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Filing date: **11/03/2014**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Chong T Choy		
Entity	Individual	Citizenship	Malaysia
Address	P.O. Box 396 Seria KB, 1133 BRUNEI DARUSSALAM		

Attorney information	Matthew H. Swyers, Esq. The Trademark Company 344 Maple Avenue West, Suite 151 Vienna, VA 22180 UNITED STATES mswyers@thetrademarkcompany.com Phone:18009068626100
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Registration Subject to Cancellation

Registration No	1390593	Registration date	04/22/1986
Registrant	X/OPEN COMPANY LIMITED THAMES TOWER READING, BERKSHIRE RG1 1LX, UNITED KINGDOM		

Goods/Services Subject to Cancellation

Class 009. First Use: 1984/12/14 First Use In Commerce: 1984/12/14 All goods and services in the class are cancelled, namely: COMPUTERS
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Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Abandonment	Trademark Act section 14

Related Proceedings	Cancellation Proceeding No 92057631
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Attachments	Petition to Cancel 1,390,593.pdf(249539 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Matthew H. Swyers/
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Name	Matthew H. Swyers, Esq.
Date	11/03/2014

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

In the matter of U.S. Registration 1,390,593,
For the mark UNIX,
Registered on the Principal Register on April 22, 1986.

CHONG TECK CHOY,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No.
	:	
X/OPEN COMPANY LIMITED,	:	
	:	
Registrant.	:	

PETITION TO CANCEL

Petitioner, Chong Teck Choy (hereinafter “Petitioner” or “Choy”), a Citizen of Malaysia, with an address of P.O. Box 396, Seria KB 1133, Brunei Darussalam believes that he is and will continue to be damaged by the continued registration of X/Open Company Limited’s (hereinafter “Registrant” or “X/Open”) U.S. Registration 1,390,593 for the mark UNIX and, accordingly, hereby petitions this honorable tribunal to cancel the same pursuant to 15 U.S.C. § 1064 and 37 C.F.R. § 2.111(b).

PRELIMINARY STATEMENT

Information on Parties’ Pending Cancellation Proceeding No. 92057631

On or about August 1, 2013 X/Open filed a Petition to Cancel Choy’s U.S. Registration No. 4,098,948 for the mark XIUNIX. This cancellation proceeding was assigned Proceeding No. 92057631. As basis for the Petition to Cancel against Choy’s U.S. Registration No. 4,098,948, X/Open relied upon its alleged continuous use and ownership of U.S. Trademark Registration No. 1,390,593 for the mark UNIX for use in connection with “computers” in International Class 9 and U.S. Registration No. 1,392,203 also for the mark UNIX authorized for use in connection with “computer programs” in International Class 9. On or about September 9, 2013 Choy filed his Answer and Grounds of Defense in response to X/Opens’ Petition to Cancel.

X/Open's 30-day Trial Period in Cancellation Proceeding No. 92057631 closed on or about September 6, 2014. During its trial period, X/Open took the deposition of Steve Nunn both pursuant to 37 C.F.R. §§ 2.119(b) 2.123 and as well as a witness under Federal Rules of Civil Procedure 30(B)6. Mr. Nunn testified as to the history of the UNIX Mark and the UNIX specification. During the depositions, the witness gave testimony that X/Opens' Registered UNIX Marks were effectively no longer in use as a source identifier for X/ Opens aforementioned goods or as trademarks but, at best, now serve merely as certification marks beginning in the early 2000's.

As of the date of filing of this Petition to Cancel, the parties' pending Cancellation Proceeding No. 92057631 remains active before the Board with Choy's Trial Period opening on October 6, 2014. Based on the foregoing, Choy now files the instant Petition to Cancel on the following grounds:

GROUND FOR CANCELLATION

As grounds for the instant Petition to Cancel it is alleged that:

1. Registrant perpetrated fraud upon the United States Patent and Trademark Office (hereinafter "Office") by a willful and intentional submission of material false information concerning use of the mark in commerce to procure the renewal of U.S. Registration 1,390,593.
2. Upon information and belief the mark UNIX was abandoned without the intent to resume use by X/Open Company Limited (hereinafter "Registrant"), a related entity, assignee, or successor in interest.
3. Registrant's Mark no longer functions as a trademark or as a source identifier for Registrant's Goods.

STATEMENT OF FACTS

In support for the instant Petition to Cancel, it is alleged that:

1. Petitioner is the owner of the mark: XIUNIX ("Petitioner's Mark"), as more fully identified in U.S. Registration No. 4,098,948 for use in connection with the following services, 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;

(hereinafter “Petitioner’s Services”) covered in International Class 42.

2. Petitioner’s Application for Petitioner’s Mark was filed on or about July 4, 2011.

3. Petitioner’s Application for Petitioner’s Mark was assigned U.S. Serial No. 85/362,612.

4. Petitioner’s Application for Petitioner’s Mark published for opposition on or about November 29, 2011.

5. Receiving no opposition within the opposition period, Petitioner’s Mark was published on the Principal Register on or about February 14, 2012 and received U.S. Registration No. 4,098,948.

