

ESTTA Tracking number: **ESTTA179529**

Filing date: **12/07/2007**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91179197
Party	Plaintiff VUTEk Inc.
Correspondence Address	ALEX K. GRAB, ESQ. 303 VELOCITY WAY FOSTER CITY, CA 94404 UNITED STATES alex.grab@efi.com
Submission	Opposition/Response to Motion
Filer's Name	Alex K. Grab, Esq.
Filer's e-mail	alex.grab@efi.com
Signature	/s/ Alex K. Grab
Date	12/07/2007
Attachments	Opposition to BioWare's Motion to Dismiss.pdf (22 pages)(430725 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 76636906
For the mark BIOWARE CORP.
Published in the *Official Gazette* on April 24, 2007

VUTEK INC., a Delaware corporation,

Opposer,

vs.

BIOWARE CORP., a Canadian
corporation,

Applicant.

Opposition No. 91179197

OPPOSITION TO APPLICANT
BIOWARE CORP.'S MOTION TO
DISMISS PURSUANT TO FED. R. CIV.
P. 12(b)(6)

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

TABLE OF CONTENTS

I. Introduction.....1

II. BioWare’s Motion To Dismiss Should Be Denied Because It Was
Not Timely Served On VUTEk’s Counsel.1

III. BioWare’s Motion Should Be Denied On The Merits.....2

 A. VUTEk Pleaded Proper Grounds For Denying Registration.....2

 B. VUTEk Has Standing to Challenge BioWare’s Application.....6

IV. At Worst, VUTEk should be Granted Leave To Amend.....7

V. Conclusion8

TABLE OF AUTHORITIES

CASES

<i>Allen v. City of Beverly Hills</i> , 911 F. 2d 367 (9th Cir. 1990)	7
<i>Cardinal Engineering Corp. v. Champion Mfg. Co.</i> , 300 F.2d 957, 133 U.S.P.Q. 197 (C.C.P.A. 1962)	2
<i>DeLuxe Reading Corp. v. Rexall Drug and Chemical Co.</i> , 147 U.S.P.Q. 54 (TTAB 1995)	5
<i>Intellimedia Sports Inc. v. Intellimedia Corp.</i> , 43 U.S.P.Q. 1203 (T.T.A.B. 1997)	7
<i>Lipton Indus., Inc. v. Ralston Purina Co.</i> , 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982)	6
<i>M. Aron Corp. v. Remington Products, Inc.</i> , 222 U.S.P.Q. 93 (TTAB 1990)	3
<i>Morton Foods, Inc. v. The Frito Co.</i> , 314 F.2d 822, 50 C.C.P.A. 1105 (C.C.P.A. 1963)	4, 5
<i>Richard Gregg Mfg. Co. v La Maur, Inc.</i> , 166 U.S.P.Q. 568 (TTAB 1970)	5, 6
<i>Ritchie v. Simpson</i> , 170 F.3d 1092, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999)	6
<i>Selva & Sons, Inc. v. Nina Footwear, Inc.</i> , 705 F.2d 1316, 217 U.S.P.Q. 641 (Fed. Cir. 1983)	6
<i>Wilson v. Delaunay</i> , 245 F.2d 877, 114 U.S.P.Q. 339 (C.C.P.A. 1957)	6

RULES

Fed. R. Civ. P. 15(a)	7
-----------------------------	---

TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE

§ 113.....	2
§ 309.03.....	4
§ 309.03(b).....	1, 3, 5, 6

§ 502.02(a) 1, 2
§ 503.03..... 7

TREATISES

3 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION (2007 ed.)
§ 20.13..... 2

REGULATIONS

37 C.F.R. § 2.119(b) 2

I. INTRODUCTION

Applicant BioWare Corp.'s motion to dismiss Opposer VUTEK, Inc.'s Opposition should be denied. As an initial matter, BioWare failed to timely serve the motion on VUTEK's counsel of record in violation of the Board's rules. Under the Board's rules, that alone requires that the motion be denied. Even if the Board were to ignore BioWare's transgression, its motion should nonetheless be denied on the merits.

