No. 99-15852

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sony Computer Entertainment, Inc., *et. al.*,

Plaintiffs and Appellees,

vs.

Connectix Corporation,

Defendant and Appellant.

Appeal from the United States District Court
for the Northern District of California

BRIEF AMICI CURIAE OF
AMERICAN COMMITTEE FOR INTEROPERABLE SYSTEMS AND
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF APPELLANT CONNECTIX CORPORATION

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Dated: June 3, 1999

CERTIFICATE OF INTEREST

The undersigned counsel of record for *amici curiae* furnishes the

following information in compliance with FRAP Rule 26.1.

1.   The American Committee for Interoperable Systems ("ACIS")

is an informal organization, not a corporation. The following companies

have joined ACIS by subscribing to the ACIS Statement of Principles:

> Accolade, Inc.
> Advanced Micro Devices, Inc.
> Amdahl Corporation
> America Online, Inc.
> Berkeley Software Design, Inc.
> Broderbund Software, Inc.
> Bull HN Information Systems, Inc.
> Clearpoint Research Corporation
> Color Dreams, Inc.
> Comdisco, Inc.
> Emulex Corporation
> Forecross Corporation
> The Fortel Group
> Fujitsu Systems Business of America, Inc.
> Hitachi Data Systems
> ICTV
> Insignia Solutions
> Johnson-Laird, Inc.
> Landmark Systems Corporation
> LCS/Telegraphics
> MidCore Software, Inc.
> NCR Corporation
> New York Systems Exchange, Inc.
> Passage Systems, Inc.
> Phoenix Technologies, Ltd.
> Plimoth Research Inc.
> QAD Inc.

Seagate Technology, Inc.
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Software Forum
Storage Technology Corporation
Sun Microsystems, Inc.
3Com Corporation
Tandem Computers
Trilium Consumer Electronics, Inc.
TriTeal
Western Digital Corporation
Zenith Data Systems Corporation

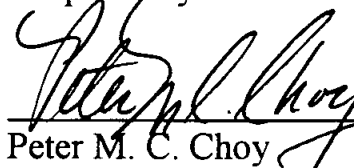2.   The Computer & Communications Industry Association

("CCIA") is a non-profit association. Its members are:

Amdahl Corporation
AT&T Corporation
Bell Atlantic Corporation
Block Financial Corp.
CAI/SISCo
Commercial Data Servers, Inc.
CommonRoad Corporation
Datum, Inc.
Entegrity Solutions Corporation
Fujitsu Limited
Giga Information Group
Government Sales Consultants, Inc.
Hitachi Data Systems, Inc.
Intuit, Inc.
Leasing Solutions, Inc.
MERANT
Netscape Communications Corporation
NOKIA
Nortel Networks
NTT America, Inc.
Okidata
Oracle Corporation
RedCreek Communications, Inc.
The SABRE Group

SBC Communications, Inc.
Sun Microsystems, Inc.
Telesciences, Inc.
TSI International Software, Ltd.
VeriSign, Inc.
Viatel, Inc.
ViON Corporation
V-SPAN, Inc.
Yahoo! Inc.

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STATUTES

OTHER AUTHORITIES

Interest of Amicus

The American Committee for Interoperable Systems ("ACIS") is an

informal organization of companies that develop innovative software and

hardware products that interoperate with computer systems developed by

other companies.[1] Computer & Communications Industry Association

("CCIA") members participate in many sectors of the computer and

telecommunications industry and range in size from small entrepreneurial

firms to the largest in the industry.[2]

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[1] The following companies have joined ACIS by subscribing to the
ACIS Statement of Principles: Accolade, Inc., Advanced Micro Devices,
Inc., Amdahl Corporation, America Online, Inc., Berkeley Software
Design, Inc., Broderbund Software, Inc., Bull HN Information Systems,
Inc., Clearpoint Research Corporation, Color Dreams, Inc., Comdisco, Inc.,
Emulex Corporation, Forecross Corporation, The Fortel Group, Fujitsu
Systems Business of America, Inc., Hitachi Data Systems, ICTV, Insignia
Solutions, Johnson-Laird, Inc., Landmark Systems Corporation,
LCS/Telegraphics, MidCore Software, Inc., NCR Corporation, New York
Systems Exchange, Inc., Passage Systems, Inc., Phoenix Technologies,
Ltd., Plimoth Research Inc., QAD Inc., Seagate Technology, Inc., Software
Association of Oregon (consists of over 550 software development firms,
firms in associated industries, and individuals professionally involved in
software development), Software Forum (consists of over 1,000 software
entrepreneurs and developers), Storage Technology Corporation, Sun
Microsystems, Inc., 3 Com Corporation, Tandem Computers, Trilium
Consumer Electronics, Inc., TriTeal, Western Digital Corporation, Zenith
Data Systems Corporation.