6. Petitioner first used Petitioner’s Mark in connection with Petitioner’s Services in commerce on or about August 29, 2004, as verified by the priority date claimed on Petitioner’s U.S. Registration No. 4,098,948.

7. Petitioner’s use of Petitioner’s Mark in connection with Petitioner’s Services has been continuous since on or about August 29, 2004.

8. Based upon information and belief, Registrant is a Foreign Corporation organized in the United Kingdom, with a principal place of business located at Thames Tower 37045 Station Road Reading Berkshire, United Kingdom.

9. Registrant contends that it is the owner of the following mark: UNIX (“Registrant’s Mark”) for use in connection with the following goods, namely: “Computers” (hereinafter “Registrant’s Goods”) covered in International Class 9.

10. On or about May 13, 1985 Registrant filed an Application for Registrant’s Mark for use in connection with Registrant’s Goods.

11. Registrant’s Application for Registrant’s Mark was assigned Serial No. 73/537,419.

12. Registrant’s Application for Registrant’s Mark claimed a date of first use in commerce of Registrant’s Mark on December 14, 1984.

13. Registrant’s Mark was published for opposition on or about August 27, 1985.

14. Receiving no opposition within the opposition period, the Registrant's Mark registered on the Principal Registry on or about April 22, 1986 and was assigned U.S. Registration 1,390,593.

REGISTRANT'S FRAUD UPON THE OFFICE

15. On or about April 21, 2006 Registrant filed a Section 8 Affidavit to effectuate the renewal of U.S. Registration 1,390,593 for Registrant's Mark.

16. Registrant's Registration was renewed by notice of the USPTO's acceptance of Registrant's Section 8 Affidavit on or about July 24, 2006.

17. Based on information and belief and per the testimony of X/Open's witness in Cancellation Proceeding No. 92057631, Steve Nunn (*see* Preliminary Statement above), at the time Registrant filed its Section 8 Affidavit to renew U.S. Registration 1,390,593, Registrant was no longer using the mark UNIX as a trademark or service mark or as a source identifier for Registrant's Goods.

18. Based on information and belief, Registrant perpetrated fraud upon the Office in that Registrant was not using Registrant's Mark as a trademark or service mark or as a source identifier for Registrant's Goods at the time Registrant filed its Section 8 Affidavit to effectuate the renewal of U.S. Registration 1,390,593 on or about July 24, 2006 and was aware of this fact at the time it made said filing. Registrant's acts therein were intentional, fraudulent, and a deliberate attempt to deceive the Office into renewing Registrant's Registration for Registrant Mark through material misstatements of facts.

ABANDONMENT OF REGISTRANT'S TRADEMARK / FAILURE TO FUNCTION AS A TRADEMARK

19. Based on information and belief and per the testimony of X/Open's Witness, Steve Nunn (*see* Preliminary Statement above), since the early 2000's Registrant has not used Registrant's Mark as a trademark or as a source identifier for Registrant's Goods.

20. Upon information and belief Registrant does not retain intent to resume use of the mark UNIX as a trademark in the future.

21. Upon information and belief, Registrant's Mark fails to function as a trademark as it is no longer a source identifier of Registrant's Goods pursuant to Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127.

22. Petitioner believes that it will be damaged by Registrant's continued registration of the Registrant's Mark insofar as the instant registration confers upon Registrant rights to which it is not entitled which may be used to adversely affect the continued Registration of Petitioner's Mark and Petitioner's use of the same.

CONCLUSION

WHEREFORE in consideration that the Registrant's continued registration of Registrant's Mark was garnered through fraud and material misstatements on its Section 8 Affidavit submitted to the Office, and that Registrant's Mark has been abandoned, and that Registrant does not retain the intent to resume use, Registrant's Mark no longer functions as a trademark or as a source identifier for Registrant's Goods, and, accordingly Petitioner respectfully requests that US. Registration No. 1,390,593 be cancelled on the grounds and for the reasons set forth hereinabove.

Counsel for Petitioner is available for an oral hearing on this matter should the Board require the same.

Respectfully submitted this 3rd day of November, 2014.

THE TRADEMARK COMPANY, PLLC

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Counsel for Petitioner

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

In the matter of U.S. Registration 1,390,593,
For the mark UNIX,
Registered on the Principal Register on April 22, 1986.

CHONG TECK CHOY,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No.
	:	
X/OPEN COMPANY LIMITED,	:	
	:	
Registrant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 3rd day of November, 2014 to be served, via first class mail, postage prepaid, upon:

MARK SOMMER
FINNEGAN HENDERSON FARABOW ET AL
901 NEW YORK AVE NW
WASHINGTON, DISTRICT OF COLUMBIA 20001-4413

cc: JACQUELINE M LESSER, Esq.
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/Matthew H. Swyers/
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