BioWare offers two arguments to support its motion to dismiss: First, BioWare argues that VUTEK has not alleged sufficient "damages" caused by BioWare's application for the mark BIOWARE CORP. Second, it argues that VUTEK lacks standing to challenge the application. Neither argument has merit. First, contrary to BioWare's argument, VUTEK has pleaded proper grounds for denying the registration: The opposition is based on TBMP § 309.03(b), which expressly allows an opposition where the applicant, like BioWare here, "has asserted a likelihood of confusion in another proceeding between the parties involving the same marks." Second, VUTEK has standing. As an applicant itself for the mark "BIOWARE," VUTEK has a real interest in the application at issue here, and a reasonable basis for its belief of damage should the mark issue. Indeed, the same rule that establishes VUTEK's damages confirms that VUTEK has standing. Accordingly, if the Board reaches the motion's merits, the Board should deny BioWare's motion to dismiss in its entirety.

II. BIOWARE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE IT WAS NOT TIMELY SERVED ON VUTEK'S COUNSEL.

The Board should BioWare's motion without even considering its merits because BioWare failed to timely or properly served the motion on VUTEK's counsel in this proceeding.

TBMP § 502.02(a) requires that every motion must be served, and proof of service must be shown, "before the motion will be considered by the Board." TBMP § 502.02(a). 37 C.F.R.

§ 2.119(b), which is recited in TBMP § 113, requires service on a party's attorney of record. *See* TBMP § 113; 37 C.F.R. § 2.119(b).

Here, as BioWare's moving papers show, BioWare failed to serve its motion to dismiss on VUTEK's counsel in this proceeding. [*Mot. to Dismiss* at 11.] Instead, BioWare served its motion on October 5, 2007 on Greenberg Traurig LLP. [*Id.*] Although that law firm represents VUTEK in *another* proceeding, that firm does *not* represent VUTEK in this one. VUTEK's diligence in obtaining the motion to dismiss cannot and should not excuse BioWare from complying with the Board's rules. Because BioWare failed to properly serve VUTEK, BioWare's motion should not even "be considered by the Board." *See* TBMP § 502.02(a).

III. BIOWARE'S MOTION SHOULD BE DENIED ON THE MERITS.

Even if the Board were to consider the merits, BioWare's motion should nevertheless be denied. A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure must be denied unless it is certain that the opposer cannot, under any circumstances, prevail on its opposition. *See Cardinal Engineering Corp. v. Champion Mfg. Co.*, 300 F.2d 957, 133 U.S.P.Q. 197 (C.C.P.A. 1962). By contrast, a party opposing a trademark application need only plead "any legal defect or deficiency in the application" to demonstrate a valid ground for denying the registration. *See* 3 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 20.13 (2007 ed.). Because VUTEK's Opposition is based on a specific TTAB rule authorizing oppositions like it, BioWare's motion must be denied.

A. VUTEK PLEADED PROPER GROUNDS FOR DENYING REGISTRATION.

BioWare argues that VUTEK has failed to plead sufficient grounds for denying registration of the mark. Not so. Rule 309.09(b) specifically provides for damages claims based on facts asserted in VUTEK's Opposition. According to that rule:

A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff [Opposer] pleads (and later proves): ... Defendant [Applicant] has relied on its ownership of its application or registration in another proceeding between the parties, or [the applicant] has asserted a likelihood of confusion in another proceeding between the parties involving the same marks.

TBMP § 309.03(b) (emphasis added).

The Board has considered oppositions that involve a trademark applicant's actions in another proceeding—just as VUTEk has alleged here. *See also M. Aron Corp. v. Remington Products, Inc.*, 222 U.S.P.Q. 93, 96 (TTAB 1990). In *M. Aron*, M. Aron petitioned to cancel a registration sought by Remington, relying on Remington's previous opposition to its trademark application. *Id.* at 94. In denying Remington's motion to dismiss the petition, the Board held that "it is well settled that where a counterclaim to cancel an opposer's pleaded registration [in the other proceeding] is filed in an opposition which itself is based upon opposer's allegation of likelihood of confusion [in the other proceeding], it is clear from counter-claimant's position as defendant in the opposition that he has a personal stake in the controversy, and it is unnecessary for the counterclaimant to allege likelihood of confusion." *Id.* at 95. After citing this rule, the Board specifically denied Remington's argument that the same rule should not extend to separate proceedings. *Id.* As the Board recognized, "once a party has established its real interest in the proceeding and demonstrates that it is not a mere intermeddler, it may raise any ground for cancellation that exists under the Act. What is necessary to demonstrate a real interest in the proceeding may vary from case to case." *Id.*

