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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMIGA, INC., a Delaware corporation,  
  
Plaintiff,  
  
and  
  
HYPERION VOF, a Belgium corporation,  
  
Defendant.

CAUSE NO. CV07-0631RSM

AMIGA'S REPLY MEMORANDUM OF  
LAW SUPPORTING 12(c) MOTION

**PRELIMINARY STATEMENT**

1 Plaintiff Amiga, Inc., a Delaware corporation (“Amiga Delaware”), replies in support of  
 2 its Rule 12(c) motion. Hoping to distract the Court from fatal flaws in its amended counter-  
 3 claims, Defendant Hyperion’s opposition misrepresents fact and law in an effort to create false  
 4 issues. Hyperion also proffers declarations making irrelevant, demonstrably false assertions and  
 5 attaching irrelevant exhibits, all of which are extrinsic to the pleadings and should be stricken.  
 6

7 **I. HYPERION’S 15 U.S.C. §1114(1) INFRINGEMENT CLAIM FAILS**  
 8 **BECAUSE HYPERION IS NOT A “REGISTRANT” OF ANY AMIGA MARK**

9 **A. Amiga Delaware Is The Sole Registrant Of All**  
 10 **AMIGA Formative Or Related Trademark Registrations**

11 Hyperion is not a “registrant” of any federally registered AMIGA formative or related  
 12 mark and so it lacks standing under 15 U.S.C. § 1114(1). Hyperion has submitted no evidence to  
 13 the contrary, because there is no evidence to submit. Attempting to obscure this simple truth,  
 14 Hyperion again proffers (Dkt. 95, p. 2:16-20) a Declaration of William A. Kinsel dated July  
 15 20, 2007 (Dkt 55), previously filed in opposition to Amiga Delaware’s Rule 12(c) motion to  
 16 dismiss Hyperion’s initial Counterclaims. By citing that declaration, which Amiga Delaware  
 17 previously refuted (*see* Dkt. 60, 61), Hyperion attempts to perpetuate the irrelevant and  
 18 demonstrably false assertion that *Amiga Delaware* is not a registrant of any registered AMIGA  
 19 mark. Amiga Delaware, as a matter of public record, is the registrant of all relevant registered  
 20 AMIGA formative and related trademarks. (Dkt. 61 ¶¶ 4-5; Ex. A)<sup>1</sup> However, on this motion,  
 21 *Amiga Delaware’s* registrant status is irrelevant to the undeniable fact that *Hyperion* is not a  
 22 “registrant” of any registered mark purportedly being infringed – an essential element of  
 23 Hyperion’s §1114(1) claim. All assertions that Amiga Delaware is not a registrant of such marks  
 24 should be stricken (*see* Point V below) and the 15 U.S.C. § 1114(1) counterclaim dismissed.  
 25

26 <sup>1</sup> In connection with its prior 12(c) motion against Hyperion’s initial Counterclaims, Amiga, Inc. submitted  
 27 two reply declarations of Tim Paterson, one addressing trademark *registrations* (Dkt 61), and the other trademark  
*applications* (Dkt. 60), as well as a reply Declaration of Lawrence R. Cock Authenticating Documents (Dkt 62).  
 Those three declarations are relied on for this reply and incorporated herein by reference, but not re-filed.

1           **B. The PTO Has Approved Amiga Delaware’s Recent Trademark Applications,  
2           And Hyperion’s Mere Notice of Opposition Is Irrelevant To This Motion**

3           Citing a Second Declaration of William A. Kinsel (Dkt. 100) in opposition to the instant  
4 motion, Hyperion makes the further irrelevant and misleading statement that Amiga Delaware  
5 “is still struggling to obtain registrations” for certain additional, recently-filed trademark  
6 applications. (Dkt. 99, p. 9:3-4) The only obstacle is a Consolidated Notice of Opposition, filed  
7 by Hyperion at the Trademark Trial and Appeal Board (“TTAB”) on *December 7, 2007*. (See  
8 Dkt. 100, Ex. 2, p.8) However, the ability to file a notice of opposition at the TTAB is not  
9 dependent on the opposer having any ownership rights in, or entitlement to register the mark.  
10 J. McCarthy, 3 *McCarthy on Trademarks & Unfair Competition*, § 20:07 at 20-17 (2007)<sup>2</sup>  
11 Again, the status of recent Intent-to-Use applications filed by Amiga Delaware is entirely  
12 irrelevant to the fact that *Hyperion* is not a “registrant” of any federally-registered AMIGA  
13 trademark purportedly being infringed by Amiga Delaware. Accordingly, these assertions in  
14 Hyperion’s opposition papers should be stricken. (See Point V below)

