

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NUMBER 2502431
BY DAVID MICHAEL THROWER**

**TO REGISTER THE FOLLOWING MARK IN CLASS 28:
PUTTERSCOPE**

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IN THE MATTER OF APPLICATION NUMBER 2502431

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TO REGISTER THE MARK PUTTERSCOPE IN CLASS 28

Background

1. On 14 November 2008, David Michael Thrower of 2 Orchard Rise, Ledbury, Herefordshire HR8 2GB ('the applicant') applied to register trade mark application number 2502431 for the mixed device and word mark:

PUTTER SCOPE

For the following goods in class 28:

Golf practice apparatus, golf putters, golfing apparatus, golf training aids, golf swing alignment apparatus

2. On 12 December 2008, the Intellectual Property Office issued an Examination Report in response to the application, which deemed the mark open to objection under Section 3(1)(b) and (c) of the Trade Marks Act 1994 ('The Act') on the basis that the mark consists exclusively of the words 'PUTTER SCOPE', being a sign which may serve in trade to designate the kind of the goods e.g. golf putting aids.

3. On 10 February 2009, the applicant's appointed trade mark attorney, Mr Gareth Jenkins of Wynne-Jones, Laine & James LLP, made written submissions in response to the objection raised to argue that the objection raised was not properly substantiated and further, that the mark was acceptable under the provisions of Section 3(1)(b) and (c) of the Act as, *inter alia* the mark was a neologism and that the term 'scope' had, to quote, "...no bearing to the context within a golfing industry and would therefore be completely abstract in this context"

4. The mark also incorporates a device of what is best described as a telescopic sight, or scope, which replaces the letter 'O' in the word 'SCOPE'. Mr Jenkins submitted that the mark could not be devoid of any distinctive character because of this device and that the mark in its entirety must be considered distinctive for the goods claimed.

5. On 9 March 2009, the examiner wrote to Mr Jenkins confirming that in his opinion, the objection was valid on the basis that the mark did not possess more distinctive character than the plain words 'PUTTER SCOPE', as the device element served merely to reinforce the meaning of the words.

6. A request for a hearing of the application was made on 22 April 2009 and the hearing was held on 2 July 2009 and attended by Mr Jenkins. At hearing, the objection raised during examination was maintained on the basis that the words 'putter scope' appear to be an entirely apt term for goods which may perform this function i.e. a scope attached to a golf putter which allows the user to better observe putting action or putting lines. The range of goods claimed by the applicant in Class 28 clearly covers goods of this nature e.g. golf training aids and golf swing alignment apparatus. The device element was considered to be nothing more than a simple device of a scope and therefore did not add any distinctive character to the mark overall.

7. An invitation was extended to Mr Jenkins under Rule 62(1) of the Trade Mark Rules 2008 to obtain examples of the mark in use to ascertain whether the goods actually performed this function. Such examples, including illustrations from the Mr Thrower's patent application GB0823511.1 for the goods claimed, were filed on 4 August 2009, however as they demonstrated that the goods claimed are instruments for viewing, or aligning, golf balls, the mark was deemed to be an apt descriptive term and the objection raised under Section 3(1)(b) and (c) of the Act was therefore considered valid. The application was refused on 24 November 2009.

8. On 4 December 2009, Mr Jenkins submitted a form TM5 to request a full Statement of Grounds to set out the reasons for refusal of the application.

Decision

9. Sections 3(1)(b) and (c) of the Act read as follows:

"3. - (1) The following shall not be registered –

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services.

On consideration, the objection under Section 3(1)(c) is not maintained.

Relevant Authorities

10. The European Court of Justice (ECJ) has repeatedly emphasised the need to interpret the grounds for refusal of registration listed in Article 3(1) and Article 7(1), the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark, in the light of the general interest underlying each of them (Case C-37/03P, *Bio ID v OHIM*, paragraph 59 and the case law cited there and, more recently, Case C-273/05P *Celltech R&D Ltd v OHIM*).

11. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. Thus, in the case of the registration of colours *per se*, not spatially delimited, the Court has ruled that the public interest is aimed at the need not to restrict unduly the availability of colours for other traders in goods or services of the same type. Also, in relation to Section 3(1)(b) (and the equivalent provisions referred to above) the Court has held that "...the public interest ... is, manifestly, indissociable from the essential function of a trade mark" (Case C-329/02P, SAT.1 *SatellitenFernsehen GmbH v OHIM*).