Here, as in *M. Aron*, BioWare has alleged a likelihood of confusion in a separate proceeding involving the same core mark. In opposing VUTEk's application for International Class 2 registration of the mark BIOWARE in TTAB Proceeding No. 91174133, BioWare asserted that there is a likelihood of confusion between VUTEk's mark in Class 2 and BioWare's

marks in other classes. [See *BioWare's Notice of Opposition* ¶¶ 10-11, 15-16, Oppo. No. 91174133, a true and correct copy of which is attached hereto as Exhibit A.] Based upon BioWare's own litigation position, therefore, VUTEK will be damaged by BioWare's application at issue here: If the mark is registered, BioWare will use this mark to argue further that there is a likelihood of confusion between its marks and VUTEK's. That is a sufficient damage to support VUTEK's opposition here. TBMP § 309.03 and *M. Aron* are thus the beginning and the end of the analysis of BioWare's motion.

Rather than confront the TTAB rule and applicable case law, however, BioWare insists that VUTEK's damages allegations—despite falling squarely within Rule 309.03—are insufficient. [*Motion* at 4.] To reach this conclusion, BioWare distorts VUTEK's allegations in an effort to pigeonhole its argument into otherwise inapplicable case law. As discussed above, both BioWare's registrations and VUTEK's application are based on the word "BIOWARE." [*VUTEK's Opposition*, ¶¶ 3-6.] VUTEK has applied for that mark in International Class 2 [*Opposition*, ¶ 3], and BioWare has applied for it in International Classes 9, 16, 25, 41 and 42, and has registered it in International Classes 9 and 16 [*Opposition*, ¶¶ 4, 6]. If BioWare's application for the BIOWARE CORP. mark at issue here is registered, BioWare will—as it has already done before—use that registration as evidence of "likelihood of confusion" against VUTEK's application for BIOWARE in Class 2. VUTEK's allegations are thus *not* based upon the mere filing of an opposition or perceived procedural disadvantage, but upon the actual damage to VUTEK that would result from the registration of the mark at issue here.

Ignoring Rule 309.03(b) and the *M. Aron* case, BioWare instead relies on a line of cases following *Morton Foods, Inc. v. The Frito Co.* Those cases are inapposite. In a two page opinion, the *Morton* court held only that an application that creates a "mere tactical advantage"

in pending civil litigation does not alone constitute sufficient damages to oppose registration of a mark similar to that in the civil litigation. *Morton*, 314 F.2d 822, 823-24, 50 C.C.P.A. 1105, 1106 (C.C.P.A. 1963). That conclusion does not help BioWare here because, as discussed above, VUTEk has not sought to create a “mere tactical advantage.” VUTEk alleged real damages, including those specifically identified by the TTAB Rules as a basis for opposing a registration.

The other cases BioWare cited are equally unpersuasive. *DeLuxe Reading Corp. v. Rexall Drug and Chemical Co.* and the cases it cites only stand for the proposition that the filing of an opposition to a trademark application does not alone constitute legal injury. *See, e.g., DeLuxe*, 147 U.S.P.Q. 54 (TTAB 1995). In *Richard Gregg Mfg. Co. v La Maur, Inc.*, 166 U.S.P.Q. 568 (TTAB 1970), the petitioner never even responded to the motion to dismiss. The Board simply held that neither the filing of an opposition, as in *DeLuxe Reading*, nor the threat of an infringement suit, is sufficient by itself to constitute legal damage.

In contrast to these cases, BioWare did not merely oppose VUTEk’s application for BIOWARE. As discussed above, it also asserted a likelihood of confusion between the marks. BioWare’s assertion lands the Opposition at issue here squarely within TBMP § 309.03(b), and outside the reach of the cases BioWare cited. The *Morton* line of cases also does not apply here because VUTEk *has* alleged damages in this action—not just tactical disadvantages or opposition in another action. *Morton* is further inapplicable because it is BioWare that has asserted that there is a likelihood of confusion between the different BIOWARE marks.

Indeed, BioWare’s assertion of likelihood of confusion is tantamount to an acknowledgement that VUTEk will be damaged—as VUTEk alleges in its Opposition here—if the application here issues. As suggested in BioWare’s own cases, BioWare is effectively

asserting that its right to use its mark is inconsistent with VUTEk's right to use its mark. *See, e.g., Richard Gregg*, 166 U.S.P.Q. at 569. Having insisted on that likelihood of confusion, BioWare cannot assert the contrary here. For these reasons, the Board should deny BioWare's motion to dismiss on the ground that VUTEk has not alleged sufficient damages.

