ESTTA Tracking number: **ESTTA716942**

Filing date: **12/28/2015**

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

Proceeding	92057631
Party	Defendant Chong Teck Choy
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Attachments	Brief of the Registrant.pdf(274362 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board

Reg. No. 4,098,948
For the mark XIUNIX
Registered on November 29, 2011

X/Open Company Limited	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92057631
	:	
Chong Teck Choy,	:	
	:	
Registrant.	:	

BRIEF OF THE REGISTRANT

THE TRADEMARK COMPANY, PLLC

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I. PRELIMINARY STATEMENT

Registrant owns Reg. No. 4,098,948 for the service mark XIUNIX used on or in connection with a host of computer-related services. Registrant registered the service mark in 2012. In August 2014, Petitioner, relying upon trademarks that its own witness concedes are no longer in use as trademarks, petitioned to cancel the instant registration on the grounds of a likelihood of confusion with those registered trademarks as well as on the grounds of non-use in the United States and fraud.

Based upon the following it is respectfully submitted that the Petitioner has failed in its burden to establish any of its claims and, accordingly, the instant petition should be denied.

II. DESCRIPTION OF THE RECORD

The record consists of the following:

1. Deposition of Steve Nunn dated September 5, 2014;
2. Petitioner's Notice of Reliance dated August 28, 2014; and
3. Registrant's Notice of Reliance dated August 12, 2015.

III. STATEMENT OF FACTS

a. *Registrant Chong Teck Choy*

Registrant's business, XIUNIX, provides computer services, such as, but not limited to the following:

> [W]ebsite design, website hosting, graphic design, software design, computer consultancy, customization of computer hardware and software, data conversion of electronic information, data migration services, and cloud storage.

See Petitioner's Notice of Reliance dated August 28, 2014, *Exhibit 6: Registrant's Responses to Petitioner's First Set of Interrogatories to Registrant* at p. 1 (hereinafter "PNOR, Reg. Resp. to Interrogatories"). More generally, Registrant adopted and began using the mark XIUNIX in commerce on July 4, 2011 for the services covered in Reg. No. 4,098,948, namely:

Cloud seeding; Computer consultation; Computer graphics services; Computer hardware and software design; Computer network design for others; Computer programming; Computer programming and software design; Computer security consultancy; Computer services, namely, cloud hosting provider services; Computer services, namely, creating computer network-based indexes of information, websites and resources; Computer services, namely, data recovery services; Computer services, namely, designing and implementing web sites for others; Computer services, namely, integration of private and public cloud computing environments; Computer services, namely, providing search engines for obtaining data on a global computer network; Computer site design; Computer software design; Consulting services in the field of cloud computing; Consulting services in the field of computer-based information systems for businesses; Consulting services in the field of hosting computer software applications; Consulting services in the field of industrial engineering; Conversion of data or documents from physical to electronic media; Creating and maintaining internet sites for others; Creating of computer programs; Customization of computer hardware and software; Data conversion of electronic information; Data migration services; Design of computer database; Design of home pages, computer software and web sites; Design of homepages and websites; Design services for packaging; Designing and developing webpages on the internet; Digital transfer services for transferring home videos and film to DVD and the internet; Displaying the web sites and images of others on a computer server; Document data transfer from one computer format to another; Electronic document and e-mail time-stamping services; Fashion design consulting services; File sharing services, namely, providing a website featuring technology enabling users to upload and download electronic files; Graphic design services; Hosting the software, websites and other computer applications of others on a virtual private server; Hosting the web sites of others on a computer server for a global computer network; Hosting websites on the Internet; Industrial design services; Installation and maintenance of computer software; IT consulting services; Mapping; On-line security services, namely, providing security and anonymity for electronically transmitted credit card transactions; Providing a web site featuring technology that enables internet users to share documents, images and videos; Providing a web site that gives computer users the ability to upload, exchange and share photos, videos and video logs; Providing a website allowing users to download music and music videos; Providing a website featuring a media aggregator and search engine for internet content; Providing customized on-line web pages featuring user-defined information, which includes search engines and on-line web links to other web sites; Providing virtual computer systems and virtual computer environments through cloud computing; Provision of Internet search engines; Public document retrieval; Recovery of computer data; Remote computer backup services; Remote online backup of computer data; Research, development, design and upgrading of computer software; Searching and retrieving information, sites, and other resources available on computer networks for others; Technical consulting services in the fields of datacenter architecture, public and private cloud computing solutions, and evaluation and implementation of internet technology

> and services; Technical support services, namely, remote and on-site infrastructure management services for monitoring, administration and management of public and private cloud computing IT and application systems; Web site hosting services; Website design and development for others.

