMENT CVBA

Counterclaim
Plaintiff,

- against -

CLOANTO CORPORATION, AMIGA, INC.,
ITEC, LLC and AMINO DEVELOPMENT
CORPORATION,

Counter-Defendants.

Civil Action No.: 2:18-cv-00381-RSM
(consolidated with 2:18-cv-00535)

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:
January 18, 2019**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION

Plaintiffs Amiga, Inc., Itec, LLC, Amino Development Corporation (individually, “Amiga,” “Itec,” and “Amino,” and collectively the “Amiga Parties”) and Cloanto Corporation (“Cloanto”) move the Court for entry of a preliminary injunction to enjoin Defendant Hyperion Entertainment CVBA (“Hyperion”) from marketing, offering for sale, and selling certain products titled “Amiga OS 3.1.4.” The basis for the motion by the Amiga Parties is breach by Hyperion of the Settlement Agreement entered into by Hyperion and the Amiga Parties in 2009, and incorporated into the Stipulated Judgment signed by the Hon. Ricardo S. Martinez on December 14, 2009, in Case No. 07-0631-RSM. Cloanto joins in the motion based on (a) Cloanto’s ownership of the copyright in the Amiga operating system 3.1 (hereinafter “Amiga OS 3.1”), which is being infringed by Hyperion, and (b) Cloanto’s right, as a signatory to Exhibit 3 to the Settlement Agreement, to enforce the terms of the Settlement Agreement against Hyperion. *See*, ¶ 32, Declaration of Michele Console Battilana (hereinafter “Battilana Decl.”), attached hereto as Exhibit 1.

According to Hyperion’s website, Hyperion began selling “Amiga OS 3.1.4” on September 30, 2018. ¶ 17, Declaration of William McEwen (hereinafter “McEwen Decl.”), attached hereto as Exhibit 2; Battilana Decl., ¶ 25. On October 4, 2018, counsel for Plaintiffs (then acting as counsel for Amino and Cloanto) sent a cease-and-desist notice to Avangate, which was then Hyperion’s online distributor. Avangate ceased distribution, but within a few weeks, Hyperion had engaged Digital River, among others, to continue distributing and selling “Amiga OS 3.1.4.” Battilana Decl., ¶¶ 26, 27, 29. None of those other distributors have responded to the cease-and-desist notices, and Avangate has advised that it will resume sales and release withheld

1 monies unless Plaintiffs obtain a preliminary injunction. McEwen Decl., ¶ 18; Battilana Decl., ¶¶
2 26, 29. According to conversations that Mike Battilana had with third parties, Hyperion promised
3 to indemnify the distributors against any claims. Battilana Decl., ¶ 29.

4 In material breach of the 2009 Settlement Agreement, Hyperion is using both the AMIGA
5 OS and “Boing Ball” logo marks to market and sell “Amiga OS 3.1.4.” McEwen Decl., ¶ 19, and
6 Exhibits WM-7 and WM-8 thereto. Hyperion’s floppy discs and boot-up screen also show
7 Hyperion falsely claiming to be the copyright owner of “Amiga OS 3.1.4,” and hence, Amiga OS
8 3.1, of which it is a mere “update.” McEwen Decl., ¶ 20; Battilana Decl., ¶¶ 25, 27, 28, and
9 Exhibits MB-3, MB-4, and MB-6 thereto. By removing the original copyright notice from the
10 boot-up screen of Amiga OS 3.1, and providing false copyright notices claiming Hyperion as the
11 owner of copyrights, Hyperion intended to conceal from the public the fact that Hyperion has no
12 right to create and sell “Amiga OS 3.1.4” under the Settlement Agreement, and no authorization
13 from the copyright owner, which is Cloanto.

14 As a result of Hyperion’s unauthorized conduct, Plaintiffs are suffering irreparable harm and,
15 unless a preliminary injunction is issued, will continue to suffer irreparable harm.