12. The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above mentioned judgment). Marks which are devoid of distinctive character are incapable of fulfilling that essential function.

Section 3(1)(b)

13. The objection raised under Section 3(1)(b) is maintained against the following goods:

Class 28: golf practice apparatus, golf putters, golfing apparatus, golf training aids, golf swing alignment apparatus.

14. I approach this ground of objection on the basis of the following principles derived from the ECJ cases referred to below:

- an objection under Section 3(1)(b) operates independently of objections under Section 3(1)(c) – (*Linde AG (and others) v Deutsches Patent-und Markenamt*, Joined Cases C-53/01 to C-55/01, paragraphs 67 to 68);
- for a mark to possess a distinctive character it must identify the product (or service) in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product (or service) from the products (or services) of other undertakings (*Linde* paragraphs 40-41 and 47);
- a mark may be devoid of distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive (*Koninklijke KPN Nederland NV v Benelux-Merkenbureau*, Case C-363/99, paragraph 86);
- a trade mark's distinctiveness is not to be considered in the abstract but rather by reference to the goods or services in respect of which registration is sought and by reference to the relevant public's perception of that mark (*Libertel Group BV v Benelux Merkenbureau*, Case C-104/01 paragraphs 72-77);
- the relevant public must be deemed to be composed of the average consumer who is reasonably well-informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*).

15. The instant mark is comprised of two words: 'PUTTER' and 'SCOPE' with the device of a 'scope' (see below) incorporated into the letter 'O'. There are also some very minimal additional stylistic elements in that the letters 'P' and 'S' are in bold font.

16. Mr Jenkins has submitted in correspondence (his letter of 10 February 2009 refers, paragraph 5, page 1) prior to the hearing that:

- the mark is not devoid of distinctive character under the provisions of Section 3(1)(b) of the Act, as the mark is "visually distinctive"; and
- the mark was inherently distinctive, as it did not describe a characteristic of the goods and, in this context, the term 'putter scope' is not a known dictionary term.

I take the first of these assertions to refer to the stylistic and figurative elements of the mark, that is, other than just the plain words. In dealing with these points, I intend to comment upon the composition of the mark as a whole.

17. The words 'putter' and 'scope' are clearly understood and relatively commonplace. The Collins English Dictionary provides the following definitions for both respectively:

PUTTER *noun*, a club for putting, usually having a solid metal head;

SCOPE *noun*, indicating an instrument for observing, viewing, or detecting: *microscope*; *stethoscope*.

18. The term 'putter scope' is therefore a combination of two nouns that create a grammatically correct whole with a clearly understandable meaning in the context of the goods at issue, as I discuss below. I cannot agree with Mr Jenkins' assertion that the mark is a neologism i.e. a newly coined word, that this, in itself, is enough to justify registration. I refer to the *Wm Wrigley Jr & Company v OHIM* Case C-191/0P, paragraph 32 which states (*inter alia*):

"... it is not necessary that the signs and indications composing the mark ... actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provisions itself indicates, that such signs and indications could be used for such purposes."

My contention is that 'putter scope' has an aptness of meaning in relation to the goods at issues that amounts to no more than a description.

19. It is pertinent at this point to consider the average consumer and their immediate and natural expectation when encountering the mark upon the goods claimed in Class 28. I take that latter to be "golfers" subsuming under that term the full spectrum of individuals from professionals to what might be called occasional 'social' players, but including all who would have an desire to improve their performance of the sport. One does not need to be an expert in the game of golf to appreciate that it is a

precision sport with an emphasis on ball control. A putter is a club used for 'putting', or rolling the ball on the ground. Alignment is therefore essential, as is hand to eye co-ordination and distance gauging. From my own research, range finders are relatively common tools in the golfing trade; these goods are also referred to as 'golf scopes', for example see the annex to this decision from various websites, referring to the Seemore Solana Protoputter (www.maximusgolf.co.uk), the Adler Focus 8x21 Golf Scope (www.pulsar-optical.co.uk) and the Bushnell Golf Scope Range Finder (www.golfonline.co.uk). These goods all incorporate a scope, or reticle, and are used as a tool to assist the golfer to align a shot. The applicant has submitted documents under Rule 62(1) and Mr Jenkins' covering letter dated 4 August 2009 states that the goods are "clearly an alignment tool", in other words a device to improve co-ordination.