15           **C. As a Matter of Law, Hyperion is Neither “Successor” Nor “Assign” With  
16           Respect to Any Registered AMIGA Trademark, by Virtue of Any Limited  
17           License Purportedly Granted Under the Agreement or Otherwise**

18           Hyperion’s sole basis for claiming that it should be treated as a “registrant” within the  
19 meaning of 15 U.S.C. §1114(1) is its conclusory assertion that it “meets the *common sense*  
20 definition of the term ‘successor’ or ‘assign’” (Dkt. 99, p. 11:14-16; emphasis added) (1) by  
21 virtue of the license it claims to have acquired through Sections 2.07 and 2.08 of the Agreement  
22 and (2) based on Hyperion’s erroneous contention that as of September 30, 2004, Amiga  
23 Washington’s “corporate status expired” when it was administratively dissolved by the Secretary  
24 of State, and that by virtue of Amiga Washington’s supposed non-existence Hyperion somehow

25 <sup>2</sup> By citing the July 20, 2007 Kinsel Declaration (Dkt. 55), Hyperion also attempts to perpetuate the further  
26 irrelevant and misleading statement, that the PTO issued “final” refusals to register Amiga Delaware’s additional,  
27 recent applications. (See Dkt. 55, ¶¶ 1-6) As demonstrated in connection with the prior 12(c) motion, that statement  
mischaracterized the nature and consequences of the PTO action as well as the then-current status of those  
applications, all of which had by then been *approved* by the PTO. The applications were published in the PTO’s  
Official Gazette and only thereafter were opposed by Hyperion. (See Dkt. 60, ¶¶ 4-5, Ex. A, Dkt 100, Kinsel Decl.)

1 became Amiga Washington's "successor" or "assign" to "the Amiga trademarks" (which are  
2 actually owned and registered by Amiga Delaware). (See Dkt. 99, p 3:18 through p. 4:11;  
3 p. 11:9-18) Hyperion is wrong as a matter of fact and law.

4 1. Amiga Washington Has Never Ceased to Exist

5 As a threshold matter, Hyperion's assertions regarding the effect of Amiga Washington's  
6 administrative dissolution by the Secretary of State are entirely inaccurate. "A corporation  
7 administratively dissolved continues its corporate existence," RCW 23B.14.210 (3), and has five  
8 years to remedy whatever deficiency led to its dissolution and be reinstated. RCW 23B.14.220.  
9 During the period of its dissolution, a corporation may operate to the extent necessary to wind up  
10 and liquidate its business and affairs. *Equipito Div. Aurora Equip. Co. v. Yarmouth*, 134  
11 Wash.2d 356, 370, 950 P.2d 451, 458 (1998). Reinstatement, when obtained, relates back to the  
12 date of dissolution, and the corporation may resume its business as if the administrative  
13 dissolution had never occurred. RCW 23B.14.200 (3). Therefore, Amiga Washington continued  
14 to exist. Moreover, even if it had never been reinstated, any sale or assignment of its trademarks  
15 and intellectual property after it was administratively dissolved (e.g., Amiga Washington's sale  
16 and assignment of assets to KMOS, aka Amiga Delaware) would constitute a permissible and  
17 valid step toward winding-up and liquidating its business and affairs.

