

ESTTA Tracking number: **ESTTA1222805**

Filing date: **07/19/2022**

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

Proceeding no.	92076998
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Submission	Motion for Summary Judgment  <b>Yes</b> , the Filer previously made its initial disclosures pursuant to Trademark Rule 2.120(a); OR the motion for summary judgment is based on claim or issue preclusion, or lack of jurisdiction.  The deadline for pretrial disclosures for the first testimony period as originally set or reset: <b>07/22/2022</b>
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Attachments	Respondents Motion for Summary Judgment.pdf(349795 bytes )

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

Registration Nos. 5246957 and 5251738  
Marks: OFFICESUITE

Mobail Systems Ltd.	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92076998
	§	
	§	
Broadview Networks, Inc. and	§	
Windstream Intellectual Property	§	
Services, LLC (joined after assignment)	§	
	§	
Respondents.	§	
	§	

**RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT**

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## SUMMARY JUDGMENT EVIDENCE

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Exhibit B: Official Trademark Record Registration No. 5251738 Respondents' Registration	WIN1056-WIN1173
Exhibit C: Petitioner's Response to First Set of Interrogatories	1-7
Exhibit D: Official Trademark Record Serial No. 77193742 Mobile Application	WIN228-WIN353
Exhibit E: Official Trademark Record Serial No. 87806128 MobiSystems Application	WIN1174-WIN1450
Exhibit F: Official Trademark Record Serial No. 79253425 Mobail Application	WIN656-WIN925
Exhibit G: Official Trademark Serial No. 79253292 Mobail Application	WIN354-WIN655
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Respondents Broadview Networks, Inc. and Windstream Intellectual Property Services, LLC (“Respondents”) hereby move for summary judgment pursuant to Federal Rule of Civil Procedure 56 because Petitioner’s generic use of “OfficeSuite” cannot establish the proprietary right required to establish priority of use as a matter of law.

## **I. INTRODUCTION**

Over the course of the last fourteen years, Petitioner has repeatedly attempted – and repeatedly failed - to register “OfficeSuite” because the Trademark Office has properly held at all times that Petitioner’s use of “OfficeSuite” is generic. Petitioner has filed three separate trademark applications for the word mark “OfficeSuite” under three different company names (each claiming to own “OfficeSuite”) in its attempts to register what cannot be registered. Multiple name changes and multiple applications have resulted in nothing but rejection because nothing can alter the fact that the Petitioner’s actual use of “OfficeSuite” in commerce has been - and remains - generic. Therefore, Petitioner’s claimed use in commerce of “OfficeSuite” cannot serve as a basis for priority in these proceedings, and Respondents are entitled to summary judgment on this case-dispositive issue.

## **II. FACTS**

Petitioner filed this Cancellation claiming priority of use and likelihood of confusion. 2 TTABVUE 1.

Respondents filed the “OfficeSuite” registrations that are the subject of this cancellation on August 24, 2015 (Registration No. 5246957) and October 2, 2015 (Registration No. 5251738) (collectively, “Respondents’ Registrations”). Regitz Decl., Exhibit A, Official Trademark Office Record for Registration No. 5246957, at WIN938; Exhibit B, Official Trademark Office Record for Registration No. 5251738, at WIN1068. For purposes of these cancellation proceedings,

Respondents are relying on the later of the two constructive use dates, October 2, 2015 (“Respondents’ 2015 Constructive Use Date”). The first “use in commerce dates” claimed on Respondents’ Registrations was March 13, 2015, and both registrations were issued in July 2017.

*Id.*

Petitioner Mobail Systems Ltd. (presumably the Bulgarian spelling of “Mobile Systems”) claims to be a Bulgarian company established in 1997, though it has operated exclusively through its U.S. distributor with respect to its non-distinctive use of “OfficeSuite” within the United States, Regitz Decl., Exhibit C, Petitioner’s Response to First Set of Interrogatories, Answer to Interrogatory No. 4, at 2-3 (“Petitioner is a Bulgarian company, established in 1997. The U.S. company was established in 2002 under the name Mobil Systems, Inc. The same year the name was changed to Mobile Systems, Inc. In 2015 the name of the company was changed once again to MobiSystems, Inc.”).

