

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: June 14, 2007

Opposition No. **91175892**

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Microsoft Corporation

v.

Mark T. Daniel

**Frances S. Wolfson, Interlocutory Attorney:**

On April 9, 2007, applicant filed a motion to suspend proceedings pending publication or abandonment of opposer's pleaded trademark applications for the mark ZUNE.<sup>1</sup> The Board, on May 8, 2007, issued an order wherein it noted that opposer's pleading of priority was based not only on the priority filing date of its applications, but also on its prior actual use of the mark "in a manner analogous to trademark use." Finding that this latter claim had been insufficiently pleaded, the Board allowed opposer time to amend its pleading to properly state, if such grounds existed, its alternate theory of priority.

Opposer filed an amended notice of opposition on May 11, 2007. The amended notice alleges that opposer used its mark prior to the filing dates of applicant's applications in a manner "analogous to trademark use," and that such use

was thereafter followed by use that had a "substantial impact on the purchasing public ... since at least [the earliest filing date of applicant's applications]." The allegations are sufficient to plead a priority claim derived from analogous use. Of course, opposer is left to its proof at trial.

Since there is now a ground upon which relief may be granted that is not dependent upon the status of opposer's pleaded applications, although the disposition of applicant's pleaded marks may ultimately have a bearing on this proceeding, it is unnecessary to suspend proceedings pending their resolution at this time.

Accordingly, applicant's motion to suspend is denied. Trial dates, including the close of discovery, are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:	<b>December 15, 2007</b>
30-day testimony period for party in the position of plaintiff to close:	<b>March 14, 2008</b>
30-day testimony period for party in the position of the defendant to close:	<b>May 13, 2008</b>
15-day rebuttal period for party in the position of the plaintiff to close:	<b>June 27, 2008</b>

**IN EACH INSTANCE,** a copy of the transcript of testimony, together with copies of documentary exhibits,

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<sup>1</sup> Serial Nos. 78953571 and 78977970.

must be served on the adverse party within **thirty days** after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.