

ESTTA Tracking number: **ESTTA1157646**

Filing date: **09/06/2021**

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

Proceeding	92076846
Party	Plaintiff Picture Engine Company, Inc
Correspondence Address	JON CARLSON PICTURE ENGINE COMPANY, INC 550 LYKINS AVE BOULDER, CO 80304 UNITED STATES Primary Email: treerock@icloud.com No phone number provided.
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Jon Carlson
Filer's email	treerock@iCloud.com
Signature	/joncarlson/
Date	09/06/2021
Attachments	PetitionCorrected2.pdf(176439 bytes)

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

In the matter of trademark registration of:

Registrant: OpenSky Project, Inc
U.S. Trademark Registration No.: 6255115
Mark: AUCTION SNIPER
Registration Date: January 26, 2021

Plaintiff: Picture Engine Company, Inc. in reference to: Cancellation No.: 92076846

vs.

Defendant: OpenSky Project, Inc

PETITION TO CANCEL

I. Introduction

1. Pursuant to 37 C.F.R. § 2.111, Plaintiff/Plaintiff, Picture Engine Company, Inc. (hereinafter “Plaintiff”), a Colorado S-corporation based in Boulder, Colorado, submits the following Petition to Cancel (hereinafter “Petition”) U.S. Trademark Registration No. 6255115 (hereinafter “ ’115 Registration”), because it believes that it has been and will continue to be damaged by the continued registration of the ’115 Registration for the standard character mark AUCTION SNIPER (hereinafter “Mark”).

Defendant’s Mark is currently and purportedly owned by OpenSky Project, Inc (hereinafter “Defendant”), a purported US corporation based in New York.

2. Plaintiff offers the following services under the mark AUCTION SNIPER FOR EBAY (“Plaintiff’s Copyright”): An Application for sale in two Apple, Inc. ‘App Stores’, iOS ‘Apple App Store’, and Apple’s ‘Mac App Store’, These Applications provide ‘sniping’ ability of eBay, Inc.’s online Auctions ‘Sniping’ (the purpose of the app) which is described by the words ‘Auction Sniper’. and hence the noun ‘Sniper’ also describe the purpose referring to the application or person or website doing it, is a term that is short hand for placing a bid for an auction at the last possible minute, so that other bidders do not know what the ‘sniper’ (person or application doing it for them) is willing to bid until they do not have a chance to react. This term has been in use since at least 1998 by all manner of people and companies for Auctions in general. Several Companies have used this term “Auction Sniper” in various forms since the early 2000s, including the Plaintiff since 2013 also in various forms of the term, an example of which is ‘Auction Bidding Sniper for eBay’. I’ve also personally used the term in various forms, along with at least thousands of people since 1998 for placing last minute bids manually before there were apps, and before I created my own app to do it automatically.

II. Plaintiff’s reasons for this Petition are as follows:

1. On April 5, 2021, Registrant filed a motion with Apple, Inc. to have Plaintiff’s apps removed from Apple’s ‘App Store(s)’ asserting claims of ‘infringes its intellectual property rights’ and for ‘trademark infringement’ for use of the Defendant’s Mark. Unless the Defendant’s Mark is canceled, I will be forced to remove my apps for sale from Apple, Inc.’s various ‘App Stores’. In other words I am continually forced to defend the apps (continuous

damage control) as Apple has written several emails asking that my app(s) ‘does not infringe on Complainant’s rights’ (the Defendant) and I will be permanently damaged if the Defendant’s Mark is not canceled, as Apple will of course remove my apps for ‘trademark infringement’ if Defendant’s Mark is upheld.

2. The ’115 Registration grants Defendant the exclusive right to use the generic term “Auction Sniper” for Defendant’s Goods and/or Services in exclusion of the other companies using the term in its various forms including mine. Therefore, the ’115 Registration is a source of damage and injury to Plaintiff. Moreover, as evidenced by the claims Registrant has asserted against Plaintiff in the Related Apple, Inc. Action, Plaintiff has been and will continue to be damaged by the maintenance of the Registration maintained by the TTAB, the TTAB being my only source of relief.

3. Even if the names of my Apps were something like “Auction Bid Sniping”, The Defendant, Through Apple, can have my apps removed. Based on the Defendant’s claim that the app(s) ‘infringes its intellectual property rights’, It is my belief on being in the App Store for about 10 years that Apple will remove my apps even with a name like that “Auction Bid Sniping” or “Bidding Sniper for Auctions” or several others. As Apple can and will side with the company holding ‘property rights’ like that. As one can guess Apple will take the ‘safer’ route and side with the ‘holding’ company. The TTAB can stop such abuse by companies using the Trademark process to gain rights to such unbelievably generic terms.