18 2. Any Licenses Under the Agreement Are Extremely Narrow  
19 in Scope, Compared With Amiga Delaware's Registrations

20 Simply put, a license is *not* an assignment. Any trademark license purportedly granted  
21 pursuant to Sections 2.07 or 2.08 of the Agreement was to Amiga One Partners, not Hyperion,  
22 and certainly was not an assignment of all rights in a registered AMIGA trademark for all  
23 purposes, as Hyperion claims. Hyperion disingenuously asserts that rights it allegedly received  
24 under these sections, allowing it to develop a new version of the operating system based on prior  
25 versions, also gave it unlimited rights to use all AMIGA formative and related trademarks for all  
26 purposes and glibly concludes that "there appears to be nothing left for anyone else to possess."  
27 (Dkt. 99, p. 11:11-12) However, Hyperion is blurring the distinction between copyright and

1 trademark rights purportedly licensed to Amiga One Partners under these sections, in an attempt  
 2 to beef up a narrow putative trademark license and make the further leap that the license was an  
 3 assignment. “Copyright protection subsists . . . in original works of authorship fixed in any  
 4 tangible medium of expression,” 17 U.S.C. § 102(a), while “[t]he term ‘trademark’ includes any  
 5 word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify  
 6 and distinguish his or her goods, including a unique product, from those manufactured or sold by  
 7 others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127.

8 Any license allegedly granted to the Amiga One Partners under Section 2.07 ( “an  
 9 exclusive, perpetual, world-wide and royalty free right and license to develop (at their sole  
 10 expense), use, modify and market the Software and OS 4 under the ‘Amiga OS’ trademark”) or  
 11 under Section 2.08 ( “an exclusive, perpetual, worldwide right and license to develop, use,  
 12 modify and market the Software and OS 4 under the ‘Amiga OS’ trademark and at their sole  
 13 expense”) would comprise separate copyright and trademark rights: (1) a *copyright* license to  
 14 develop certain updated versions of Amiga Operating System software based on the Source Code  
 15 of certain pre-existing versions of the Amiga Operating System (constituting derivative works of  
 16 copyright, *see* 17 U.S.C. § 101) and (2) a limited *trademark* license to market only those updated  
 17 versions – *i.e.*, only those derivative works – only under the “Amiga OS” trademark.

18 This alleged limited trademark license for use of the “Amiga OS” mark is a far cry from  
 19 what Hyperion claims was a complete assignment of all AMIGA formative or related trademarks  
 20 covering a wide range of goods far beyond new versions of an old operating system. In contrast,  
 21 Amiga Delaware’s trademark registrations encompass a broad range of goods. For example:

- 22 • Registration No. 1,401,045 for the trademark AMIGA, issued July 15, 1986,  
 23 covers computers, computer disk drives, RAM expansion cartridges, computer  
 monitors and computer modems. (Dkt. 1, Complaint Ex. C)
- 24 • Registration No. 2,369,059 for the POWERED BY AMIGA & Boing Ball Design  
 25 mark, issued July 18, 2000, covers computers, computer peripherals and computer  
 operating systems. (*Id.* at Ex. D)
- 26 • Registration No. 2,802,748 for the AMIGA trademark, issued July 18, 2000,  
 27 covers computer software used to facilitate development of software applications  
 that can run on multiple platforms and other electronic devices; operating system

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1 software for personal computers and other electronic devices. (*Id.* at Ex. E)

2 Further, any license under Sections 2.07 or 2.08 of the Agreement to use the “Amiga OS”  
 3 trademark is expressly limited to the Amiga One Partners’ use of that particular mark in  
 4 connection with updated versions of the old operating system software. It would *not*, for  
 5 example, extend to use of the “Amiga OS” trademark to market an entirely new operating system  
 6 that is not derived from Source Code of pre-existing versions, let alone to separate software  
 7 applications (*e.g.*, word processing and spreadsheet programs and games), or for computer  
 8 hardware or peripherals. Any such license also would not extend to use of the “Boing Ball”  
 9 mark or any AMIGA or AMIGA-formative marks, aside from just the mark “Amiga OS.” All  
 10 other rights regarding all other products and all other trademarks and all trademark registrations  
 11 were retained by Amiga Washington in the Agreement – assuming the Section 2.07 or 2.08  
 12 licenses were ever triggered. Amiga Delaware now owns all those other rights, trademarks and  
 13 trademark registrations. (*See* Dkt. 61, Paterson *Registration* Decl. ¶¶ 4-5 and Ex. A)

14 As a matter of law, Hyperion is neither a “registrant” nor a successor or assign of a  
 15 “registrant” with respect to any AMIGA formative or related trademark registrations and so lacks  
 16 standing under § 1114(1). *See Nat’l Licensing Ass’n, LLC v. Inland Joseph Fruit Co.*, 361 F.  
 17 Supp. 2d 1244, 1254 (E.D. Wash. 2004). The § 1114(1) counterclaim should be dismissed.