B. VUTEK HAS STANDING TO CHALLENGE BIOWARE'S APPLICATION.

BioWare also argues that VUTEk lacks standing to oppose BioWare's application. This argument, too, lacks merit. There are two requirements for standing in *inter partes* cases. An opposer or petitioner must have: (1) a "real interest" in the proceedings; and (2) a reasonable basis for the belief of damage. *Ritchie v. Simpson*, 170 F.3d 1092, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999). "This 'real interest' requirement stems from a policy of preventing 'mere intermeddlers' who do not raise a real controversy from bringing oppositions or cancellation proceedings in the PTO." *Id.*, 50 U.S.P.Q.2d at 1025; *see also Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982) (purpose of standing is to weed out "intermeddlers" from those with "a personal interest in the outcome beyond that of the general public"); *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 217 U.S.P.Q. 641 (Fed. Cir. 1983) (only the basis for a reasonable belief in damage that is examined).

The issue is not whether the opposer owns the mark or is entitled to register it, but merely whether it is likely that he would be somehow damaged if a registration were granted to the applicant. *Wilson v. Delaunay*, 245 F.2d 877, 114 U.S.P.Q. 339 (C.C.P.A. 1957). As the Board's rules make clear: "All that is necessary . . . is that the 'person' bringing the opposition establish conditions and circumstances from which damage to it from the opposed mark can be assumed." TBMP § 309.03(b). A party has standing to oppose an application where it "pleads . . . [the applicant] has asserted a likelihood of confusion in another proceeding between the parties involving the same marks." *Id.*

There is no question that VUTEK has standing to oppose BioWare's application. As the applicant for the BIOWARE mark in Class 2, VUTEK has a real interest in this proceeding, and a reasonable basis for its belief it will be damaged if BioWare's application is granted. As discussed above, this proceeding and the '4133 proceeding on VUTEK's application are both marks containing the core term "BIOWARE." BioWare has opposed VUTEK's application on the ground that there is a likelihood of confusion between BioWare's registrations and VUTEK's application. If BioWare's position is adopted, then VUTEK will be damaged in its application for its own mark. This is precisely the sort of "real interest" in the outcome and damages that the Board's rules recognize. As a matter of law, therefore, VUTEK has standing to challenge BioWare's application. Accordingly, the Board should deny BioWare's motion to dismiss on the ground that VUTEK lacks standing.

IV. AT WORST, VUTEK SHOULD BE GRANTED LEAVE TO AMEND.

Even if the Board were to conclude that BioWare's motion should be granted, VUTEK should be granted leave to amend its Opposition. As in federal courts, the Board's normal course when granting a motion to dismiss is to allow the Opposer "an opportunity to file an amended pleading." See TBMP § 503.03; *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 U.S.P.Q. 1203 (T.T.A.B. 1997) (granting motion with leave to amend of twenty days). Such leave is routinely granted; indeed, the Federal Rules of Civil Procedure require it "be freely given when justice so requires." Fed. R. Civ. P. 15(a); *Allen v. City of Beverly Hills*, 911 F. 2d 367, 372 (9th Cir. 1990). Here, assuming the Board excuses BioWare for failing to properly serve VUTEK with its motion, and then also concludes that VUTEK's pleading is deficient, the Board should allow VUTEK to amend its Opposition.

V. CONCLUSION

BioWare's motion to dismiss is replete with adverbs and adjectives, but it ultimately lacks merits. VUTEk has standing to oppose BioWare's application to register the mark, and has asserted proper grounds for its Opposition. Accordingly, BioWare's motion to dismiss should be denied in its entirety. At worst, VUTEk should be granted leave to amend its Opposition.

Dated: December 7, 2007

Respectfully submitted,

By /s/ Alex K. Grab
ALEX K. GRAB

Attorney for Opposer
VUTEK INC.

CERTIFICATE OF FILING

The undersigned hereby certifies that this pleading, VUTEk Inc's OPPOSITION TO APPLICANT BIOWARE CORP.'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6), was electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, on December 7, 2007.