III. Grounds for Cancellation

1. **Priority and likelihood of confusion:**

A. Priority This Plaintiff is claiming and showing prior common law use. In Addition, this Plaintiff is showing prior common law use in general by other companies/websites/individuals as far back as 1998. This Petition itself is showing this prior common law use in many places and in it's exhibits.

B. Likelihood of Confusion This Plaintiff is claiming through this Petition that the term "Auction Sniper" that is in both this Plaintiff's app name and the Defendant's app name is merely descriptive and therefore weak, and in this way the Mark does cause a likelihood of confusion. The Board has already disclaimed the word "Auction" from the registration. In both cases/apps, the obvious and dominant terms are the first two words "Auction" and "Sniper". This leaves "Sniper" or the use together, which the entire Petition and it's exhibits is on the path to finish the job of showing how weak and merely descriptive the entire Mark is.

2. The mark is merely descriptive: The terms in the Mark are describing the very purpose of many of the services/products of many companies. These are shown in this Petition and its exhibits and citations. (In particular see Exhibit B email) where a person is literally describing the purpose of the software in the subject title as an example of using the terms to show the purpose, rather than the name of this Plaintiff's app, (and that this purpose was not

working at the time, hence the email) Then separately in the body of the email using the terms as a descriptive purpose to a “tool”. There is no better way to show this than to show people actually using the term. None referring to the Defendant’s Mark at all.

3. The mark is or has become generic: This Petition and every exhibit/citation is deals with and shows how generic and merely descriptive the Mark “Auction Sniper” is. This consistent use of Auction Sniper/Sniping by many companies (and people) has not in the vast majority of cases been in reference to Defendant but to the general practice either the ‘verb’ form “Sniping” in relation to Auctions, or ‘noun’ form the person/thing that does it, “Sniper” of Auctions, and in the vast majority of cases some other company that is not associated with the Defendant has used this term to describe directly or indirectly their business, if they are an “Auction Sniper” service or product. I personally have emails from 100’s of people with the term “Auction Sniper” or “Auction Sniping” or “Auction bidding sniper” etc... and they are not referring to the Defendant or it’s products/services, but to the general practice of Sniping, or my service in particular.

4. The mark is not inherently distinctive and has not acquired distinctiveness: To be protectable as a trademark, a term must be distinctive ... (basically originating from a single source). Here this Petition’s **V. Discussion** shows numerous examples of the words in the Mark and the Mark itself being used by dozens of companies, and thousands of people, including this Plaintiffs app long before the Defendant’s began the process to register the Mark. There is no amount of confusion on this point. In the inevitable conclusion of this Petition, the

words in the Mark and the Mark itself was used in a descriptive way and in close association with variations of the words in the Mark long before the Defendant. That is the point of this Petition's Grounds for Cancellation and exhibits.

5. Dilution by blurring: This Plaintiff's App that has the name "Auction Sniper for eBay", and is in the same commerce space (classes) as the Defendant's app with a similar name. In this way, and in this class space, this is the definition of dilution by blurring. Since this Plaintiff has been using this name before the Defendant filed for their Mark. This has caused confusion in the class space that is described in this Petition classes and Grounds for Cancellation. If the Defendant or Board is looking for an example of 'fame' in this context, An example of this, can be seen by a book in which this Plaintiff's App is mentioned by name from 2016, well before the Defendant filed for the Mark. (See Exhibit A below) Another example of 'fame' in this context is hundreds of emails by users of my app. (See Exhibit B below for an example of an email from a user of my app) Notice two things: 1) The author of the email took out the standard support email subject title to put in his/her own subject title; the author include the words "auction sniper" of their own volition. 2) The author of the email mentions using this "auction sniper" software/app/ sniping service since 2014, (that is this Plaintiff's app, so there is no confusion here caused by the dilution that the Defendant's Mark is causing) this date is before the Defendant's registrations claim of first use in all classes.

6. Registrant not rightful owner of mark for identified goods or services: Here, this Petition stands out again as addressing this Grounds for Cancellation, as it is showing dozens of cases **V. Discussion** where companies and thousands of individuals have used the terms for themselves and generically, including this Plaintiff, both as a name or generically long before the Defendant. In that respect, this Petition is showing that no one is the rightful owner of this Mark, therefor the Registrant is not the rightful owner. As one can see from citation #1 thru #6 in exhibits of this Petition, the term "Auction", "Sniper", "Sniping" always in close association with each other, and many combinations such as "Auction Sniper" has been in use for more than 20 years in all types of situations "websites/individuals/applications" This term (in it's various forms) can be described as having many and multiple examples of "generic" and in general use, and in that way, no one can claim the rightful owner of such a descriptive Mark.