[2] CCIA members include: Amdahl Corporation, AT&T
Corporation, Bell Atlantic Corporation, Block Financial Corp., CAI/SISCo,
Commercial Data Servers, Inc., CommonRoad Corporation, Datum, Inc.,
Entegrity Solutions Corporation, Fujitsu Limited, Giga Information Group,

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ACIS and CCIA members believe that computer programs deserve effective intellectual property protection to give developers sufficient incentive to create new programs. At the same time, ACIS and CCIA are concerned that improper extension of copyright law will impede innovation and inhibit fair competition in the computer industry. ACIS and CCIA seek application of legal standards that will effectuate copyright law's fundamental aims by ensuring authors "the right to their original expression," but also encouraging competitors "to build freely upon the ideas and information conveyed by a [copyrighted] work." *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 349-50 (1991).

ACIS and CCIA have long supported interpreting the copyright laws to excuse reproductions incidental to the reverse engineering performed to develop interoperable products. Both ACIS and CCIA filed *amicus* briefs with this Court in *Sega Enterprises, Ltd. v. Accolade, Inc.* 977 F.2d 1510 (9th Cir. 1992), which held that the reverse engineering technique known as disassembly was a fair use as a matter of law when it was the only way to

Government Sales Consultants, Inc., Hitachi Data Systems, Inc., Intuit, Inc., Leasing Solutions, Inc., MERANT, Netscape Communications Corporation, NOKIA, Nortel Networks, NTT America, Inc., Okidata, Oracle Corporation, RedCreek Communications, Inc., The SABRE Group, SBC Communications, Inc., Sun Microsystems, Inc., Telesciences, Inc., TSI International Software, Ltd., VeriSign, Inc., Viatel, Inc., ViON Corporation, V-SPAN, Inc., Yahoo! Inc.

obtain functional elements such as the information necessary for achieving interoperability.

Neither ACIS, CCIA, nor their members have a direct financial interest in the outcome of this litigation. However, affirmance of the district court's decision would have serious anti-competitive consequences for ACIS and CCIA members and the computer industry as a whole. It would render unlawful software development processes used every day in Silicon Valley.[3]

Argument

There appear to be three distinct categories of copying in this case. First, Connectix allegedly downloaded an infringing copy of the Sony PlayStation BIOS from the Internet. It stopped using this copy once it realized that it was out of date. Second, Connectix made a series of related copies of the BIOS while installing and running it on a personal computer during the course of developing software to interact with the BIOS: it purchased a Sony PlayStation, removed the microchip containing the BIOS, and copied the BIOS onto a disk; it next copied the BIOS from the disk into the memory (presumably the hard drive) of a personal computer; then,

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[3] ACIS and CCIA take no position on the trademark issues in this case.

whenever Connectix ran the BIOS in the PC, the PC automatically copied the BIOS into the PC's random access memory (RAM). The third category of copying involved Connectix's disassembly of the Sony BIOS while developing its own BIOS. The district court based its preliminary injunction order on the second category of copying: the series of copies related to installing and executing the BIOS. This brief will focus on this series of installation/execution copies.

It bears emphasis that a certain category of copying is *not* present in this case: the copying of Sony's protected expression in the emulator Connectix actually sold to the public. In other words, both sides and the district court agree that the final Connectix product did not infringe Sony's copyright.

This brief first addresses the importance of reverse engineering to the computer industry. It then explains how jurisdictions throughout the United States and around the world have followed this Court's *Sega* decision in permitting the copying incidental to reverse engineering. Finally, the brief presents three theories excusing the installation/execution copies made by Connectix: Section 117 of the Copyright Act; the fair use doctrine; and the copyright misuse doctrine.

I. SOFTWARE REVERSE ENGINEERING IS CRITICAL TO COMPETITION AND INNOVATION IN THE COMPUTER INDUSTRY

In most copyright industries, there is little relation between intellectual property protection and competition. A film producer, for example, has no justification for copying from another film (except in certain special cases, such as parody).

Software, however, is different. Unlike a film or novel, which stands by itself, a computer program can function only in conjunction with hardware and other software. For example, an application program, such as a word processor, must work together with an operating system in order to perform its task; otherwise, it is a useless set of magnetic impulses. Two software products can work together—*interoperate*—only if they conform to the same set of rules, or *interface specifications*.