16 **II. FACTUAL BACKGROUND**

17 **A. Hyperion’s Rights under the Settlement Agreement**

18 The Amiga Parties and Hyperion entered into the Settlement Agreement on September 30,
19 2009. (A copy of the Settlement Agreement is filed in this case as ECF No. 1-1, pp. 4-46.) The
20 Settlement Agreement was highly contested, and took nearly two years to negotiate. McEwen
21 Decl., ¶ 10. In both Hyperion’s 2007 Amended Counterclaims against Amiga, Inc. (Washington)
22 and Itec, LLC, and its Complaint against Amino, Hyperion sought enforcement of Section 2.07
23
24
25
26

1 of the 2001 OEM license, which stated that in the event of insolvency of Amiga, Inc.
2 (Washington), Hyperion would have “an exclusive, perpetual, world-wide and royalty free right
3 and license to develop (at their sole expense), use, modify and market the Software and OS 4
4 under the ‘Amiga OS’ trademark.” The “Software” was defined in the OEM license as Amiga
5 OS 3.1 and upgrades. ¶ 4, McEwen Decl.
6

7 The Settlement Agreement does not grant Hyperion such broad rights. McEwen Decl., ¶ 5.
8 Section 1(c) of the Settlement Agreement grants Hyperion the exclusive license to use the
9 trademarks AMIGA OS and AMIGA ONE, and a non-exclusive license to use the “Boing Ball”
10 logo mark “Solely for the purposes of marketing, distributing and making available AmigaOS 4
11 and any hardware required or desired to operate with AmigaOS 4.” (Emphasis added.) The
12 “exclusive” grant is also expressly subject to pre-existing licenses listed on Exhibit 1 to the
13 Settlement Agreement. McEwen Decl., ¶ 5, 14, and 15, and Exhibit WM-6 thereto.
14

15 “AmigaOS 4” is defined in Definition “d” of the Settlement Agreement as

16 the Operating System developed by Hyperion and based in part on the Software,
17 including without limitation the Software Architecture of the Software as described in
18 the Documentation, in any version (irrespective of version numbering, e.g.,
19 AmigaOS 5). [Emphasis in the original.]¹

20 The “Software,” according to definition “n,”

21 Means Amiga OS 3.1, which is the Operating System (including without limitation its
22 Software Architecture as described in the Documentation) originally developed,
23 owned and marketed by Commodore Business Machines (CBM) for their Amiga line
24 of computers in 1994.

25 ECF No. 1-1, pp. 4-5.

26 ¹ AmigaOS 4 was, at the time the Settlement Agreement was entered into, a “Power PC-based” (PPC) operating system, not one compatible for use with original Amiga hardware. ¶ 6. McEwen Decl.

1 The two definitions thus identify completely separate operating systems: (a) AmigaOS 4, the
2 operating system developed by Hyperion, which at the time the Settlement Agreement was a
3 PowerPC-based operating system, not one compatible for use with original Amiga hardware; and
4 (b) AmigaOS 3.1, the operating system created by Commodore Business Machines, which runs
5 on original Amiga hardware, and not on the PowerPC. Battilana Decl., ¶ 19. Thus, Hyperion’s
6 use of AMIGA OS and the “Boing Ball” logo mark in connection with anything other than
7 AmigaOS 4 is in plain violation of the Settlement Agreement, and constitutes a material breach
8 thereof. McEwen Decl., ¶ 19.

9
10 Hyperion also has no rights to distribute and sell Amiga OS 3.1 alone, as will be shown
11 below. Section 1(b) of the Settlement Agreement provides as follows:

12
13 Without prejudice to any existing License Agreements listed on Exhibit 1, the Amiga
14 Parties hereby grant Hyperion (at Hyperion's sole expense) an exclusive, perpetual,
15 worldwide and royalty-free, transferable right and Object Code and Source Code
16 license to the Software in order to use, develop, modify, commercialize, distribute and
17 market the Software in any form (including through sublicensing), on any medium
(now known or otherwise), through any means (including but not limited to making
AmigaOS 4 available to the public via the internet) and for any current or future
hardware platform.

18 However, Section 1(b) can only properly be understood in context with the limited trademark
19 grant in Section 1(c). The broad wording of the grant in Section 1(b) – particularly the inclusion
20 of “commercialize, distribute, and market – was intended to ensure that Hyperion would not face
21 any limitations or impediments in developing, marketing, and selling AmigaOS 4, which
22 incorporates substantial portions of AmigaOS 3.1 (including much of the so-called “software
23 architecture”). McEwen Decl., ¶ 8. The parties never intended that Hyperion would market and
24 sell, or develop derivative works of, AmigaOS 3.1. McEwen Decl. ¶¶ 9, 16. Moreover, Hyperion
25 understood Section 1(b) to be so limited, as discussed below in Section II.B.
26