PNOR, Reg. Resp. to Interrogatories at p. 3; *See Petitioner's Notice of Reliance* dated August 28, 2014, *Exhibit 7: Registrant's Supplemental Responses to Petitioner's First Set of Interrogatories to Registrant* at p. 3 (hereinafter "PNOR, Reg. Supp. Resp. to Interrogatories"); *See also* U.S. Reg. No. 4,098,948; PNOR, Reg. Supp. Resp. to Interrogatories at p. 1.

Registrant provided that he *does* retain customers for the services provided under his XIUNIX service mark in the United States. PNOR, Reg. Supp. Resp. to Interrogatories at p. 2. (*emphasis added*). Specifically, Registrant has customers and/or clients in Brunei, Malaysia and the United States. *Id.* at p. 4. Registrant registered the domain name XIUNIX.COM on or about August 25, 2004. This website offers Registrant's services to consumers. *Id*.

Registrant chose the mark because it is a palindrome[1] in the English language. PNOR, Reg. Resp. to Interrogatories at p. 6. Moreover, the English translation of the Chinese term "Xiu" means "elegant". *Id.*

Registrant is the also owner of Malaysia Trademark Application Number: 2011019909 for the mark XIUNIX. PNOR, Reg. Resp. to Interrogatories at p. 5.

b. *Petitioner X/Open Company Limited*

Petitioner called only one witness in this case, Mr. Steven Nunn. *See generally* Deposition of Steven Nunn dated September 5, 2014 (hereinafter "Nunn Depo."). Mr. Nunn provided that he is the Chief Operating Officer for the Petitioner and has held that title for over 20 years. *Id.* at p. 7.

[1] A palindrome is a word, phrase, number, or other sequence of characters which reads the same backward or forward.

Mr. Nunn testified that the Petitioner's primary function is to run certification programs in connection with industry-created standards. Nunn Depo. at pp. 11-12. Mr. Nunn conceded that the *only* services offered by the Petitioner is their software certification services as well as some lesser licensing of test suite software. *Id*. at p. 12.

In regard to the use of the UNIX trademark, Mr. Nunn testified that the "… UNIX mark is licensed in connection with product that conforms to one of standards called the Single UNIX Specification." Nunn Depo. at p. 14. He continued providing "UNIX is a standard … that can only be used by those organizations who have established that their products meet the standard." *Id.* at p. 16; *See also id.* at p. 21.

Historically, the UNIX trademark had been used since the early 1970s in connection with software code. Nunn Depo. at p. 16. This use led to the basis for the relied-upon registrations by the Petitioner. *See generally Petitioner's Notice of Reliance* dated August 28, 2014, *Exhibits 1-2: U.S. Reg. Nos. 1,390,593 and 1,392, 203* (hereinafter "PNOR, U.S. Registrations)(*emphasis added*). However, Mr. Nunn ultimately conceded that the trademark UNIX is no longer used as a source identifier. Nunn Depo. at pp. 95-97. Rather, it is merely used to identify whether products meet a specified quality or standard. *Id.* at pp. 96-97.

Mr. Nunn testified that he would consider use of a fictional mark XUNIX to be confusingly similar to Petitioner's UNIX trademark. *See* Nunn Depo. at p. 47. He did not testify, however, that Registrant's XIUNIX trademark would cause concern for Petitioner. *Id.* at pp. 47, 85-86.

Finally, Mr. Nunn testified that Petitioner first became aware of the subject registration in 2012. Nunn Depo. at p. 85. However, they did not institute the instant cancellation proceeding until August of 2013. *See Petition for Cancellation* dated August 1, 2013.