If a company could exercise proprietary control over the interface specifications implemented by its software, that company could determine which products made by other firms could interoperate with its software. And should that company have a dominant position in a particular market, it could use its control over interoperability to expand its dominant position into adjacent markets.

In short, in the software industry, overly broad copyright protection directly restricts competition. For this reason, U.S. courts in recent years have held that interface specifications fall on the idea (or unprotected) side of the idea/expression dichotomy.[4] Significantly, the U.S. government has taken this position in its pending case against Microsoft.[5]

But even though the interface specifications are not protected by copyright, a company seeking to interoperate must still learn what those interface specifications are. Because computer programs typically are distributed to the public in a form readable only by computers, a program's interface specifications usually are not readily apparent. In some instances, the developer of the program may be willing to provide the interface information to other companies. All too often, however, developers are not

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[4] *See, e.g., Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997); *Sega*, 977 F.2d at 1524-25; Jonathan Band & Masanobu Katoh, *Interfaces on Trial*, 131-146 (1995); 1 Paul Goldstein, Copyright § 2.15.2.1-2.15.2.2 (2d ed. 1998).

[5] Jonathan Band & Taro Isshiki, *Peace at Last? Executive and Legislative Branch Endorsement of Recent Software Copyright Case Law*, Computer Lawyer, Feb. 1999 at 1.

willing to provide the information, or the information they provide is tardy or incomplete.[6]

In these cases, the companies seeking to developing interoperable products have no choice but to perform painstaking research on the original program to discern the interface specifications. This research, known as *reverse engineering*, is a basic tool of software product development. Without reverse engineering, interoperability can be difficult, if not impossible, to achieve.

II. JURISDICTIONS THROUGHOUT THE WORLD HAVE ADOPTED EXCEPTIONS PERMITTING SOFTWARE REVERSE ENGINEERING

Because of the nature of computer technology, software reverse engineering almost always requires the making of a reproduction or derivative work. For example, the reverse engineering method known as *disassembly* involves "translating" the publicly distributed, computer readable program into a higher level, human readable form. In another method referred to as *black box reverse engineering*, an engineer observes a program's behavior and interaction with its environment while executing

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[6] Jeanette Bozo, *Bristol Has June 1 Date for Microsoft Lawsuit*, InfoWorld Daily News, Jan. 4, 1999; Richard Wolffe, *FTC says Intel Lawsuit 'Vital to Stop Abuse'*, Financial Post, June 18, 1998 at 19.

the program on a computer.[7] The computer automatically makes RAM copies of the program in order to run it. (The installation/exception copies at issue in this appeal occurred during the course of black box reverse engineering; Connectix was running the BIOS to ensure that the software emulator complied with the BIOS's interface specifications.)

Since this Court's 1992 decision in *Sega*, no less than four U.S. courts have permitted reproduction during the course of software reverse engineering under the "fair use doctrine."[8] Other courts have prevented enforcement under a copyright misuse theory.[9] Moreover, the Digital Millennium Copyright Act (DMCA), the legislation enacted by Congress in

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[7] Engineers refer to this method as black box reverse engineering because the externally visible characteristics of the program are observed without looking into the program itself; the actual contents of the program remain unknown.

[8] *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *DSC Communications Corp. v. DGI Techs.*, 898 F. Supp. 1183 (N.D. Tex. 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996); *DSC Communications Corp. v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997), *aff'd in part, rev'd in part, and vacated in part*, 170 F.3d 1354 (Fed. Cir. 1999).

[9] *DSC Communications Corp. v. DGI Techs.*, 81 F.3d 597 (5th Cir. 1996); *Alcatel U.S.A., Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999).

1998 to implement the World Intellectual Property Organization Copyright and Performances and Phonograms Treaties, permits the circumvention of technological protections for the purpose of engaging in software reverse engineering. 17 U.S.C. § 1201(f).[10] Citing *Sega*, the Senate Judiciary Committee Report states that this exception is "intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter."[11] The Report adds that the exception's objective is "to foster competition and innovation in the computer and software industry."[12]

Similarly, the 1991 European Union Software Directive contains a specific exception for software reverse engineering.[13] The Directive has been implemented throughout the European Union, as well as in the EFTA countries and throughout Eastern and Central Europe.[14] Thus, both the

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[10] *See also* note 4.