1 Various drafts of the Settlement Agreement prior to the final, executed version also confirm
2 the intention of both the Amiga Parties and Hyperion that Hyperion would only use AMIGA OS
3 in connection with AmigaOS 4, and that it would not market and sell AmigaOS 3.1 itself. As
4 recounted by Bill McEwen, who was President and CEO of Amiga, Inc. during the time the
5 Settlement Agreement was being negotiated, and who signed the Settlement Agreement on
6 behalf of Amiga, Inc. and Amino Development Corporation, the parties had agreed on the
7 limited trademark grant in December, 2008, nine months prior to reaching the final version of the
8 Settlement Agreement. McEwen Decl., ¶¶ 11. McEwen notes that a draft provided by William
9 Kinsel, Hyperion’s counsel, contained the limiting language in Section 1(c), “Solely for the
10 purposes of marketing, distributing, and making available Amiga OS 4...” McEwen Decl., ¶ 11.
11 Furthermore, the parties wrangled over the definition of “Amiga OS 4,” with Hyperion
12 advocating a definition that might have included Amiga OS 3.1. McEwen Decl., ¶ 11. In
13 response, Amiga corrected the definition to make it clear that “Amiga OS 4” referred to the
14 system “developed by Hyperion,” and not Amiga OS 3.1, the one developed by Commodore
15 Business Machines. McEwen Decl., ¶ 12. In a subsequent draft, the definition was again
16 amended to add “e.g., AmigaOS 5” after the words “irrespective of version numbering.”
17 McEwen Decl., ¶ 13. These changes, incorporated in the final, executed version of the
18 Settlement Agreement, resolved any doubt over the extent of Hyperion’s trademark rights.
19 Simply put, Hyperion was granted no right whatsoever to use AMIGA OS or the “Boing Ball”
20 logo mark in connection with Amiga OS 3.1 or anything other than Amiga OS 4, as that term is
21 defined in the Settlement Agreement. McEwen Decl., ¶ 11-13.
22
23
24
25
26

1 The specific grant of rights in the Settlement Agreement was also aimed at protecting
2 existing licensees – in particular, Cloanto, which had been granted various rights by Amiga and
3 its predecessors for emulation and Classic Support,² and which had been very successful in those
4 areas for, as of 2009, more than ten years. McEwen Decl., ¶ 14-15; Battilana Decl., ¶¶ 6-11. In
5 entering into the Settlement Agreement, the parties intended that Hyperion would have exclusive
6 rights with respect to AmigaOS 4 and subsequent versions; Cloanto would continue to offer
7 emulation and Classic Support; and Amiga would exploit ancillary AMIGA products and
8 systems, including through the AmigaDE and AmigaAnywhere operating systems. McEwen
9 Decl., ¶ 14-15.

11 **B. Hyperion’s Knowledge of its Specific and Limited Rights**

12 Hyperion is well aware that the Settlement Agreement granted it the right to use AMIGA OS
13 and the “Boing Ball” logo mark solely in connection with AmigaOS 4, and that this prevented
14 Hyperion – and was intended to prevent Hyperion – from marketing and selling Amiga OS 3.1
15 on its own, whether in original or enhanced form, e.g., “AmigaOS 3.1.4.” McEwen Decl. ¶ 16.
16 That intention was confirmed by Hyperion in a press release published on Hyperion’s website on
17 October 17, 2009, less than a month after the Settlement Agreement was signed. The statement
18 reads in full:
19

20
21 Hyperion Entertainment CVBA is pleased to announce that on September 30, 2009, it
22 has reached a comprehensive settlement agreement with Amiga, Inc., Itec LLC and
23 Amino Development Corporation, Inc. [sic] to bring all ongoing litigation and
24 worldwide pending procedures between the parties to an end.

25 ² “Classic Support” consists of providing the Amiga operating systems prior to Amiga OS 4, together with
26 enhancements and bug fixes, for use with original Amiga-branded equipment, i.e., in a non-emulation environment.
McEwen Decl., ¶ 9.

1 As part of the settlement agreement, the Amiga Parties acknowledge that Hyperion is
2 the sole owner of AmigaOS 4 without prejudice to any third party rights.