IV. ARGUMENT

a. Laches Bars the Petitioner's Claims

In order to prevail on the defense of laches respondent is required "to establish that there was undue or unreasonable delay by petitioner in asserting its rights, and prejudice to respondent resulting from the delay." *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France,* 245 F.3d 1359, 58 USPQ2d 1460, 1462- 1463 (Fed. Cir. 2001). *See also Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc*., 971 F.2d 732, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992). The laches defense, if successful, will serve as a bar against a petition for cancellation grounded on likelihood of confusion unless confusion is inevitable. *Ultra-White Co., Inc. v. Johnson Chemical Industries, Inc*., 465 F.2d 891, 175 USPQ 166, 167 (CCPA 1972).

The reviewing court is required to look at the length of delay between a petitioner's notice of the defendant and its mark and petitioner's filing of a petition for cancellation as this is a critical factor when considering a laches defense. *See, e.g., Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 USPQ2d 1203, 1210 (TTAB 2006), *aff'd unpublished opinion*, Appeal Nos. 2006-1366 and 1367 (Fed. Cir. Dec. 6, 2006) [3 years, 8 months of unexplained delay held sufficient for laches]; and *Charrette Corp. v. Bowater Communication Papers, Inc.*, 13 USPQ2d 2040 (TTAB 1989) [14 months of delay held not sufficient for defense of laches].

In the instant case, Petitioner became aware of the Registrant's registration in 2012. Nunn Depo. at p. 85. Moreover, Petitioner was on constructive notice of Registrant's application on or about the date it was published for opposition, namely, November 29, 2011. Moreover, Mr. Nunn provided that the Petitioner receives monthly monitoring reports which alerts them to any trademarks which would cause them concern filed before the U.S. Patent and Trademark Office. *Id.* at p. 92.

As such, Petitioner had actual notice of respondent's use of its mark as early as 2012 and constructive notice by November 29, 2011. Based upon the monitoring reports testified to by Mr. Nunn, they most likely had actual notice of Registrant's months before November 2011 on or about the filing date of the application.

In such situations, in a cancellation proceeding, "... laches begins to run from the time action could be taken against the acquisition by another of a set of rights to which objection is later made. In an opposition or cancellation proceeding the objection is to the rights which flow from registration of the mark." *National Cable Television Association Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991). *See also, Teledyne Technologies, Inc.*, 78 USPQ2d at 1210. Therefore, laches begins to run in this case from, at a minimum, the date the application for the subject registration was published for opposition, and that date is November 29, 2011. It may even be earlier given the filing date of Registrant's mark and Mr. Nunn's concession as to Petitioner's monthly monitoring reports.

Notwithstanding this notice, Petitioner filed the instant petition for cancellation on August 1, 2013, thus creating a period of delay of approximately 20 months. Respondent's reliance on Petitioner's delay in filing a petition for cancellation is not a requirement for laches. In other words, a petitioner does not have to overtly or covertly lull respondent into believing that petitioner would not act. "Economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice." *Teledyne Technologies Inc. v. Western Skyways Inc., supra* at 1211. *See also Trans Union Corp. v. Trans Leasing International, Inc.*, 200 USPQ 748, 756 (TTAB 1978)(prejudice occurs where senior user takes action after the junior user builds up its business and goodwill around a mark).

In view of the above, it is requested that the Board find that the length of delay is significant and that undue prejudice to respondent would result should its registration be cancelled because of this delay.

Petitioner, through testimony, offered no excuse as to why it did not oppose or petition to cancel the Registrant's registration sooner. As such, the court has no basis before it that would justify the unreasonably delay. *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104 (TTAB 2007), *citing Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 220 USPQ 845 (Fed. Cir. 1984).

Balancing the equitable interests as a whole, it is respectfully submitted that given the unreasonable delay in asserting its rights Petitioner should be barred by the *doctrine of laches* from bringing the instant cancellation proceeding and, as such, the instant matter should be dismissed.

b. Petitioner Has Failed to Establish a Likelihood of Confusion

A determination of likelihood of confusion between marks is made on a case- specific basis. *In re Dixie Restaurants Inc*., 41 USPQ2d 1531, 1533 (Fed . Cir. 1997). The reviewing court is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;

(2) The similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;

(3) The similarity or dissimilarity of established, likely-to-continue trade channels;

(4) The conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing;

(5) The number and nature of similar marks in use on similar services; and

(6) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

Id.