Both before and after the issuance of Respondents’ Registrations, multiple trademark applications were filed over the course of fifteen years under entity names Mobile Systems, Inc. (“Mobile”), MobiSystems, Inc. (“MobiSystems”), and Mobail Systems Ltd. (“Petitioner”), all of which claimed to be the owner of the “OfficeSuite” trade name at the time they filed their trademark applications. Regitz Decl., Exhibit D, Official Trademark Office Record for Application Serial No. 77193742, at WIN229 (“Owner Name: Mobile Systems, Inc.”); Exhibit E, Official Trademark Office Record for Application Serial No. 87806128, at WIN1175 (“Owner Name: MobiSystems, Inc.”); Exhibit F, Official Trademark Office Record for Application Serial No. 79253425, at WIN658 (“Owner Name: Mobail Systems Ltd.”); Exhibit G, Official Trademark Office Record for Application Serial No. 79253292, at WIN356 (“Owner Name: Mobail Systems Ltd.”).

The claimed bases for actual use in commerce (prior to Respondents' 2015 Constructive Use Date) for each of these applications were the same three products: Officesuite, OfficeSuite Classic, and OfficeSuite Professional. This use of "OfficeSuite" was consistently held to be generic by three separate Trademark Examining Attorneys (Mary Rossman, Rebecca Caysido, and Ankhi Lindemyer). Regitz Decl., Exhibit D, at WIN240 & WIN331; Exhibit E, at WIN1185 & WIN1417.

The facts set forth below are extracted from the Official Trademark Office Records relating to the applications at issue, all of which were produced to the Petitioner on April 11, 2022, and all of which are attached hereto. Regitz Decl., Exhibits D-G. Also cited below (and attached) are Respondent Interrogatories (First Set of Interrogatories served on November 16, 2021, Second Set of Interrogatories served on March 8, 2022) and Petitioner's Answers (Petitioner Responses to First Set of Interrogatories served on December 16, 2021, Petitioner Responses to Second Set of Interrogatories served on April 7, 2022). Regitz Decl., Exhibits C, H-J.

**The 2007 Mobile "OfficeSuite" Application**  
Serial Number 77193742

Mobile's "OfficeSuite" application ("Mobile Application"), which was rejected as generic in 2007 and again in 2008 (and abandoned in 2008), claimed the following goods: "Computer software that allows the user to access and modify documents on wireless communication devices, namely, mobile phones, hand-held computers, personal digital assistants, electronic personal organizers, and hand-held units for playing electronic games."

**INTERROGATORY NO. 21:** Identify by name (e.g., OfficeSuite Classic, OfficeSuite Professional, etc.) any "computer software that allows the user to access and modify documents on wireless communication devices, namely, mobile phones, hand-held computers, personal digital assistants, electronic personal organizers, and hand-held units for playing electronic games" sold or marketed by Petitioner in the United States and the years in which these products were sold or offered for sale in the United States.



**Answer to Interrogatory NO. 21 (in relevant part):**

- Officesuite since 2004
- OfficeSuite Classic in 2004-2018
- OfficeSuite Professional in 2004-2018

2007 Mobile Application Specimen

MobiSystems OfficeSuite  [DOWNLOAD](#) |  [BUY NOW](#)



MobiSystems OfficeSuite is a software office bundle for S60 Smartphones, comprising the office essentials - Docs and SpreadSheets.

MobiSystems OfficeSuite Classic 7  [DOWNLOAD](#) |  [BUY NOW](#)



Create dynamic documents, calculate and analyze data, and design eye-catching presentations right on your Palm handheld. Work with remote documents and synchronize with your desktop PC.

MobiSystems OfficeSuite Professional 7  [DOWNLOAD](#) |  [BUY NOW](#)



MobiSystems OfficeSuite Professional is a software bundle comprising MobiSystems Docs, MobiSystems SpreadSheet, MobiSystems Slides, MobiSystems Paint, MobiSystems Database Professional with Windows dekstop.

Regitz Decl., Exhibit D, at WIN353.

**The 2018 MobiSystems “OfficeSuite” Application**

Serial Number 87806128

MobiSystems’ “OfficeSuite” application (“MobiSystems Application”), which was rejected as generic in 2018 and again in 2019 (and abandoned in 2019), claimed the following goods: “Computer application software for mobile phones, namely, software for creating, editing and sharing text, spreadsheet, presentation documents.”

**INTERROGATORY NO. 20:** Identify by name (e.g., OfficeSuite Classic, OfficeSuite Professional, etc.) any “computer application software for mobile phones, namely, software form creating, editing and sharing text, spreadsheet, presentation documents” sold or marketed by Petitioner in the United States and the years in which these products were sold or offered for sale in the United States.