3 Within the framework of the settlement agreement Hyperion is granted an exclusive
4 perpetual, worldwide right to AmigaOS 3.1 in order to use, develop, modify,
5 commercialize, distribute and market AmigaOS 4.x (and subsequent versions of the
6 AmigaOS including without limitation AmigaOS 5) in any form, on any medium and
7 for any current or future hardware platform under the exclusive trademark “AmigaOS”
8 (Amiga operating system) and using other associated trademarks (such as the
9 “BoingBall” logo).

Hyperion will continue development and distribution of AmigaOS 4.x (and beyond) as
it has done since November of 2001.

10 We wish to thank our loyal customers who have supported us through the judicial
11 procedures and especially the AmigaOS 4.x development team for their continued
12 efforts and at the request of whom this official announcement was made.

13 As Hyperion Entertainment’s most ambitious project to date is drawing to a close in
14 collaboration with our partners, we invite our current and prospective customers to
15 watch this space for further updates on Hyperion’s continued efforts to revive the
16 Amiga platform.

17 (Emphasis added.) See, Battilana Decl., ¶ 20 and Exhibit MB-1 thereto.

18 Hyperion’s knowledge that it lacks the rights to market and sell “Amiga 3.1.4” is also
19 reflected in its conduct. In 2011, Hyperion packaged Amiga OS 3.1 with AmigaOS 4, failing to
20 advertise that fact and limiting distribution to customers with OS4-capable hardware, i.e., those
21 who had PowerPCs or other equipment that ran AmigaOS 4. Battilana Decl., ¶ 22. In 2016,
22 knowing that it lacked the rights to use the AMIGA OS mark in connection Amiga OS 3.1, or to
23 sell Amiga OS 3.1 at all, began selling Amiga OS 3.1 under the misleading names, “New
24 Hyperion 3.1 Kickstart ROM” and “Workbench 3.1.” Battilana Decl., ¶ 23. In those versions,
25 Hyperion also added the “Boing Ball” logo mark to the boot-up screen in violation of the
26 Settlement Agreement, and displayed the false copyright notice, “3.1 ROM (Kickstart Version
40.72) Copyright © 1985-2016 Hyperion Entertainment CVBA. Developed under license.”

1 Battilana Decl. ¶ 23 and Exhibit MB-2 thereto. After Cloanto sent Hyperion and its e-commerce
2 provider a cease-and-desist notice for Hyperion’s unauthorized use of Cloanto’s WORKBENCH
3 trademark (U.S. Reg. No. 3946885), Hyperion sold the product outside the United States as
4 “AmigaOS Workbench 3.1.” Battilana Decl., ¶ 24.
5

6 In contrast to Hyperion’s honest and forthright press release immediately following
7 execution of the Settlement Agreement, on December 31, 2017, after Cloanto filed suit against
8 Hyperion in the Northern District of New York, Hyperion proclaimed itself the owner of all
9 rights in “AmigaOS,” i.e., all operating systems and accompanying trademark rights, and not just

10 AmigaOS 4:

11 Hyperion Entertainment nonetheless hereby affirms unequivocally that on the basis of
12 the aforementioned stipulation judgment, it has the worldwide exclusive right to
13 distribute and sublicense AmigaOS on a standalone basis or bundled with hardware
14 (OEM license), either on a physical medium (such as a ROM or DVD) or
15 electronically (digital download). The same applies for obvious reasons to any
improvements and upgrades of AmigaOS for both 68K and PPC which Hyperion
Entertainment has released and is planning to release.³

16 Battilana Decl., ¶ 31 and Exhibit MB-7 thereto; see also, Battilana Decl., ¶ 34, regarding a
17 meeting between Cloanto and Hyperion on October 29, 2017, during which there was apparent
18 internal disagreement at Hyperion over its rights.

19 Reflecting that over-reach, and in a further attempt to mislead consumers into believing that
20 Hyperion possessed all the rights it needed to market and sell “Amiga OS 3.1.4,” Hyperion
21 added the “Boing Ball” logo mark and placed false copyright notices on the program’s boot-up
22 screen and on the floppy discs, proclaiming Hyperion to be the sole author and owner. McEwen
23 Decl., ¶¶ 19, 20; Battilana Decl. ¶¶ 25, 27, 28. Initially, the false copyright notice stated “3.1.4
24

25 _____
26 ³ The reference to “68K” is to original Amiga hardware.