The court is thus tasked with evaluating the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the court must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(*citing Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir. 1994)).

Even the use of identical dominant words or terms does not automatically mean that two marks are confusingly similar. In *General Mills, Inc. v. Kellogg Co*., 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that "Oatmeal Raisin Crisp" and "Apple Raisin Crisp" are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for "FirstBank" and for "First Bank Kansas" were found not to be confusingly similar. Further, in *Luigino's Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark "Lean Cuisine" was not confusingly similar to "Michelina's Lean 'N Tasty" even though both marks use the word "Lean" and are in the same class of services, namely, low-fat frozen food.

i. Registrant's Service Mark is Not Similar to Petitioner's Trademark

Petitioner has relied upon multiple marks registered on or in connection with a trademark for a stylized "X" or the term UNIX. Registrant, on the other hand, registered the trademark

XIUNIX. Visually the terms are separate and distinct apart from one another. Petitioner's trademarks are either an X or UNIX. In this regard, there is some testimony that would indicate that the Petitioner would have us believe that its X trademarks appear with its UNIX trademarks to create a combined X_UNIX mark leaving the Petitioner's trademark only one letter off of that of the Registrant. Although there was testimony to this effect, there is simply no evidence of record which displays the Petitioner's mark in this regard such that it would narrow the divide as between the visual appearance of the marks.

In that regard, Registrant's XIUNIX mark is visually distinct apart from the Petitioner's X mark as it neither incorporates a design element but includes the additional lettering IUNIX and is two syllables as opposed to one, simple letter. Visually comparing the Petitioner's UNIX mark to that of the Registrant, again, significant differences exist. Registrant's mark XIUNIX begins with the syllable XIU and ends with NIX. Petitioner's mark, however, begins with "U" and then combines to form UNIX.

In regard to any phonetic similarities, Petitioner's own witness, Mr. Nunn, conceded that the phonetic pronunciation of Registrant's service mark is HUE – NIX. Nunn Depo. at p. 86. This is wholly distinct from the accepted pronunciation of the UNIX marks.

Of note, under Petitioner's own policy for challenging trademarks, Mr. Nunn testified that Petitioner routinely challenges trademarks that are either one letter different or phonetically confusing to the UNIX mark. *Id.* at pp. 85-86. As Registrant's trademark is neither one letter different from Petitioner's trademark nor admittedly phonetically similar to the Petitioner's trademark it would appear that not only does this *du Pont* factor favor a finding of an absence of a likelihood of confusion as between the marks, the Petitioner has seemingly conceded that under its own policy it does not believe the marks are similar enough such that Petitioner should not

have instituted the instant action. Perhaps that explains the delay which is the subject to Registrant's laches defense.

As such, it is respectfully submitted that this *du Pont* factor strongly favors a finding of an absence of a likelihood of confusion and is potentially dispositive of the whole claims of the Petitioner.

ii. The Services of Registrant do Not Overlap with the Goods of The Petitioner

The instant case presents an interesting question: What occurs when the Petitioner's only witness concedes during his testimony that Petitioner is no longer utilizing the relied upon trademarks in commerce?

As set forth above, the UNIX trademark had been used since the early 1970s in connection with software code. Nunn Depo. at p. 16. This use led to the basis for the relied-upon registrations by the Petitioner. *See generally Petitioner's Notice of Reliance* dated August 28, 2014, *Exhibits 1-2: U.S. Reg. Nos. 1,390,593 and 1,392, 203* (hereinafter "PNOR, U.S. Registrations)(*emphasis added*). However, Mr. Nunn ultimately conceded that the trademark UNIX is no longer used as a source identifier. Nunn Depo. at pp. 95-97.[2] Rather, it is merely used to identify whether products meet a specified quality or standard. *Id.* at pp. 96-97.

Thus, when examining the goods and services of the respective parties as recited in the respective registrations it is difficult to argue that such would not be related. However, although the Board denied Registrant's efforts to bring this matter into the case the testimony in this proceeding remains uncontested: Petitioner no longer uses the relied upon registrations as

[2] Upon receiving this testimony Registrant, by counsel, petitioned to cancel the relied-upon registrations on the grounds of abandonment seeking collaterally attack the registrations upon which the Petitioner relies. Registrant further sought to consolidate the matters with this proceeding. However, by order dated July 24, 2015 the Board denied Registrant's efforts to consolidate the cases further dismissing the petitions to cancel the Petitioner's trademarks at issue.

trademarks. Nunn Depo. at pp. 95-97. At best, they have become quasi-certification marks per Petitioner's own testimony. *Id.* at pp. 96-97.