IV. Goods/Services Subject to Cancellation

1. with respect to International Class 009: The Defendant does not dispute that the Plaintiffs app falls into the class of Downloadable mobile applications for the automated placing of bids for online auctions; downloadable mobile applications for ordering merchandise and consumer goods.

2. with respect to International class 035

A.1. As stated in this Petition section/paragraph I.)2.) My Application, “Auction Sniper for eBay” is for sale in Apple’s App Store since 2013, as such, the Application itself, “Auction Sniper for eBay” is an international online auction service for use with eBay. And as stated in this Petition, the app is used “for placing a bid for an auction at the last possible minute” to be absolutely clear, this means an international online auction service featuring the automated placing of bids for international goods and services. eBay (eBay is a trademark of eBay Inc.) is an international online ordering/auction service of a very large variety of world wide merchandise and consumer goods of others of which this Plaintiff’s app is a facilitator of users having access to the eBay platform. To be clear, the Defendant’s App and service is a direct competitor to this Plaintiff’s app and service within the very same international class 035. Also Plaintiff has websites in association with that product and Service, besides the obvious eBay online website that the App is a platform for. The entire reason for this Petition is for relief from the Defendant’s attempt to remove my products and services from that very class’s definition, (class 035) including international commerce.

A.2. Put in more context this Plaintiff’s App is set up for use with the “online” and “international” website ‘eBay’ (‘eBay’ is a trademark of eBay Inc.) ‘eBay’ is after all an international online commerce app, and this Plaintiff’s app directly links to the worldwide online websites of ‘eBay’ for use with those sites. The entire purpose of the app is to connect to

international online ‘eBay’ (auction) sites to provide **International** online automated bidding auction services through/for ‘eBay’.

3. with respect to International class 042) This Plaintiff is claiming common use for the entire community of Auction snipers that this space (class 042) is filled with. Online Websites of other companies besides the Defendant that provide such **international** products and services through a website, while using the terms “Auction”, “Sniper”, “Sniping” in close associations with each term together, and various forms of “Auction Sniper”. See in particular **citation #7** for an example website that is directly in this class space using “Auction sniper” and preceded the Defendant’s first use in this class, see the list of exhibits and descriptions in this Petition. This is one of the many points of this Petition. That the Defendant has not acquired, nor ever had distinction in the use of this Mark for the same **international** services in this class space. It is my belief that the Defendant will go after these websites too, if not already. so I am acting on behalf of them.

V. Discussion — Description and purpose of the Terms in the Mark

1. The purported mark shown in the ‘115 Registration is generic because, upon information and belief, the relevant consuming public for the Registrant’s Goods and/or Services does not actually associate the term “Auction Sniper” and it’s various forms like “Auction Sniping” or ‘sniper’ with any particular source, much less with Registrant.

2. The term “Auction Sniper” is a widely-used generic term. The term is used by people of the Auction industry to refer to a system for bidding of an Auction for goods/services at the last minute, and therefore the Defendant’s Mark is invalid. “Auction Sniper” is a generic term and not an indicator of the source of the goods and/or services, based in part, on the generic use of the term Sniping as it refers to auctions in general. Thus, the purported “Auction Sniper” Mark shown in the Registration, does not function to identify Registrant’s products or services from several companies and by now millions of people at all, showing no distinctiveness nor priority. Nor is the term “Auction Sniper” serve to distinguish Registrant’s product, nor make it distinguishable from products or services offered by many others, including companies use of the term as their own in its various forms like “Auction Sniper” or “Auction Sniping” and not only before this Mark’s registration date, but also before the Defendant’s product was put into the ‘App Store’ or stores. I will show many companies using various forms of the term “Auction Sniper” in the early 2000s to identify their service they offered. I will show several Major Publications writing stories about the term “Sniping” and or the noun “Sniper” in relation to Auctions in the year 1998, this is not merely mentioning the term, but actually writing the story ABOUT “Sniping” of Auctions (see exhibits). In other words, major publications who had millions of subscribers actually feeling the need to write a story about what people were doing in 1998. They certainly did not write the story about the Defendant, but about the generic practice of doing Auction Sniping, or the people doing it “Auction Sniper”(s).