1 ROM (Kickstart Version 46.143) Copyright © 2018 Hyperion Entertainment. All Rights
2 Reserved.” Battilana Decl. ¶¶ 25, 28 and Exhibit MB-3 thereto. After counsel for Plaintiffs sent a
3 cease and desist letter to Hyperion’s distributor regarding the use of the AMIGA OS mark,
4 Hyperion added “Developed under license,” which only amounted to a further misrepresentation.
5 Battilana Decl., ¶ 27 and Exhibit MB-4 thereto. When a prospective customer read about the
6 change in the copyright notice and asked Hyperion about it, Hyperion misleadingly responded
7 “We only fixed a mistake in the copyright strings, nothing to worry about.” Battilana Decl. ¶ 27
8 and Exhibit MB-5 thereto.
9

10 **C. Cloanto’s Rights**

11 As shown above, one of the purposes of the Settlement Agreement was to protect licensees
12 whose rights pre-dated the Settlement Agreement, Cloanto in particular. McEwen Decl., ¶ 14-15.
13 Exhibit 1 to the Settlement Agreement describes Cloanto’s rights in broad terms: “various
14 licenses commencing in 1994; indefinite term,” and “Rights sufficient to support Amiga Forever,
15 including emulation modules.” *Id.*
16

17 Since 1997, under its AMIGA FOREVER trademark, Cloanto has sold “emulation” software,
18 that is, software that allows modern hardware and operating systems to emulate AMIGA
19 hardware and run (a) AMIGA operating systems 0.7 through 3.1, together with various
20 enhancements (bug fixes, patches, etc.), (b) AMIGA applications; and (c) games created for the
21 AMIGA platform. Battilana Decl., ¶ 7-10. In 1998, Cloanto began including in its products the
22 ability of users to run Amiga operating systems 1.1 through 3.0 on original Amiga hardware (i.e.,
23 in a non-emulation environment). This was the beginning of “Classic Support.” Battilana Decl.,
24 ¶ 8. In 1999, Cloanto’s Classic Support expanded to include Amiga OS 3.1. Battilana Decl., ¶ 10.
25
26

1 Cloanto and Hyperion have known each other since the early 2000s. Battilana Decl., ¶¶ 12-
2 16. Given Cloanto's visibility in the Amiga world and the meetings and conversations between
3 Cloanto and Hyperion personnel, there is no possibility that Hyperion was unaware that AMIGA
4 FOREVER products provided both emulation and Classic Support capabilities.
5

6 Through a series of copyright assignments between 2011 and the end of 2016, Cloanto
7 acquired ownership of Amiga OS 3.1, among other copyrights. Battilana Decl., ¶¶ 17, 18. The
8 copyright in Amiga OS 3.1 was registered on April 27, 2007, Reg. No. TX0006587397. Battilana
9 Decl., ¶ 18.

10 **D. Irreparable Harm**

11 Plaintiffs are suffering and will continue to suffer irreparable harm to their reputations
12 and good will as the result of Hyperion's unauthorized conduct. McEwen Decl., ¶ 21; Battilana
13 Decl. ¶¶ 35-38. The Amiga Parties have also been denied the benefit of their bargain with
14 Hyperion under the Settlement Agreement, which denial cannot be remedied with a financial
15 award, particularly given that the rights granted to Hyperion under the Settlement Agreement are
16 royalty-free. McEwen Decl., ¶ 21.
17

18 Moreover, Hyperion's sale of the "Amiga 3.1.4" products, its use of false copyright
19 information, and its recent misleading public statements about the extent of its rights are causing
20 a loss of customers and goodwill, as well as damaging the reputation of Cloanto in the Amiga
21 world, despite Hyperion's limited rights under the Settlement Agreement which should prevent
22 Hyperion from engaging in such conduct. Battilana Decl., ¶¶ 35-37. On November 30, the owner
23 of one of Cloanto's largest retailers of Classic Support software informed Cloanto that in the face
24 of Hyperion's representations regarding the legitimacy and ownership of Amiga OS 3.1.4, he
25
26

1 will no longer sell Cloanto’s Amiga 3.1 Classic Support software – software that Cloanto has
2 been selling steadily for nearly 20 years. Battilana Decl., ¶ 36. Due to Hyperion’s wrongful
3 conduct, Cloanto’s sales have also collapsed or are in the process of collapsing in several
4 countries. Battilana Decl., ¶ 36.