In that context, there can be no overlap in the goods or services of the respective parties. While Registrant uses its mark in connection with the identified services as recited in its interrogatory answers and the subject registration, Petitioner no longer uses its marks in connection with computers or software but rather in connection with a hyper-specific certification program for a specific type of high-end operating system.

Within this context, there is simply no overlap and, accordingly, this *du Pont* factor should also favor a finding of a lack of a likelihood of confusion as between the registrations.

iii. No Actual Confusion in the Marketplace

Finally, Petitioner has submitted no evidence of actual confusion in the marketplace as between the goods of the Petitioner and the services of the Registrant. Perhaps this can be explained, again, due to the fact Petitioner is no longer offering its goods as admitted by Petitioner's only witness. Notwithstanding this fact, there is still no evidence of the same and if Petitioner argues this to be the case because there is little likelihood that actual confusion would be encountered because it is no longer using the trademark as a source identifier, as effectively they are compelled to do, should that not truly be dispositive of this entire discourse?

It is thus submitted that this *du Pont* factor also favors the continued registration of Registrant's trademark. Moreover, if any argument be made to the contrary concerning the absence of genuine chances for actual confusion to occur because the Petitioner is no longer using its trademark the same should be dispositive of the entire likelihood of confusion analysis.

c. Petitioner Has Failed in Its Burden to Establish Lack of Use in the United States

In Petitioner's Petition to Cancel it is alleged that Registrant is not using its trademark in the United States. However, Petitioner failed in its efforts to establish this fact and, as such, this allegation must also fail.

Specifically, the only evidence of record sets forth that Registrant has and continues to use its mark in the United States. Registrant's business, XIUNIX, provides computer services, such as, but not limited to the following:

> [W]ebsite design, website hosting, graphic design, software design, computer consultancy, customization of computer hardware and software, data conversion of electronic information, data migration services, and cloud storage.

See Petitioner's Notice of Reliance dated August 28, 2014, *Exhibit 6: Registrant's Responses to Petitioner's First Set of Interrogatories to Registrant* at p. 1 (hereinafter "PNOR, Reg. Resp. to Interrogatories"). More generally, Registrant adopted and began using the mark XIUNIX in commerce on July 4, 2011 for the services covered in Reg. No. 4,098,948, specifically, in connection with:

> Cloud seeding; Computer consultation; Computer graphics services; Computer hardware and software design; Computer network design for others; Computer programming; Computer programming and software design; Computer security consultancy; Computer services, namely, cloud hosting provider services; Computer services, namely, creating computer network-based indexes of information, websites and resources; Computer services, namely, data recovery services; Computer services, namely, designing and implementing web sites for others; Computer services, namely, integration of private and public cloud computing environments; Computer services, namely, providing search engines for obtaining data on a global computer network; Computer site design; Computer software design; Consulting services in the field of cloud computing; Consulting services in the field of computer-based information systems for businesses; Consulting services in the field of hosting computer software applications; Consulting services in the field of industrial engineering; Conversion of data or documents from physical to electronic media; Creating and maintaining internet sites for others; Creating of computer programs; Customization of computer hardware and software; Data conversion of electronic information; Data migration services; Design of computer database; Design of home pages, computer software

