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

Proceeding	92076846
Party	Plaintiff Picture Engine Company, Inc
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Submission	Motion to Amend Pleading/Amended Pleading
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Date	07/05/2021
Attachments	PetitionCorrected.pdf(107456 bytes)

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

Petitioner: Picture Engine Company, Inc.

Cancellation No.: 92076846

vs. _____

In the matter of trademark registration of:

Registrant: OpenSky Project, Inc

Reg. No.: 6255115

Mark: AUCTION SNIPER

Registration Date: January 26, 2021

PETITION TO CANCEL

INTRODUCTION

Pursuant to 37 C.F.R. § 2.111, Petitioner/Plaintiff, Picture Engine Company, Inc. (hereinafter “Plaintiff”), a Colorado S-corporation based in Boulder, Colorado, submits the following Petition to Cancel (“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 “Defendant’s Mark”).

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

1. 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 on line Auctions. ‘Sniping’ and hence the noun ‘Sniper’ 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.

Plaintiff’s grounds for this Petition are as follows:

2. 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.

3. 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 its various forms like "Auction Sniping" or 'sniper' with any particular source, much less with Registrant.

4. 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. 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).

5. "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.

6. 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.

7. 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. And I will show many other companies from the past/present with this term in their names or service too.

8. 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.

9. 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.

10. As one can see from citation #1 thru #6 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.

11. 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 Petitioner. Moreover, as evidenced by the claims Registrant has asserted against Petitioner 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.

12. 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.

PRAYER FOR RELIEF

13. 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 'you are my only hope' or "Auction Sniper"

CERTIFICATE OF SERVICE

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

“CONSOLIDATED PETITION TO CANCEL” and exhibits citations below 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: ___7/5/2021_____

EXHIBITS

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 - Nnnewest 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

CERTIFICATE OF SERVICE (in case it is required to be at end)

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

“CONSOLIDATED PETITION TO CANCEL” and exhibits citations below 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: ___7/5/2021_____