3. "The New York Times" and "The Washington Post" and "Newsday" had millions of subscribers between them in 1998, Because the term "Sniping" as it relates to online Auctions was such a popular term by 1998, all Three produced articles in that year, (with Sniper used as a noun for a person or website or company, or application that is 'sniping'): see citation #1,#2,#3 in exhibits below.

4. Because the term was popular enough to have three major publication write articles about "Sniping" as it relates to online auctions in a single year (1998). (Sniper as it is used as a noun for person or company, or application that is 'sniping') These terms "Sniping/ Sniper" in association with "Auctions" was already in use by "thousands" of people (if not more) as early as 1998, otherwise these articles would not exist by then.

5. This consistent use of Auction Sniper/Sniping by many companies (and people) has not in the vast majority of cases been in reference to Defendant but to the general practice of describing the purpose, either the 'verb' form "Sniping" in relation to Auctions, or 'noun' form the person/thing that does it, "Sniper" of Auctions, and in the vast majority of cases some other company that is not associated with the Defendant has used this term to describe directly or indirectly their business, if they are an "Auction Sniper" service or product. I personally have emails from 100's of people with the term "Auction Sniper" or "Auction Sniping" or "Auction bidding sniper" etc... and they are not referring to the Defendant or it's products/services, but to the general practice of Sniping, or my service in particular. And I will show many other companies from the past/present with this term in their names or service too.

6. Several companies had been using the term "Auction Sniper" in various forms shortly after the year 2000, including eBay it's self, which included a definition for "Sniping" as it relates to eBay auctions. eBay currently considers "auction snipers" acceptable, but in 2002, eBay Germany actually banned it, which also shows it's popularity and use by a service that has many millions of users by then. See citation #4 in exhibits below.

7. Before 2008, various internet (web hosted) companies adopted the term, but mostly 'people' used the term as they "sniped" auctions manually by sitting in a chair and waiting for the auction to end. As technology made it possible around 2008 for mobile devices, many software (application) companies adopted the term in various forms: See citation #5 in exhibits below. Also see this example list of companies using the term and dates, Citation #6 in exhibits below.

8. As one can see from citation #1 thru #7 in exhibits below, the term "Auction Sniper" or Sniping has been in use for more than 20 years in all types of situations "websites/ individuals/applications" This term (in it's various forms) can be described as having many and multiple examples of "generic" and in general use, **denying the Mark any distinctiveness, Let alone anything other than a description of its purpose.**

VI. PRAYER FOR RELIEF

1. Picture Engine Company, Inc. prays that this Petition be granted and that the '115 Registration be cancelled. In motion picture terms, TTAB 'you are my only hope' that companies like the Defendant do not trademark generic terms like "Auction Sniper"

Respectfully submitted by: /joncarlson/ 9/6/2021

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing

"PETITION TO CANCEL" and any and all exhibits/citations of this document has been served on (OpenSky Project, Inc. through NICHOLAS S KUHLMANN) by forwarding said copy via email to: (nkuhlmann@hjlawfirm.com, amueller@hjlawfirm.com).

Signature: /joncarlson/ Jon Carlson

Date: ___9/6/2021_____

EXHIBITS / CITATIONS

A) link/description for book:

<https://www.theusefulbookofgadgets.com/the-book>

- book titled “Useful Book of Gadgets, Gizmos & Apps”
- first Published October 4, 2016 by Management Books
- ISBN 9781852527723 (ISBN10: 1852527722)
- Author: Martin Bailey

Plaintiff has no association with this Author or Publisher other than this Plaintiff’s app is mentioned in the book, and this Plaintiff shows a link from Plaintiff’s websites to this book.

B) Example email: (name and email address hidden for privacy of user)

Notice two things:

- 1) The author of email took out the standard support email subject title to put in his/her own subject title; including the words “auction sniper”
- 2) The author of the email, mentions using this “auction sniper” software/app/ sniping service since 2014, (that is my app, so there is no confusion here) this date is before the Defendant’s registrations claim of first use.

Date: October 22, 2017 at 7:22am

From: gxxxxxm@aol.com

Subject: Is the auction sniper software having issues this morning?

To: supportX001@PictureEngineCompany.com

Good morning,

I have and use Auction snipe tool for eBay on a Macbook pro using Sierra 10.12.6

This morning it has gone haywire. I had a few snipes and when I tried to open the app, it wouldn't. I was able to open it from Finder, but it started popping up snipes from 2014. I am trying to delete those.

Please advise - I'm hoping this is just a glitch that you have already found and are working to correct. I use this app all the time - first time I had these issues.