[11] S. Rep. No. 105-190, at 13 (1998).

[12] *Id.*

[13] Council Directive 91/250/EEC on the Legal Protection of Software Programs, Articles 5 and 6 (May 14, 1991), O.J. No. L122/42,44 (May 17, 1991).

[14] *See Interfaces on Trial* at 258-62.

United States and the European Union have recognized the central role reverse engineering plays in maintaining legitimate competition in the computer industry.

Asian countries share this recognition. Within the past two years, Hong Kong, Singapore, and the Philippines have all amended their copyright laws to permit software reverse engineering.[15] Additionally, the Australian government recently introduced similar amendments in the Senate.[16]

III. THE INSTALLATION/EXECUTION COPIES MADE BY CONNECTIX DO NOT VIOLATE THE COPYRIGHT ACT

The court below entered its preliminary injunction order on the basis of the installation/execution copies Connectix made of the Sony BIOS. Connectix made these copies during the course of developing the emulator software intended to interoperate with the BIOS. Every day engineers in Silicon Valley perform this sort of black box reverse engineering —
running an existing program to determine the interface specifications with which a new product under development must comply. If this Court

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[15] Ord. No. 92 of 1997 (H.K.); Copyright (Amendment) Bill of 1998 (Sing.); Republic Act 8293 of 1996 (Phil.).

[16] Copyright Amendment (Computer Programs) Bill of 1999 (Austl.).

prohibits the making of these copies, much software development would grind to a halt. Moreover, an engineer must make installation/execution copies before performing the type of reverse engineering permitted by *Sega* — disassembly. Before one can disassemble a program, one must first copy it into the computer's memory. If the copyright law prohibits installation/execution copies, *Sega* has no practical effect.

Fortunately, three distinct legal theories excuse Connectix's installation/execution copying: Section 117 of the Copyright Act; the fair use doctrine; and the copyright misuse doctrine. These theories will be discussed *seriatim*.

A. Section 117 of the Copyright Act Provides a Complete Defense for Connectix's Installation/Execution Copying

As computers are currently designed, when a user wants to run a program, he must first install the program into the computer. In a personal computer, for example, the user usually copies the program from a diskette or a CD-ROM into the computer's hard drive. When the user wants to run a particular program, the computer automatically copies the program from the hard drive into the computer's random access memory. The computer then executes the operations directed by the RAM copy of the program. Once the computer is turned off, or another program overwrites it, the RAM copy disappears (but the copy in hard drive remains).

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Accordingly, even the most innocent use of a program involves copying it at least twice: once, when initially installing the program into the hard drive; and again, when the computer automatically copies the program into RAM whenever the program is run. Additional RAM copies are made every time the user turns on the computer and seeks to run the program. As noted above, such a RAM copy typically disappears whenever the user turns the computer off, or overwrites it when loading another program into RAM.

The basic installation and execution of program may require the making of other copies. If the program is installed in a high level language, such as C++, the computer must "compile," or convert, the program into a lower level language before the computer can execute the program. Similarly, a program might need to be transferred from one storage medium to another before it can be installed in the computer. If for example, a computer does not have a CD-ROM drive, a program stored on a compact disc would have to be transferred to a floppy disk before it could be installed in the computer.

Recognizing that computer technology necessitates the copying and recopying of programs into memory, Congress in 1980 amended Section 117 of the Copyright Act to provide that:

it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of the computer program provided ... that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and it is used in no other manner....[17]

Connectix's installation/execution copies fall directly with the scope of this exception; each was made as an essential step in the utilization of the BIOS in conjunction with the computer which was running the BIOS. In order for the personal computer to execute the program, Connectix had to 1) copy the BIOS from the microchip to the disk; 2) copy the BIOS from the disk into the computer's hard drive; and 3) copy the BIOS from the hard drive into the computer's RAM.

The court below erroneously rejected Connectix's Section 117 defense because it misapplied this Court's ruling on Section 117 in *Sega*. In *Sega*, this Court ruled that disassembly — the translation of machine readable object code into a higher level, human readable form — was not an essential step in the utilization of the program in conjunction with a computer, and thus was not excused by Section 117. This Court's ruling was correct because disassembly in fact *is not* an essential step in the

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[17] 17 U.S.C. § 117(1).

utilization of program. There is absolutely no technological need to disassemble a program in order to execute it.

The copies made by Connectix, in contrast, were essential to the utilization of the BIOS in the computer. This Court's Section 117 ruling in *Sega*, therefore, does not prevent the application of Section 117 here.