18 **II. HYPERION’S 15 U.S.C. § 1125(C) DILUTION CLAIM FAILS BECAUSE, AS A**  
 19 **MATTER OF LAW, IT IS NOT “OWNER” OF ANY FAMOUS AMIGA MARK**

20 Erroneously asserting that it is the owner of the “AmigaOS” trademark, (*see* (Dkt. 99,  
 21 p. 4:19 through p. 5:6; p. 12:8 to p. 13:15), Hyperion again confuses the distinction between  
 22 copyright and trademark. Hyperion claims that Amiga Washington (or its successors-in-interest)  
 23 failed to make payment pursuant to Section 3.01 of the Agreement, with the result that Hyperion  
 24 purportedly retained ownership of the Object Code, Source Code and intellectual property of OS  
 25 4.0, which is just an updated version of prior operating systems (*i.e.*, a derivative copyright work,  
 26 17 U.S.C. § 101) owned and previously sold by Amiga Washington and its predecessors under  
 27 the AMIGA brand. Hyperion then makes the conclusory leap that ownership of the OS 4.0

1 derivative copyright includes "necessarily the right to call it by name, specifically AmigaOS  
2 4.0." (Dkt. 99, p.13:11-13; *see also* p. 5:7-8) That is simply wrong as a matter of law.

3 Contrary to Hyperion's assertion, alleged ownership of the copyright in the derivative  
4 work, including Object Code and Source Code, would not carry with it ownership of the AMIGA  
5 trademark that was used to sell prior versions of the operating system. The 4.0 version is merely  
6 a version of an "operating system" – a derivative copyright work. Its "name," if any, is "OS 4.0,"  
7 not "*Amiga*OS 4.0." Neither "AmigaOS," nor "AmigaOS 4.0," is a generic designation for this  
8 or any other operating system. "AMIGA" and "AmigaOS" are trademarks used to identify a  
9 single source of goods -- i.e., the trademark owner. *See* 15 U.S.C. § 1127 (purpose of a  
10 trademark is to "identify and distinguish" one's products "from those manufactured or sold by  
11 others and to indicate the source of the goods"). Whatever Hyperion might have acquired  
12 pursuant to Section 3.01 of the Agreement, it was not ownership of a trademark.

13 Since Hyperion is not the "owner" of any famous AMIGA trademark allegedly being  
14 diluted by Amiga Delaware, its Cause No. 6 should be dismissed with prejudice. *See Thane Int'l*  
15 *v. Trek Bicycle Corp.*, 305 F.3d 894, 907 (9th Cir. 2002); *see also Nissan Motor Co. v. Nissan*  
16 *Computer Corp.*, 378 F.3d 1002, 1012 (9th Cir. 2004).

17 **III. HYPERION NEVER PLED AND CANNOT AS A MATTER OF**  
18 **LAW STATE ANY CLAIM FOR COMMON LAW TRADEMARK**  
19 **INFRINGEMENT OR DILUTION OR FALSE DESIGNATION OF ORIGIN**

20 **A. Hyperion's Counterclaims Do Not Allege Common Law Causes of Action**

21 Faced with dismissal of its Federal claims, Hyperion scrambles to assert that its Amended  
22 Counterclaims are intended to include common law causes of action for trademark infringement  
23 and dilution and false designation of origin. (Dkt. 99, p. 13:16-26) However, Hyperion's  
24 allegations in Cause Nos. 6 and Cause No. 7 claim only Lanham Act violations. It is not just the  
25 counterclaims' titles that reference the Lanham Act. Paragraph 76 in Cause No. 6 expressly  
26 states: "By reason of the foregoing, Amiga Delaware has violated § 32(1) and § 43(a) of the  
27 Lanham Act, 15 U.S.C. § 1114(1) and 1125(c)." *Accord* ¶ 81 in Cause No. 7. Nowhere in either

1 counterclaim does Hyperion allege anything about trademark rights, infringement, dilution or  
2 false designation of origin under common law. Such claims must be pled separately and  
3 specifically if at all.