/s/ Alex K. Grab

ALEX K. GRAB

VUTEK's OPPOSITION
EXHIBIT A

ESTTA Tracking number: **ESTTA111250**

Filing date: **11/22/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	BioWare Corp.		
Entity	Corporation	Citizenship	Canada
Address	4445 Calgary Trail, Suite 200 Edmonton, ALB T6H5R7 CANADA		

Attorney information	Paul N. Tauger Schnader Harrison Segal & Lewis LLP One Montgomery Street, Suite 2200 San Francisco, CA 94104-5501 UNITED STATES ptauger@schnader.com Phone:(415) 364-6700
----------------------	--

Applicant Information

Application No	78841029	Publication date	10/31/2006
Opposition Filing Date	11/22/2006	Opposition Period Ends	11/30/2006
Applicant	VUTEk Inc. One Vutek Place Meredith, NH 03253 UNITED STATES		

Goods/Services Affected by Opposition

Class 002. All goods and services in the class are opposed, namely: Ink jet printer ink
--

Attachments	NtcOpposition.pdf (6 pages)(142875 bytes)
-------------	--

Signature	/Paul N. Tauger/
Name	Paul N. Tauger
Date	11/22/2006

BOX: TTAB FEE

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before the Trademark Trial and Appeal Board**

IN RE: Application No. 78/841,029
Trademark: BIOWARE
Opposer: BioWare Corp.
Applicant: Vutek, Inc.
Published: October 31, 2006
Attorney Docket No: 3006345-0000/10US/OP3

NOTICE OF OPPOSITION

Commissioner for Trademarks
BOX: TTAB FEE
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir or Madam:

BioWare Corp., a corporation of Canada, located and doing business at 4445 Calgary Trail, Suite 200, Edmonton, Alberta T6H5R7 Canada believes it will be damaged by the registration of the BIOWARE mark, Application Serial No. 78/431,095, published October 25, 2005 (hereinafter, "Applicant's Mark") and having sought and obtained an extension of the time to file a Notice of Opposition, hereby opposes the same.

The grounds for the opposition are as follows:

1. BioWare Corp. (hereinafter, "Opposer") is an internationally renowned electronic entertainment company specializing in the creation of computer and console video games.
2. Opposer was founded in 1995. Since that time, it has developed an outstanding international reputation for the high quality and success of its video games.

Its games have sold many millions of copies in the U.S. and in many countries throughout the world. Opposer is universally acknowledged as one of the leading developers of computer and console games. Opposer has received over 100 industry awards for games that it has authored and developed, including Billboard Digital Entertainment's Game Developer of the Year, as well as many other business awards.

3. Opposer's games have been translated into many languages, including French, Italian, German, Spanish, Polish, Chinese, and Japanese.

4. Opposer and LucasArts Entertainment collaborated to produce the first role playing game in the Star Wars® universe, titled *Star Wars: Knights of the Old Republic*. The game has accumulated over 100 awards, including acknowledgments for its excellence in story telling, technology and sound. The game has garnered over 45 Games of the Year Awards as well as three Academy of Interactive Arts and Science Awards and one British Academy of Film and Television Arts Award.

5. Microsoft Corp. has released Opposer's newest game, *Jade Empire*, named "Game of the Year" by numerous publications and reviewers. *Jade Empire* received "Best of Show" awards at the 2004 Electronic Entertainment Expo (E3) from GameSpy, GameSpot, GameInformer, 1UP, Yahoo! Games Domain and other industry leaders. CNN described *Jade Empire* as, "a gripping and intense single-player magnum opus. Its rich story, memorable characters and clever combat system make this title a must-have for your Xbox collection." USA Today said, "Overall "Jade Empire" is a gripping and intense single-player magnum opus. Its rich story, memorable characters and clever combat system make this title a must-have for your Xbox collection." GameSpy published the following: "BioWare combines excellent storytelling, exciting combat, and gorgeous visuals to create the best RPG ever to hit the Xbox."

6. Opposer has partnered with Interplay Entertainment on the *Baldur's Gate* game series, which is now in its second sequel.

7. Opposer is responsible for the popular role-playing game, *NeverWinter Nights*, which is distributed by Atari and has accumulated over 90 industry awards.