**Answer to Interrogatory NO. 20 (in relevant part):**

- Officesuite since 2004
- OfficeSuite Classic in 2004-2018
- OfficeSuite Professional in 2004-2018

**The 2019 Mobail “OfficeSuite” Applications**  
Serial Numbers 79253425 and 79253292

Petitioner’s “OfficeSuite” Madrid protocol applications (“Petitioner Applications”) were rejected as “merely descriptive” and confusingly similar to five of Respondent’s “OfficeSuite” registrations. Although these applications asserted a wide-ranging list of goods and services across three classes, the record establishes that the only commercial use claimed was the same use that had been previously rejected as generic on four separate occasions (i.e., the Mobile Application and the MobiSystems Application).

**INTERROGATORY NO. 12:** From the lists of goods and services described in Petitioner’s Applications, identify any OFFICESUITE-branded goods or services actually sold by Petitioner in the United States.

**Answer to Interrogatory No. 12 (in relevant part):** Petitioner identifies cross-platform application, which allows users to create and manage text, spreadsheets, PDF files, presentation documents as well as calendar and emails and related services,

**INTERROGATORY NO. 21:** Identify by name (e.g., OfficeSuite Classic, OfficeSuite Professional, etc.) any “cross platform applications that allow users to create and manage text, spreadsheets, PDF files, presentation documents as well as calendar and emails and related services” sold or marketed by Mobile Systems in the United States and the years in which these products were sold or offered for sale in the United States.

**Answer to Interrogatory No. 21 (in relevant part):**

- Officesuite since 2004
- OfficeSuite Classic in 2004-2018
- OfficeSuite Professional in 2004-2018

**INTERROGATORY NO. 13:** Identify any OFFICESUITE-branded goods or services actually sold by Petitioner in the United States that are different from the goods described in the Mobile Application and the MobiSystems Application.

**Answer to Interrogatory No. 13 (in relevant part):** [G]oods described in the Mobile Application and the MobiSystems Application include cross-platform application, which allows user to create and manage text, spreadsheets, PDF files, presentation documents as well as calendar and emails and related services. **Therefore, none.** (emphasis added).

It is undisputed that (1) the only OfficeSuite-branded products sold by MobiSystems (f/k/a Mobile Systems) and Petitioner prior to Respondents' 2015 Constructive Use Date were OfficeSuite, OfficeSuite Classic, and OfficeSuite Professional, (2) repeated attempts by MobiSystems (f/k/a Mobile Systems) in 2007 and again in 2018 to register "OfficeSuite" as a trademark were properly and universally rejected by the Trademark Office on the grounds that the claimed use in commerce (i.e., the sale of OfficeSuite, OfficeSuite Classic, and OfficeSuite Professional products) was generic. As a matter of law, Petitioner's generic use of "OfficeSuite" cannot serve as a basis for priority, establish distinctive use, or prove the proprietary rights necessary for an alleged unregistered mark to prevail in cancellation proceedings.

### **III. ARGUMENTS AND AUTHORITIES**

As Petitioner bases its claimed priority on alleged common law rights in an unregistered mark, Petitioner is required to establish proprietary rights in "OfficeSuite," and as the Trademark Office has repeatedly held, this is impossible as a matter of law. Petitioner's use of "OfficeSuite" is generic, and as such, it can never function as a trademark to identify or distinguish its products.

#### **A. Summary Judgment Standard**

The purpose of summary judgment is to save the time and expense of a trial when no amount of additional evidence would reasonably be expected to change the result. *Kellogg Co. v. Pack'Em Enters., Inc.*, 14 U.S.P.Q.2d 1545, 1550 (TTAB 1990) (precedential). If there is no genuine dispute as to any material fact relating to an asserted defense, summary judgment shall be granted, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if there is sufficient evidence for the fact finder to decide the issue in favor of the non-movant when all of the evidence is viewed in a light favorable to the non-movant. *See Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993). The movant bears

the initial burden of demonstrating the absence of any genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant satisfies this burden, the burden shifts to the non-movant to present sufficient evidence to establish a genuine issue of material fact as to the asserted defense. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 U.S.P.Q.2d 1733, 1735 (TTAB 2001) (precedential). Factual assertions devoid of evidentiary support cannot raise a genuine issue of material fact. *See id.* at 1739.