4 **B. Trademark Dilution Under Washington Law Is Exclusively Statutory**

5 Hyperion adamantly asserts that its trademark dilution claim encompasses a claim of  
6 dilution under Washington *common law*. (See Dkt. 99, p. 13:16-26) However, trademark  
7 dilution under Washington law is *exclusively statutory*. RCW § 19.77.160. No common law  
8 cause of action exists. Any purportedly pled by Hyperion should be dismissed as a matter of  
9 law.

10 1. Attempting to Assert a Statutory Dilution Claim Under Washington Law  
11 Would Not Avail Hyperion Which is Not “Owner” of Any AMIGA Mark

12 Even if Hyperion could invoke Washington’s dilution statute, as explained in Amiga  
13 Delaware’s moving papers, Hyperion is not the “owner” of any AMIGA trademark purportedly  
14 being diluted by Amiga Delaware, and Washington’s dilution statute makes relief available only  
15 to “[t]he owner of a mark that is famous in this state . . . .” RCW § 19.77.160(1).

16 2. Any Claim Under Washington’s Dilution Statute Is Preempted By  
17 15 U.S.C. § 1125(c)(6) Due to Amiga Delaware’s Federal Registrations

18 Moreover, any dilution claim under the Washington statute would, by virtue of Amiga  
19 Delaware’s federal trademark registrations, be preempted by 15 U.S.C. § 1125(c)(6), which  
20 provides that “ownership by a person of a valid [federal trademark] registration . . . shall be a  
21 complete bar to an action against that person with respect to that mark [for trademark dilution]  
22 brought by another person under the common law or a statute of a State . . . .”

23 In sum, Hyperion has no basis whatsoever for any kind of trademark dilution claim  
24 against Amiga Delaware under any federal or Washington statutory or common law.

25 **C. Washington Has Never Recognized a Common Law Claim for False**  
26 **Designation of Origin Apart From a Claim Under 15 U.S.C. § 1125(a)**

27 Research has revealed no case in Washington ever recognizing a false designation of  
origin claim under state common law, apart from a claim under Section 43(a) of the Lanham Act.  
15 U.S.C. § 1125(a). Accordingly, there is no basis for allowing such a claim by Hyperion.

1           **D. Hyperion's Opposition Papers Demonstrate Its Lack of Priority**  
 2           **Of Trademark "Use in Commerce" as a Matter of Law, Thereby**  
 3           **Barring Any Kind of Common Law Trademark Claim**

4           Hyperion's opposing papers demonstrate that Hyperion has never engaged in any trade-  
 5           mark use that could establish any trademark rights inuring to its own benefit and thus cannot, as  
 6           a matter of law, establish common law trademark rights superior to Amiga Delaware's.

7           Hyperion purports to claim priority over Amiga Delaware by virtue of having "used"  
 8           various AMIGA formative and related marks ever since entering into the Agreement in  
 9           November 2001, which granted limited trademark use rights to Amiga One Partners. (*See* Dkt.  
 10           99, p. 3:12-21) All use of a trademark by a licensee necessarily inures to the benefit of the  
 11           licensor, not the licensee. *See Twentieth Cent. Fox Film Corp. v. Marvel Enter.*, 155 F. Supp. 2d  
 12           1, 20-21 (S.D.N.Y. 2001); *Printers Serv. Co. v. Bondurant*, 1991 U.S. Dist. LEXIS 20561, \*13  
 13           (C.D. Cal. 1991); *see also* 15 U.S.C. § 1055. Thus, to the extent Hyperion engaged in any "use"  
 14           of the trademarks in commerce, such use either was pursuant to the license, thereby inuring to  
 15           the benefit of the licensor, or (if outside the scope of the license) constituted infringement.