8. Opposer and Microsoft Game Studios have announced Opposer's latest game, *Mass Effect*.

9. Opposer licenses its game engine technology which has powered a number of critically acclaimed role-playing games.

10. Opposer is the owner of the following trademark registrations:

Registration No.	Mark	Type	First Use in Commerce	Class	Filing Date
2,615,576	BIOWARE CORP	Words in Stylized Form	8/1/1998	9, 16	10/31/2001
2,730,731	BIOWARE AURORA ENGINE	Typed Drawing	6/2001	9	10/10/2001
2,872,470	BIOWARE ODYSSEY ENGINE	Typed Drawing	7/16/2003	9	3/15/2001
2,733,351	THE BIOWARE INFINITY ENGINE	Typed Drawing	12/1998	9	3/6/2001
2,454,474	BIOWARE	Typed Drawing	2/1/1995	9	2/24/1999
2,460,807	BIOWARE CORP	Typed Drawing	8/1/1998	9, 16	2/24/1999
3,172,886	BIOWARE	Standard Character Mark	1A	9, 16, 25, 41, 42	4/21/2005

11. Opposer has pending the following trademark registrations:

Application No.	Mark	Type	Basis	Class	Filing Date
76/653517	BIOWARE/PANDEMIC STUDIOS	Standard Character Mark	1B	41	1/17/2006
76/636724	BIOWARE ECLIPSE ENGINE	Standard Character Mark	1B	42	4/21/2005
76/636906	BIOWARE CORP	Words, Letter and/or Number in Stylized Form	1A	9, 16, 25, 41, 42	4/21/2005
76/594456	BIOWARE ECLIPSE ENGINE	Standard Character Mark	1B	9	5/28/2004

12. Opposer's trademark is inherently distinctive in the context of the goods and services to which it is applied and has been used in commerce.

13. Opposer's long-term and extensive use, sales, distribution, advertising and promotion of its trademark throughout the United States, Canada and Europe renders it a famous mark within the meaning of 15 U.S.C. § 1125(c) (Section 43 (c) of the Lanham Act).

14. On information and belief, Applicant's contemplated use of the identical mark will result in dilution of the distinctive quality of Opposer's famous mark.

15. Notwithstanding the international and U.S. classes claimed by Applicant's pending application, Opposer is informed and believes that Applicant's goods and services are sufficiently related to Opposer's goods and services so as to result in a likelihood of confusion of the consumer demographic for Opposer and Applicant as to source, sponsorship, affiliation or endorsement of Applicant's and/or Opposer's goods.

16. Applicant's use and registration of Applicant's mark for the goods and services of the application herein opposed will lead to confusion, to mistake, or to deception of the public within the meaning of 15 U.S.C. § 1052(d) (Section 2(d) of the Trademark Act of 1946).

17. If Applicant is permitted to register its mark, the registration would give Applicant a *prima facie* exclusive right to the use of BIOWARE for the goods and services of the application. Such registration may preclude Opposer from marketing BIOWARE-identified goods that are based on and related to its computer and console video games and ancillary and other goods and services.

18. By reason of the foregoing, Applicant's registration of BIOWARE for the goods and services of the application herein opposed would cause injury and damage to Opposer and its BIOWARE marks.

WHEREFORE, Opposer prays that its opposition be sustained and that Application Serial No. 78/841,029 be refused.

A duplicate copy of this Notice of Opposition is enclosed.

Please address all correspondence to Paul N. Tauger, Esq. at the address below.

Respectfully submitted,

SCHNADER HARRISON SEGAL & LEWIS LLP

Dated: November 22, 2006

By:  PAUL N. TAUGER

Address: One Montgomery Street, Suite 2200
San Francisco, CA 94104-5501
Phone: (415) 364-6700
Fax: (415) 364-6785
ptauger@schnader.com (e-mail authorized)

ATTORNEYS FOR OPPOSER

Certification Under 37 CFR 1.8

I hereby certify that this paper or fee is being deposited with the United States Postal Service with sufficient postage as first-class mail under 37 CFR 1.8 on the date indicated above and is addressed to:

Commissioner for Trademarks
Box TTAB FEE
P.O. Box 1451
Alexandria, VA 22313-1451

With a copy also sent by Federal Express service to:

Vutek, Inc.
One Vutek Place
Meredith, NH 03253

With a copy also sent by first-class mail to:

Susan L. Heller
Greenberg Traurig, LLP
2450 Colorado Avenue, Suite 400E
Santa Monica, CA 90404

Dated: November 22, 2006


Steven G. Davenport