6 **III. ARGUMENT**

7 **A. Standard for Preliminary Injunctive Relief**

8 The purpose of preliminary injunctive relief is to preserve the status quo and to protect the
9 rights of the parties pending trial on the merits. In order to obtain injunctive relief, the party
10 seeking the injunction must demonstrate that it is “likely to succeed on the merits” and “likely to
11 suffer irreparable harm in the absence of preliminary relief.” *Winter v. NRDC, Inc.*, 555 U.S. 7,
12 129 S. Ct. 365 (2008). The test, however, is a “sliding scale” on which “the required degree of
13 irreparable harm increases as the probability of success decreases.” *A&M Records, Inc. Napster,*
14 *Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2011); *MetroPCS New York, LLC v. 35-46 Broadway, Inc.*,
15 Case No. 17-1554-RSM (W.D. Washington, 2018), 2018 U.S. Dist. LEXIS 120076, 2018 WL
16 3455500 (“The Ninth Circuit has often compressed this analysis into a single continuum where
17 the required showing of merit varies inversely with the showing of irreparable harm.”) In
18 addition to satisfying the elements of likelihood of success and likelihood of suffering irreparable
19 harm, the party seeking relief must show that “the balance of equities tips in his favor, and that
20 an injunction is in the public interest.” *Winter v. NRDC, Inc.*, *supra*, 129 S. Ct. at 374.

23 **B. Plaintiffs Are Likely to Succeed on the Merits of their Claims.**

24 The Settlement Agreement unambiguously grants Hyperion the right to use AMIGA OS and
25 “Boing Ball” logo marks solely in connection with the marketing and sale of AmigaOS 4, which
26

1 is defined in the Settlement Agreement as the “Operating System developed by Hyperion and
2 based in part on the Software, including without limitation the Software Architecture of the
3 Software as described in the Documentation, in any version (irrespective of version numbering,
4 e.g., AmigaOS 5).” McEwen Decl., ¶¶ 5-6, and ECF No. 1-1, pp. 4, 6. Hyperion pretends that
5 this wording means that Hyperion can simply upgrade Amiga OS 3.1 (i.e., the operating system
6 developed by Commodore) and use the AMIGA OS and “Boing Ball” logo marks in order to
7 market and sell it. However, a plain reading of Section 1(c) and the entire history of the case,
8 stretching back to the 2001 OEM license, and culminating in Hyperion’s public admission as to
9 what rights it acquired in the Settlement Agreement, prevent any such interpretation. McEwen
10 Decl., ¶¶ 4-16; Battilana Decl., ¶ 20 and Exhibit MB-1 thereto. Simply put, Amiga OS 4 means
11 the system developed by Hyperion and future versions based on it, “e.g., AmigaOS 5.” It does
12 not include Amiga OS 3.1 or “Amiga OS 3.1.4.”

15 Furthermore, Plaintiffs are likely to prevail on their claim that Hyperion was not granted
16 any right to market and sell Amiga OS 3.1 on its own – a claim supported by the context of the
17 litigation and Hyperion’s own public admission, shortly after the Settlement Agreement was
18 executed, that “[w]ithin the framework of the settlement agreement Hyperion is granted an
19 exclusive perpetual, worldwide right to AmigaOS 3.1 in order to use, develop, modify,
20 commercialize, distribute and market AmigaOS 4.x (and subsequent versions of the AmigaOS
21 including without limitation AmigaOS 5) in any form, on any medium and for any current or
22 future hardware platform under the exclusive trademark “AmigaOS” (Amiga operating system)
23 and using other associated trademarks (such as the “Boing Ball” logo).” Battiana Decl., ¶ 20,
24 and Exhibit MB-1 thereto.

1 Given Cloanto's privity with Hyperion by virtue of the "Exhibit 3 Acknowledgement –
2 Acquirer Agreement Form," Battilana Decl., ¶ 32, and the fact that Hyperion has exceeded the
3 scope of rights granted to it under the Settlement Agreement with respect to the sale of Amiga
4 OS 3.1, Hyperion has also run afoul of Cloanto's rights in the copyright of Amiga OS 3.1. See,
5 *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948 (9th Cir. 2017) (a licensee that exceeds the
6 scope of the rights granted may be found liable for copyright infringement).
7

8 **C. Plaintiffs Are Likely to Suffer Irreparable Harm in the Absence of a Preliminary**
9 **Injunction.**