**B. Respondents Rely on Constructive Use Date of October 2, 2015.**

For purposes of this Motion for Summary Judgment, Respondents rely on their latest constructive use date of either of Respondents' Registrations that are subject to these cancellation proceedings: **October 2, 2015**. Parties to a cancellation may rely upon the application filing date (i.e., constructive use date) to establish priority. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 U.S.P.Q. 1134, 1140 (TTAB 2013) (precedential); *see also id.* at n.14 ("Once the relevant application or registration is of record, the constructive use date is established . . ."). Respondents have made the applications of record, and therefore, will rely on October 2, 2015 as the constructive use date for both of the Respondents' Registrations. *See* Regitz Decl., Exhibit A, Official Trademark Office Record for Registration No. 5246957, at WIN938; Exhibit B, at WIN, Official Trademark Office Record for Registration No. 5251738, at WIN1068.

**C. The Trademark Office Has Consistently Held that Petitioner's Claimed Use of "OfficeSuite" is Generic.**

Throughout the prosecution of two separate trademark applications, three different Trademark Examining Attorneys have held over the course of four Office Actions that Petitioner's use in commerce of "OfficeSuite" for the claimed products was at all times generic, and therefore, incapable of functioning as a trademark. It is a foundational principle of trademark law that

“generic terms by definition are incapable of indicating source.” *In re Hotels.com, L.P.*, 573 F.3d 1300, 1302 (Fed. Cir. 2009). For over a decade, Petitioner and its U.S. subsidiary (using two different names) have each claimed ownership rights in “OfficeSuite,” while the Trademark Office has consistently held that the claimed use was generic:

### **Generic Timeline**

**May 2007** - Mobile applies for registration of “OfficeSuite” on the Supplemental Register for its OfficeSuite, OfficeSuite Classic, and OfficeSuite Professional products.

**September 2007** – The Trademark Office refuses Mobile’s application on the Supplemental Register because “the proposed mark is generic for applicant’s goods and is incapable of distinguishing source within the meaning of Trademark Act Section 23(c), 15 U.S.C. § 1091(c).”

**March 2008** – Mobile responds that (1) its “OFFICESUITE product allows users to access their office suite on wireless communication devices, but is not itself an office suite” and (2) that “OFFICESUITE” is not a bundle of programs but rather a program which allows the user to access their office suite on wireless communication devices.”

**April 2008** – The Trademark Office issues an 8-page Final Office Action (with seventy-two attachments) reaffirming its finding of genericness and rejecting Mobile’s arguments by citing evidence contradicting Mobile’s argument and statements about its goods and evidence of use by third parties of OFFICESUITE/OFFICE SUITE for mobile/wireless devices.

**November 2008** – Mobile Application abandoned for failure to respond to April 2008 Office Action.

**February 2018** – MobiSystems (f/k/a Mobile) applies for registration again, this time on the Principal Register using a different description than it used in the 2007 application, but still having no additional OFFICESUITE products in commerce than what was available in 2007 (i.e., OfficeSuite, OfficeSuite Classic, OfficeSuite Professional). *See* Regitz Decl., Exhibit J, Petitioner Responses to Interrogatory Nos. 20 and 21.

**June 2018** – The Trademark Office again refuses registration on the Principal Register and the Supplemental Register “because the applied-for mark is generic and thus incapable of distinguishing applicant’s goods.” The Examining Attorney makes it clear that MobiSystems cannot overcome the refusal by submitting evidence of acquired distinctiveness because “no amount of purported proof that a generic term has acquired secondary meaning can transform that term into a registerable trademark or service mark.”

**December 2018** – MobiSystems responds by claiming that the evidence relied upon by the Trademark Office to refuse registration was insufficient to establish genericness, specifically stating that evidence citing “Office Suite” instead of “OfficeSuite” should be ignored. And even after having been warned in the initial Office Action that submitting evidence of acquired distinctiveness was futile against a genericness refusal, MobiSystems submitted over one hundred pages of alleged acquired distinctiveness evidence.

**February 2019** – The Trademark Office issues a Final Office Action refusing the application on the grounds that MobiSystems’ use of “OfficeSuite” is generic. While confirming that the evidence from the initial Office Action was indeed sufficient to support the genericness determination, the Trademark Office supplements the record with over one hundred pages of its own evidence supporting the genericness determination. The Trademark Office notes that “applicant itself uses the generic term and type of software, ‘office suite’ to refer to its goods” in

its Office Action Response. *See* Regitz Decl., Exhibit E, Official Trademark Office Record for Application Serial No. 87806128, at WIN1184. Finally, the voluminous evidence of alleged acquired distinctiveness submitted by MobiSystems was rejected as irrelevant to the genericness determination.