Thanks and regards,

Steve Lxxxxxx

citation from article #1:

Mr. Bauer also said that he had been the victim of "sniping," in which a nominal high bidder is picked off by an opportunistic rival as an auction's time limit is about to expire. It happened to him when he had been the high bidder on an 1860 election pamphlet throughout most of the proceedings. With a few minutes left for bidding, he had to leave his desk; when he returned, someone had outbid him by just \$2.50, securing the pamphlet.

— Terry McManus, "Lincoln Artifacts Are Popular on Line," *The New York Times*, October 22, 1998

citation from article #2:

"Sniping" — waiting until the 11th hour to enter a bid — has been elevated to an art form in online auctions, where bidders use e-mail and a mouse to haggle over all manner of goods from all over the world.

— Leslie Walker, "Going, Going . . . ; Investors Bid Up Shares of Online Auction Firm," *The Washington Post*, September 25, 1998

citation from article #3:

Others go for manipulative maneuvers such as sniping — filing a bid at the last possible moment.

"I'll go to my bid page, type in the bid, and wait," Roth explains. "The countdown will say 58 seconds, and I'll sit there and go 57, 56 . . . and when it hits 10 seconds, I'll hit Enter."

Relying on sniping can backfire, Roth admits, when another sniper's bid is higher, or when heavy volume on the system slows processing.

— Denise Flaim, "Going, going, strong," *Newsday* (New York, NY), June 4, 1998

citation from article #4 (Wikipedia article): (<https://en-academic.com/dic.nsf/enwiki/1715915>)

While auction sniping is frowned upon by some people, it does not break any of the rules established by eBay. However, eBay Germany did ban sniping services in 2002

[[<http://www.auctionbytes.com/cab/abn/y02/m10/i25/s02> eBay Germany Bans 'Sniping' Services]] .

(I am fairly certain that this has since been withdrawn, as my app is in use in Germany for eBay.de, and has been for the past eight years) the link reference still works and you can see the actual article.

citation #5: News reports

(see Wikipedia article above if some of these links are no longer accessible as they are that old, which is the point of this cancelation petition:)

* [<http://www.newscientist.com/article.ns?id=dn9398> Mathematicians snipe to win on eBay (23 June 2006, NewScientist.com news service)]

* [<http://www.newscientist.com/article/mg19125585.800.html> Play it cool if you want to win an online auction (01 July 2006, From New Scientist Print Edition.)]

* [http://www.seedmagazine.com/news/2006/07/best_to_bid_late_on_ebay_1.php Best to bid late on eBay]

* [http://www.usatoday.com/tech/science/columnist/vergano/2006-06-25-ebay-physics_x.htm On eBay, it pays to snipe (Posted 6/25/2006 6:21 PM ET, From USATODAY news)]

* [<http://www.omniscienceisbliss.org/sniping.html> Why sniping with one's maximum value is the optimal bidding strategy for eBay (27 April 2004)]

citation #6:

(these references are from a "cracking" website, which was engaged in finding hacks to use these "Auction Sniper/s" to give to users free use.

what is useful with this website is that it lists dates as to when they found "hacks", meaning the actual "Auction Sniper" websites and applications were in use before these dates:

<https://crackinns.com/a/i/y/BayGenie+eBay+Auction+Sniper+Pro+Edition/>

use the search bar to search for individual "Auction Sniper/s" listed below, then look for the first version numbers for earliest dates:

(all dates are for hacks, so actual application/websites were in operation before these dates)

Baygenie Ebay Auction Sniper Pro Edition serials key Nov-29-2006

Twisted S Com Baygenie Ebay Auction Sniper Pro Jan-24-2008

Joybidder-ebay-auction-sniper-pro 1.7.1 serials key Apr-28-2011

Ebay Auction Sniper serial keys gen Sep-20-2009

Ebay Auction Bid Sniper Jun-16-2007

Myibay Ebay Auction Bid Sniper 1.0.0.27 keymaker Oct-31-2008

Ebay Auction Sniper Pro Edition Jun-22-2012

Myibidder Auction Sniper For Ebay key generator Jan-11-2006

Auction Sniper 3.3.3.0 serials generator Nov-10-2009

Ebay Autobid Auction Turbo Sniper - Nnnnewest Version crack Feb-24-2010

The Best Ebay Sniper Tool crack Aug-27-2009

Very Fast Ebay Sniper - Non Public key generator Aug-02-2012

Ebay Sniper serial keygen Nov-01-2009

citation #7: link/description of website directly in class 042:

Link: <https://www.bidnapper.com/index.php3>

Name: Bidnapper - Free eBay Auction Sniper.

Date: Version 1.0: first tracked: 07/12/2013