Appellee might argued that this Court should not apply Section 117 because Connectix was not using the BIOS in the manner intended by Sony. That is, Connectix was not executing the BIOS to play Sony — licensed video games on a PlayStation; rather, it was executing the BIOS to develop software which ultimately would compete with Sony products. The Fifth Circuit considered, and rejected, precisely this argument in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 261 (5th Cir. 1988). Vault had argued that the Section 117 exception should be interpreted to permit the copying of a computer program only if it is used for its intended purpose. The *Vault* court "decline[d] to construe 117(1) in this manner.... Section 117(1) contains no language to suggest that the copy must be employed for a use intended by the copyright owner, and, absent clear congressional guidance to the contrary, we refuse to read such limiting language into this exception."

Appellee might also argue that this Court's holding in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), significantly narrowed the scope of the Section 117 defense in this Circuit. To be sure, this Court did narrow the scope of the defense, but not in any way relevant here. In *MAI*, this Court ruled that the Section 117 was available only to *owners* of copies of programs, and not to *licensees* of copies of programs. There is nothing in the record here, however, to suggest that Connectix is a licensee and not an owner of the copy of the BIOS included in the PlayStation it purchased.

Moreover, it is not clear what aspects of the *MAI* decision survive the recent amendment to Section 117. In 1998, Congress enacted Title III of the Digital Millennium Copyright Act specifically to overturn the result in *MAI*.[18] In any event, given that Connectix was not a licensee, the Court need not reach this issue.[19]

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[18] *See* S. Rep. 105-190, at 21-22 (1998).

[19] The Court, however, may wish to make clear that Sony could not alter the applicability of Section 117 to this case simply by printing a "license" on the outside of a PlayStation box.

B. The Fair Use Doctrine Provides a Complete Defense for Connectix's Installation/Execution Copies

Even if Section 117 did not excuse Connectix's copying, then 17 U.S.C. § 107 excuses it as a fair use. The fair use analysis performed by the court below fails to see the forest for the trees. In *Sega*, this Court ruled that disassembly, when performed to gain access to otherwise unavailable functional elements, was a fair use as a matter of law. It reached this conclusion because to prohibit Accolade's disassembly would have resulted in "the owner of the copyright gain[ing] a *de facto* monopoly over the functional aspects of his work — aspects that were expressly denied copyright protection by Congress."[20] Thus, this Court permitted an "intrusive" act of copying — the translating of a program to decipher the interface information contained within it — to prevent copyright from extending *de facto* protection to the unprotectable interface information.

By making its installation/execution copies, Connectix had the same objective as Accolade: uncovering interface information so that it could develop an interoperable product. Connectix's copies, however, were far less intrusive than Accolade's. At the development phase at issue here, Connectix did not open up the BIOS and look within; rather, it installed the

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[20] *Sega*, 977 F.2d at 1526.

BIOS in a computer and observed the BIOS's interaction with its environment from the outside while it ran on the computer. If Accolade's intrusive copying is a fair use as a matter of law, then Connectix's far more discreet copying *a fortiori* is a fair use.

The court below also tried to distinguish *Sega,* but in so doing revealed its failure to appreciate *Sega*'s facts. The court below suggested that in *Sega,* the copying by Accolade led to its development of its own games that ran on Sega's platform, whereas here, Connectix's copying led to the development of an emulator that competed with the Sony platform. What the court below failed to understand is that in both cases, the platform manufacturer controlled both sides of the interface. Sega manufactured platforms, and determined what companies could make games that ran on its platform. It licensed interface information to these companies in exchange for a hefty royalty. Similarly, Sony manufactures the PlayStation, and determines what companies can make PlayStation compatible games. These companies also have to pay significant royalties for the privilege of running on the PlayStation. Accolade reverse engineered a Sega compatible game in order to develop its own Sega compatible games. While the Accolade games did not compete with the

Sega platform, they did compete with other Sega compatible games, and in so doing, almost certainly diminished Sega's revenue stream.

To be sure, the *Sega* Court tried to minimize the harm Accolade caused to Sega's market by suggesting that a consumer could buy more than one game: "A consumer particularly interested in sports might purchase both Accolade's 'Mike Ditka Football' and Sega's 'Joe Montana Football'."[21] But even the *Sega* Court would have to acknowledge that Accolade's development of Mike Ditka Football prevented Sega or one of its licensees from developing Mike Ditka Football. Ultimately, the *Sega* Court disposed of the issue by concluding that "an attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression...."[22]

The Connectix emulator without question contains original creative expression; Sony and the court below acknowledge that the emulator does not containing any infringing code. Further, although the emulator might displace the sales of some PlayStations, there is no reason to assume that a consumer might not buy both a PlayStation *and* an emulator. For example, a parent might buy a PlayStation for one child to use with the television in

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[21] *Id.* at 1523.