10 Paragraph 16 of the Settlement Agreement expressly authorizes Plaintiffs to seek injunctive
11 relief (among other remedies) without the necessity of proving actual damage:
12

13 The Parties agree and acknowledge that a breach of any provision of this Agreement
14 by the other Party may result in irreparable injury, the extent of which would be
15 difficult and/or impractical to assess, and that monetary damages alone would be an
16 inadequate remedy for such breach, in which case, the nonbreaching Party shall be
17 entitled to seek injunctive relief (inter alia related to protection of its intellectual
18 property rights), in addition to, and without prejudice, to any other remedies such as
19 specific performance of this Agreement as may be necessary or appropriate without
20 the necessity of proving actual damage by reason of any such breach of this
21 Agreement.

18 Plaintiffs assert that its burden of proving likelihood of irreparable harm in seeking a
19 preliminary injunction is diminished by this provision.
20

21 Nevertheless, as shown in detail in Section II.D. above, the Amiga Parties and Cloanto have
22 satisfied their burden of showing that irreparable harm is likely in the absence of a preliminary
23 injunction. For the Amiga Parties, the irreparable harm comes by way of damage to their
24 reputations and good will, as well as through being denied the benefit of their bargain with
25 Hyperion to determine which rights it granted to each of its licensees. McEwen Decl., ¶ 21. For
26

1 Cloanto, the irreparable harm is not only likely, but actual. Hyperion’s wrongful conduct is
2 causing Cloanto a loss of distributors and customers, a collapse of sales of its Classic Support
3 products, and damage to the goodwill and reputation that Cloanto has built up over more than 20
4 years. Battilana Decl., ¶¶ 35-37. *See, MetroPCS New York, LLC v. 35-46 Broadway, Inc., supra*
5 (diversion of customers following breach of agreement found to constitute irreparable harm).
6

7 **D. The Balance of Equities Tips in Plaintiffs’ Favor.**

8 Until September 30, 2018, Hyperion never marketed or sold a major upgrade to Amiga
9 OS 3.1. The creation, marketing, and sale of “Amiga OS 3.1.4,” in plain violation of the
10 Settlement Agreement and violates the status quo that existed when Hyperion filed its Complaint
11 in this action (ECF No. 1). That status quo should be preserved and Hyperion should not be
12 rewarded for its wrongful conduct. Most of the sales of “Amiga OS 3.1.4” will be made in the
13 first six months from release, making a preliminary injunction critical at this stage. Battilana
14 Decl., ¶ 38.
15

16 Furthermore, a preliminary injunction should be issued where, as here, the defendant’s
17 actions stem from its desire to avail itself of rights that it does not have, while intentionally
18 harming plaintiffs in the process. *See, Getty Images (US), Inc. v. Virtual Clinics*, 2014 U.S. Dist.
19 LEXIS 37611; Copy. L. Rep. (CCH) P30, 580, Case No. 13-0626-JLR (W.D. Washington,
20 March 20, 2014).
21

22 Under the circumstances, it is appropriate to issue a preliminary injunction to preserve
23 and maintain the status quo pending a full trial on the disputed factual and legal issues.
24
25
26

1 **E. Issuing an Injunction is in the Public’s Interest.**

2 There is a general public interest in the enforcement of voluntarily assumed contractual
3 obligations. “Parties entering into contracts have a right to expect that those contracts will be
4 enforced and that secretive efforts to violate contractual obligations, breach fiduciary obligations,
5 and violate the law will not be countenanced.” *Empower Energies, Inc. v. Solarblue, LLC*, 2016
6 U.S. Dist. LEXIS 130583 *38, 2016 WL 5338555, Case No. 16-cv-3220 (S.D.N.Y. September
7 23, 2016). *See also, Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511
8 F.3d 535, 551 (6th Cir. 2007); *Cuciniello v. Cuciniello*, 378 N.Y.S.2d 976, 977 (N.Y. Sup. Ct.
9 1976) (“In general, public policy holds competent contracting parties to bargains made by them
10 freely and voluntarily, and requires the courts to enforce such agreements.”). This is all the more
11 true when the contract is a Settlement Agreement incorporated into a Stipulated Judgment, as in
12 this case. *First 100, LLC v. Omni Fin., LLC*, 2016 U.S. Dist. LEXIS 83766, Case No. 16-cv-
13 00099 (D. Nev., June 28, 2016) (“There is a public interest in the enforcement of contracts and
14 judgments and in predictability in commercial transactions.”) Moreover, the “public interest”
15 prong favors the party that will likely prevail on an infringement claim. *See, Parah, LLC v.*
16 *Mojack Distributors, LLC*, 2018 U.S. Dist. LEXIS 142217, 2018 WL 4006057, Case No. 18-cv-
17 1208 (D. Kansas, August 22, 2018) (regarding patent infringement).