16           Indeed, the very examples of "use" cited in the Carton Declaration demonstrate  
 17           Hyperion's lack of independent trademark rights. For example, various Hyperion web pages  
 18           cited by Carton bear a legend and notice stating: "***AMIGA and its logos are registered***  
 19           ***trademarks of Amiga, Inc.***" (Dkt. 54 Ex. B, pp. 17, 18; emphasis added) Similarly, Carton cites  
 20           Hyperion's placement of Amiga trademarks on the CD jacket and CD containing Developer Pre-  
 21           release versions of OS 4.0, but those bear the legend and notice: "***developed under license from***  
 22           ***KMOS, Inc. All rights reserved. Amiga ® is a registered trademark of Amiga, Inc.***" (Dkt. 54  
 23           Ex. C, pp. 20, 21; emphasis added) Far from establishing Hyperion's trademark rights in  
 24           AMIGA marks, such notices constitute admissions that Hyperion lacked such trademark rights  
 25           and was not using the AMIGA marks to exercise or establish trademark rights for itself. *See*  
 26           *Sengoku Works v. RMC Int'l*, 96 F.3d 1217, 1221 (9th Cir. 1996) (holding that trademark  
 27           ownership, or the lack thereof, can be established by "admissions by the parties as to which one  
 owns the trademark.") Much the same is true of the Amiga History Guide web site

1 (<http://www.amigahistory.co.uk>) cited by Carton as a supposed example of “public awareness of  
2 the relationship between Hyperion and Amiga OS 4.0.” (Dkt. 54 ¶ 7) That site, like Hyperion’s  
3 own web pages, contains a legend stating unequivocally “*Amiga is a registered Trademark of*  
4 *Amiga Inc.*” demonstrating third party awareness that the AMIGA belongs to Amiga Delaware,  
5 *not* Hyperion. (Dkt. 62 Lawrence Cock Decl. Ex. 1; emphasis added) In any event, a link on a  
6 “.uk” web site in the United Kingdom does not constitute evidence of any kind of general,  
7 “public awareness” of anything – even in the United Kingdom, let alone in the United States.  
8 *See Grupo Gigante SA DE CV v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004) (“[A] well-  
9 established principle of trademark law, the territoriality principle, ... says that priority of  
10 trademark rights in the United States depends solely upon priority of use in the United States, not  
11 on priority of use anywhere in the world.”).

12 Although Hyperion further asserts that it has used AmigaOS, AmigaOne and Boing Ball  
13 trademarks outside the scope, and independent, of the license granted in the Agreement (*see* Dkt.  
14 99, p. 8:7-10; Dkt. 54 ¶¶2-10, Exs. A-C), the purported “use” described by Hyperion, as a matter  
15 of law, does not and cannot constitute “use in commerce.” For example, Evert Carton,  
16 Managing Partner of Hyperion, alleges that the name “AmigaOS 4.0” was mentioned “in  
17 interviews and appearances at enthusiasts shows to create public awareness and explain the  
18 project to the public,” and alleges that Hyperion used the trademarks in press releases and over  
19 the internet, including in “announcements about the development of OS 4.0” on its website and  
20 to “develop consumer awareness” about the operating system. (Dkt. 54 ¶¶ 2-4, 6 and Exs. A, B)  
21 Such conduct barely rises to the level of mere advertising, which does not constitute “use in  
22 commerce.” *See Brookfield*, 174 F.3d at 1052-53 (defendant's "purported use" of a mark by  
23 "limited email correspondence with lawyers and a few customers" and "register[ing] its domain  
24 name" insufficient; these activities show a mere intent or preparation to use a mark in commerce,  
25 not "use in commerce"); *Sleep Country USA, Inc. v. Northwest Pacific, Inc.*, 2003 U.S. Dist.  
26 LEXIS 26055 (W.D.Wa. 2003) (holding "pre-sale activities," consisting of a listing in the phone  
27

1 directory and distributing flyers, did not constitute "use in commerce" to establish trademark  
 2 ownership.); *Future Domain Corp. v. Trantor Sys. Ltd.*, 1993 U.S. Dist. LEXIS 9177 (N.D.Cal.  
 3 1993); *see also Sweetwater Brewing Co., LLC v. Great Am. Rests., Inc.*, 266 F. Supp. 2d 457,  
 4 464 (E.D.Va. 2003) ("use of a mark on press releases, brochures, sales presentations, newspaper  
 5 articles, and the like, [is] not relevant trademark use ... Defendants' attempts to establish 'use' of  
 6 the mark through promotional activities are without merit.").