> and web sites; Design of homepages and websites; Design services for packaging; Designing and developing webpages on the internet; Digital transfer services for transferring home videos and film to DVD and the internet; Displaying the web sites and images of others on a computer server; Document data transfer from one computer format to another; Electronic document and e-mail time-stamping services; Fashion design consulting services; File sharing services, namely, providing a website featuring technology enabling users to upload and download electronic files; Graphic design services; Hosting the software, websites and other computer applications of others on a virtual private server; Hosting the web sites of others on a computer server for a global computer network; Hosting websites on the Internet; Industrial design services; Installation and maintenance of computer software; IT consulting services; Mapping; On-line security services, namely, providing security and anonymity for electronically transmitted credit card transactions; Providing a web site featuring technology that enables internet users to share documents, images and videos; Providing a web site that gives computer users the ability to upload, exchange and share photos, videos and video logs; Providing a website allowing users to download music and music videos; Providing a website featuring a media aggregator and search engine for internet content; Providing customized on-line web pages featuring user-defined information, which includes search engines and on-line web links to other web sites; Providing virtual computer systems and virtual computer environments through cloud computing; Provision of Internet search engines; Public document retrieval; Recovery of computer data; Remote computer backup services; Remote online backup of computer data; Research, development, design and upgrading of computer software; Searching and retrieving information, sites, and other resources available on computer networks for others; Technical consulting services in the fields of datacenter architecture, public and private cloud computing solutions, and evaluation and implementation of internet technology and services; Technical support services, namely, remote and on-site infrastructure management services for monitoring, administration and management of public and private cloud computing IT and application systems; Web site hosting services; Website design and development for others.

PNOR, Reg. Resp. to Interrogatories at p. 3; *See Petitioner's Notice of Reliance* dated August 28, 2014, *Exhibit 7: Registrant's Supplemental Responses to Petitioner's First Set of Interrogatories to Registrant* at p. 3 (hereinafter "PNOR, Reg. Supp. Resp. to Interrogatories"); *See also* U.S. Reg. No. 4,098,948; PNOR, Reg. Supp. Resp. to Interrogatories at p. 1.

Registrant provided that he does retain customers for the services provided under his XIUNIX service mark in the United States. PNOR, Reg. Supp. Resp. to Interrogatories at p. 2. Specifically, Registrant has customers and/or clients in Brunei, Malaysia and the United States.

Id. at p. 4. Registrant registered the domain name XIUNIX.COM on or about August 25, 2004. This website offers Registrant's services to consumers. *Id*.

As such, any allegation by the Petitioner that Registrant is not using his service mark in commerce in the United States must necessarily fail as Petitioner has failed to satisfy its burden of proof with respect to the only evidence on point before this court as referenced above.

d. Petitioner Has Failed to Establish Fraud on Behalf of the Registrant

The Federal Circuit has stated that fraud must be proven "to the hilt with clear and convincing evidence" with no room for speculation, inference or surmise. *In re Bose Corp*., 2009 WL 2709312 (Fed. Cir., Aug. 31, 2009). To establish fraud, a petitioner must submit specific evidence of an intent to deceive the United States Patent and Trademark Office on the part of a registrant who is alleged to have committed fraud upon the office.

In the instant case, Petitioner has failed to set for or submit any specific evidence of fraud on the part of the Registrant sufficient to satisfy this burden. As such, Petitioner's fraud claims must be denied.

V. CONCLUSION

WHEREFORE it is respectfully submitted that a likelihood of confusion would not result should Registrant's service mark be permitted to remain registered. The Registrant's service mark is not similar in appearance, connotation, or phonetically sufficient to raise a concern regarding a likelihood of confusion. Moreover, Petitioner has, for all intensive purposes abandoned its use of the UNIX mark as a source identifier virtually eliminating even the most remote possibility of a likelihood of confusion. Moreover, even if one were found to exist, Petitioner's unexplained and unreasonable delay in bringing the instant action should bar it from receiving its remedy under the *doctrine of laches*. Finally, Petitioner has failed to establish that

the Registrant's service mark is either not in use in the United States or was procured by perpetrating fraud upon the United States Patent and Trademark Office.

Accordingly, it is respectfully requested that the Petition to Cancel be dismissed and Registrant's service mark allowed to continue to be registered.

Respectfully submitted this 28th day of December, 2015.

The Trademark Company, PLLC

/Matthew H. Swyers/

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board

Reg. No. 4,098,948
For the mark XIUNIX
Registered on November 29, 2011

X/Open Company Limited	:	
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Petitioner,	:	
	:	
vs.	:	Cancellation No.92057631
	:	
Chong Teck Choy,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 28th day of December 2015, to be served, via first class mail, postage prepaid, upon:

Jacqueline M Lesser, Esq.
Baker & Hostetler LLP
2929 Arch St Cira Centre, 12th Floor
Philadelphia, Pa 19104-2891

/Matthew H. Swyers/
Matthew H. Swyers