18 **F. Cloanto Should Be Required Only to Post a Minimal Bond**

19 Fed. R. Civ. P. 65(c) provides that “[t]he court may issue a preliminary injunction or a
20 temporary restraining order only if the movant gives security in an amount that the court
21 considers proper to pay the costs and damages sustained by any party found to have been
22 wrongfully enjoined or restrained.” However, the amount of the security, if any, lies in the
23
24
25
26

1 Court's discretion. *Organo Gold Int'l, Inc. v. Ventura*, 2016 U.S. Dist. LEXIS 58839, Case No.
2 16-cv-487 (W.D. Washington, May 3, 2016), quoting *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th
3 Cir. 2011) (quoting *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009)).

4 In this case, Hyperion's breach of the Settlement Agreement by marketing and selling the
5 "Amiga OS 3.1.4" products is clear and flagrant. Furthermore, after Hyperion's initial
6 distributor, Avangate, received a cease-and-desist notice and stopped the sale of the products,
7 Hyperion sought out other distributors and agreed to indemnify them in the event of an adverse
8 claim. Battilana Decl. ¶ 29. As a consequence, those distributors continued selling the "Amiga
9 OS 3.1.4" products in spite of the cease-and-desist notices. Battilana Decl. ¶ 29. Given the
10 equities in this case, which tip clearly in Plaintiffs' favor, any bond required to be posted should
11 be minimal, and at any rate should not exceed \$10,000.00.
12

13 **G. Conclusion**

14 Plaintiffs have demonstrated the necessity for injunctive relief in order to preserve the
15 status quo (i.e., existing at the commencement of this action) pending trial. Plaintiff are likely to
16 succeed on their claim that Hyperion has no right to market and sell "Amiga OS 3.1.4" products,
17 and absent a preliminary injunction, Plaintiffs are suffering or are likely to suffer irreparable
18 harm.
19

20 For the reasons stated above, the Court should grant the requested preliminary injunction,
21 and, if the Court deems necessary, set a hearing to determine the amount of the bond.
22

1 Respectfully submitted this 27th day of December, 2018.
2

3 By /s/ Gordon E. R. Troy
4 Gordon E. R. Troy
5 *Pro Hac Vice*
6 Gordon E. R. Troy, PC
7 5203 Shelburne Road
8 Shelburne, VT 05482
9 Tel. (802) 881-0640
10 FAX (610) 588-1962
11 gtroy@webtm.com

12 By /s/ Michael G. Atkins
13 Michael G. Atkins, WSBA# 26026
14 Atkins Intellectual Property, PLLC
15 113 Cherry Street #18483
16 Seattle, WA 98104-2205
17 Tel (206) 628-0983
18 Fax (206) 299-3701
19 mike@atkinsip.com
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2018, I electronically filed with the Clerk of the Court, using the CM/ECF system, the foregoing Plaintiffs’ Motion for Preliminary Injunction, together with the documents referred to therein and listed below,:

Exhibit 1 – Declaration of Michele Console Battilana;

Exhibit MB-1 through Exhibit MB-7;

Exhibit 2 – Declaration of William McEwen;

Exhibit WM-1 through Exhibit WM-8.

[Proposed] Order Granting Preliminary Injunction

The CM/ECF system will send notification of such filing to the following counsel of record:

Rhett V Barney RhettB@leehayes.com

Robert J Carlson bob@leehayes.com, litigation@leehayes.com,

ShellyG@leehayes.com and soniav@leehayes.com

Sarah E Elsdon Sarah.Elsden@leehayes.com, ShellyG@leehayes.com

By /s/ Gordon E. R. Troy
Gordon E. R. Troy
Pro Hac Vice
Gordon E. R. Troy, PC
5203 Shelburne Road
Shelburne, VT 05482
Tel. (802) 881-0640
FAX (610) 588-1962
gtroy@webtm.com