[22] *Id.* at 1523-24.

the family room, and an emulator for another child to use with the Macintosh in the study. Just as a consumer might buy more than one video game, so too might he buy more than one video game platform, particularly when they can be used in conjunction with different types of hardware (*i.e.*, a television versus a computer). Moreover, the purchase of the additional platform could then stimulate the purchase of additional Sony compatible games, thereby increasing Sony's revenue.

In sum, the emulator is precisely the sort of competitive yet innovative product whose production this Court sought to preserve in its *Sega* decision. This Court should once again recognize that the copyright law should not be applied so as to prevent the development of noninfringing computer products.

C. The Misuse Doctrine Prevents Sony from Enforcing Its Copyright Against Connectix's Installation/Execution Copies

The copyright misuse doctrine provides Connectix with yet another defense for its installation/execution copies. This Circuit recently recognized the copyright misuse doctrine in *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir.), *cert. denied*, 522 U.S. 933, *amended*, 133 F.3d 1140 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998). The Fifth Circuit applied the doctrine earlier this year in a

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software copyright case similar to this one: *Alcatel U.S.A., Inc. v. DGI Techs.*, 166 F.3d 772 (5th Cir. 1999). In *Alcatel*, DSC developed both an operating system and microprocessor card for a telecommunications switch. Running the operating system required copying it into the microprocessor's memory. DGI developed microprocessor cards compatible with the DSC operating system. To test and to use the DGI cards, the DSC operating system had to be loaded into the cards' memory. The DSC license agreement, however, prohibited the running of the DSC operating system on non-DSC cards . The jury found that DSC's license agreement constituted copyright misuse, and the Fifth Circuit agreed with its finding: "DSC has used its copyright to indirectly gain commercial control over products DSC [has] not copyrighted, namely its microprocessor cards."[23]

In an earlier related case, the Fifth Circuit had similarly concluded that "DSC seems to be attempting to use its copyright to obtain a patent-like monopoly over unpatented microprocessor cards."[24] The Court reasoned,

> Any competing microprocessor card developed for use on
> DSC phone switches must be compatible with DSC's
> operating system software. In order to ensure that its card is

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[23] *Alcatel,* 166 F.3d at 793.

[24] *DSC,* 81 F.3d at 601.

compatible, a competitor such as DGI must test the card on a DSC phone switch. Such a test necessarily involves making a copy of DSC's copyrighted operating system, which copy is downloaded into the card's memory when the card is booted up. If DSC is allowed to prevent such copying, then it can prevent anyone from developing a competing microprocessor card, even though it has not patented the card.[25]

This is precisely what is occurring here. Sony does not have a patent

or copyright in the PlayStation components that interconnect with the

BIOS. Yet, it seeks to use its copyright in the BIOS to prevent the

development of a product — the emulator software — that competes with
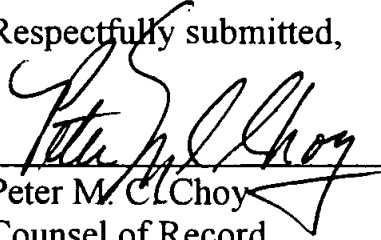
these unprotected components.

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[25] *Id.*

IV. CONCLUSION

For the foregoing reasons, ACIS and CCIA respectfully request the

Court to reverse the ruling below that Connectix's installation/execution

copies infringed Sony's copyright.

Respectfully submitted,

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Dated: June 3, 1999

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the foregoing

brief *amici curiae* is proportionately spaced, has a typeface of 14 points and

contains 4,790 words.

DATED this 3rd day of June, 1999.

Respectfully submitted,

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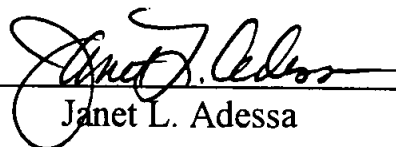(650) 336-2482
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CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of June, 1999, I caused two true

and correct copies of Brief *Amici Curiae* of American Committee for

Interoperable Systems and Computer & Communications Industry

Association, and one true and correct copy of the corresponding Motion for

Leave to File Brief *Amici Curiae* to be sent via first class mail, postage

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