**October 2019** - MobiSystems Application abandoned for failure to respond to February 2019 Office Action.

Neither the Petitioner nor its U.S. subsidiary claims to have sold any OfficeSuite-branded products prior to Respondents' 2015 Constructive Use Date other than the OfficeSuite, OfficeSuite Classic, and OfficeSuite Professional products. *See* Regitz Decl., Exhibit C & J, Petitioner's Responses to Interrogatory Nos. 12, 13, 20, 21. The Trademark Office has been unwavering in its assessment that the use of "OfficeSuite" in relation to those products is and always has been generic. Four Office Actions issued by three separate Examining Attorneys unequivocally attest to this fact. The factual and legal analyses contained in these Office Actions are unassailable, and therefore, Respondents will not waste the Board's time reiterating or repackaging them, and instead will direct the Board to the Trademark Office arguments, evidence, and conclusions as memorialized in the Office Actions attached hereto. *See* Regitz Decl., Exhibit D, Mobile Application, at WIN328 to WIN335 (Initial Office Action), at WIN231 to WIN312 (Final Office Action); *see also id.*, Exhibit E, MobiSystems Application, at WIN1414 to WIN1443 (Initial Office Action), WIN1178 to WIN1269 (Final Office Action). There is no genuine issue of material fact with respect to the genericness of the Petitioner's use of "OfficeSuite" prior to Respondents' 2015 Constructive Use Date.

**D. Petitioner Cannot Establish the Requisite Proprietary Rights in “OfficeSuite.”**

Petitioner’s Petition for Cancellation is based on Petitioner’s unregistered (and generic) use of “OfficeSuite,” and because Petitioner cannot establish the requisite proprietary rights as a matter of law, Respondents are entitled to summary judgment on this pleaded defense. *See* Respondents’ Answer, Defenses, at ¶ 23. If the use of a trade name does not identify source, then there is no basis upon which to conduct a likelihood of confusion analysis. *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1321 (CCPA 1981) (“Thus, even though something is used as a trademark, if it is not distinctive, the user does not have a trademark because he has no existing trademark rights.”). A petitioner seeking to cancel a registration based on a claimed likelihood of confusion with the petitioner’s own unregistered term cannot prevail without proving that the term is distinctive of the petitioner’s goods. *Towers v. Advent Software, Inc.*, 913 F.2d 942, 946-47 (Fed. Cir. 1990) (“The *Otto Roth* rule is applicable to trademark registration cancellation proceedings as well.”). As explained in Section III.C, there is no genuine issue of material fact with respect to Petitioner’s generic use of “OfficeSuite.” Therefore, Petitioner’s use of “OfficeSuite” prior to Respondents’ 2015 Constructive Use Date cannot be distinctive as a matter of law. *See Towers*, 913 F.2d at 946-47.

**IV. CONCLUSION**

As evidenced by the multiple and consistent genericness determinations issued by the Trademark Office over the last fifteen years with respect to Petitioner’s products, Petitioner lacks any trademark rights in “OfficeSuite.” Petitioner must prove that it owns a proprietary right in “OfficeSuite” to maintain this Cancellation, or at least establish that there is a genuine dispute of material fact on that issue. Through its U.S. subsidiary, Petitioner has repeatedly tried and failed to convince anyone at the Trademark Office that its generic use of “OfficeSuite” is a matter of



reasonable dispute. Because generic terms are incapable of identifying source, Petitioner lacks the requisite proprietary right to prevail in this Cancellation as matter of law.

Summary judgment will save the Board and the parties the time and expense of a trial when no amount of additional evidence would reasonably be expected to change the result. *See Kellogg*, 14 U.S.P.Q.2d at 1550. As the Trademark Office has repeatedly held in relation to Petitioner's use of "OfficeSuite," no amount of evidence can transform a generic term into a trademark. Therefore, Respondents respectfully move for summary judgment on this pleaded and case-dispositive defense and request that this Cancellation be dismissed with prejudice.

Dated: July 19, 2022

Respectfully Submitted,

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PROPERTY SERVICES, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing RESPONDENTS' MOTION FOR SUMMARY JUDGMENT has been served on Alexander S. Lazouski by forwarding said copy on July 19, 2022 via e-mail (without Exhibits) and Federal Express (with Exhibits) to:

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