7 As a matter of law, Hyperion has failed to identify any "use in commerce" that could  
 8 create *any* common law trademark rights for itself, let alone rights senior to Amiga Delaware's  
 9 federal registrations. Accordingly, Hyperion has no basis for asserting any supposed common  
 10 law infringement, dilution or false designation of origin claims.

11 **IV. HYPERION HAS ADMITTED THAT THE AMIGA ONE PARTNERS**  
 12 **PARTNERSHIP IS THE SOLE LICENSEE UNDER SECTION 2.07**

13 A partnership is created whenever two or more persons agree to carry on a business and  
 14 share profits and ownership control and may be formed regardless of whether the persons  
 15 entering into the agreement intend to form the partnership entity. RCW 25.05.055(1). "Property  
 16 acquired by a partnership is property of the partnership and not of the partners individually."  
 17 *Curley Electric, Inc. v. Bills*, 130 Wn.App. 114, 122, 121 P.3d 106, (2005); RCW 25.05.060.  
 18 Hyperion has admitted in its Amended Counterclaims what appears from the Agreement's face:  
 19 Amiga One Partners is the sole licensee under provisions at issue in the Amended  
 20 Counterclaims, including Section 2.07. (*E.g.*, Dkt. 66, ¶ 40(a)) Hyperion itself has asserted that  
 21 Eyetech Group Limited ("Eyetech"), the other partner therein, is a necessary party to claims  
 22 arising from the Agreement, which certainly include Hyperion's Amended Counterclaims. (Dkt.  
 23 24. Hyperion Prelim. Inj. Opp. Brief, p. 2:13-16, p. 14:17-25) Thus, Hyperion is estopped to  
 24 deny the partnership. Moreover, when the Agreement's drafters intended to give rights or  
 25 obligations to Hyperion (or Eyetech) individually, they knew how to do so. (*See e.g.*, Dkt. 1  
 26 Ex. A, Agreement §§ 2.02, 2.03 (A), (B), (C) and 4.02) If Hyperion's Cause No. 6 or No. 7  
 27 somehow survive this motion, Hyperion should be required to join Eyetech and Amiga One

1 Partners. In their absence, this Court should dismiss Hyperion’s Amended Counterclaims for  
2 trademark infringement and dilution and for false designation of origin, which are based on  
3 rights allegedly acquired through licenses made expressly to “Amiga One Partners,” not to  
4 Hyperion individually and apart from the partnership, whether *de jure* or *de facto*.

5 **V. MOTION TO STRIKE: HYPERION’S DECLARATIONS INJECT**  
6 **MATTERS OUTSIDE THE PLEADINGS AND SHOULD BE IGNORED**

7 A Court reviews a motion for judgment on the pleadings as it would a 12(b)(6) motion to  
8 dismiss. *Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir.1999). The non-moving party’s well-  
9 pled material allegations are taken as true. *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 544  
10 (6th Cir.1991), and the court should strike the non-movant’s extrinsic material. *See e.g. Proctor*  
11 *v. DialAmerica Mktg.*, 2007 WL 1394153 (N.D.Ohio); *John S. Clark Co. v. United Nat’l. Ins.*  
12 *Co.*, 304 F.Supp.2d 758, 764 n.4 (M.D.N.C.2004) (striking the factual matters presented by non-  
13 movant where movant under Rule 12(c) limited itself to the pleadings and pleading exhibits).

14 Amiga’s Rule 12(c) motion is based on Hyperion’s failure to plead elements essential to  
15 two counterclaims and is limited to the pleadings. The Court need only consider the counter-  
16 claims, not extrinsic “evidence” and legal conclusions in the Kinsel and Carton declarations.  
17 These declarations and exhibits should be stricken.

18 DATED February 22, 2008.

19 /s/ Lawrence R. Cock  
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27

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

William A. Kinsel  
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