24. I therefore conclude that the words are, of themselves, non-distinctive and the crux of the decision in this matter is, consequently, whether the addition of the device elements means that the mark that the mark is not entirely devoid of any distinctive character for the purposes of Section 3(1)(b).

25. In order to make this assessment, I must analyse the entirety of mark applied for, whereby each individual element is deliberated upon and the likely impact of the whole upon the average consumer considered. As in *QUICK WASH ACTION*, a decision of the Appointed Person (BL O-205-04) the mark herein is a composite mark incorporating words and a device composed in such a matter that, in my opinion, does not confer sufficient trade origin significance when applied to the goods in question. In the *SUN RIPENED TOBACCO* decision, Case O-200-08, the Appointed Person stated at paragraphs 11 and 13:

"11. It was pointed out to me at the hearing that *SUN RIPENED TOBACCO* may not be a known term...and that no evidence had been produced to demonstrate that the term was used by others. I do not dispute this - I therefore do not know whether the words represent a term of art, nevertheless, I take the view that the words will be seen by the average consumer as a very simple and direct reference (even if the consumer has not encountered the term before) to the fact that the goods consist of or contain tobacco that has been ripened by the sun...

13. The impact of the words in the mark are clear, namely that of a reference to the goods as described above. It is also clear that the presence of the sun device has a relationship to these words and, to some extent, may re-enforce or supplement their meaning; in other words, the sun device, in the context of the mark as a whole, is not an arbitrary or fanciful inclusion.

26. I believe this principle applies to the mark herein and I am unconvinced that the additional presentation and figurative elements make the mark perceptively different from the plain font words 'PUTTER SCOPE'. The device element is, in my view, entirely devoid of any distinctive character for the goods claimed herein. The scope, or sight is a simple representation of a reticle, or sighting device. The Collins English Dictionary gives a definition for such as:

Reticle, *noun*, a network of lines lines, wires etc, placed in the focal plane of an optical instrument to assist measurement of the size of position of objects under observation.

27. This definition appears to fit entirely with the intended purpose of the applicant's goods, as borne out by the patent application GB0823511.1, which was submitted to the Registrar in the course of the application process. Mr Jenkins describes the goods as operating by placing a golf ball under a recticle which the user then looks through to align the ball before putting. The figurative element in the mark is a clear and unimagative representation of the latter item.

28. I therefore conclude that the relevant consumer of the goods in question would not consider that these marks denote trade origin. The average consumer of the services would, upon encountering the mark 'PUTTER SCOPE' as filed, perceive the same as no more than an indication of the intended purpose of the goods. I am not persuaded that the trade mark applied for, when considered as a whole, has the necessary distinctive character that would enable me to conclude that it would service in trade to distinguish the applicant's goods from other traders.

Conclusion

29. In this decision I have considered all of the arguments submitted in relation to the application and for the reasons given, it is refused under the terms of Section 37(4) of the Trade Marks Act because it fails to qualify under Section 3(1)(b) of the Act.

Dated this 17 May 2010

Jane Hallas
For the Registrar

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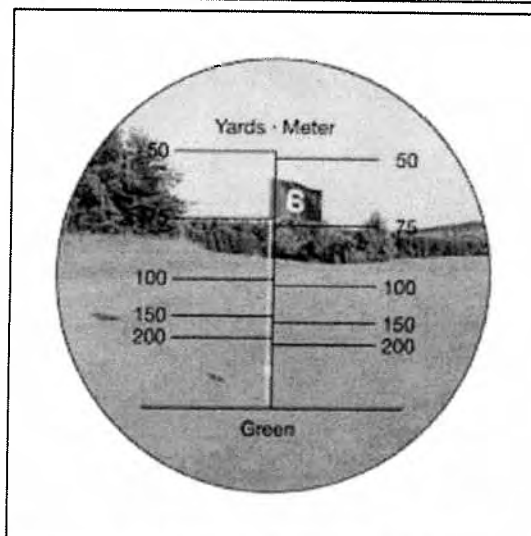
Magnification: 8x

Aperture(mm): 21

Weight(g): 86

Size(mm): 85 x 31

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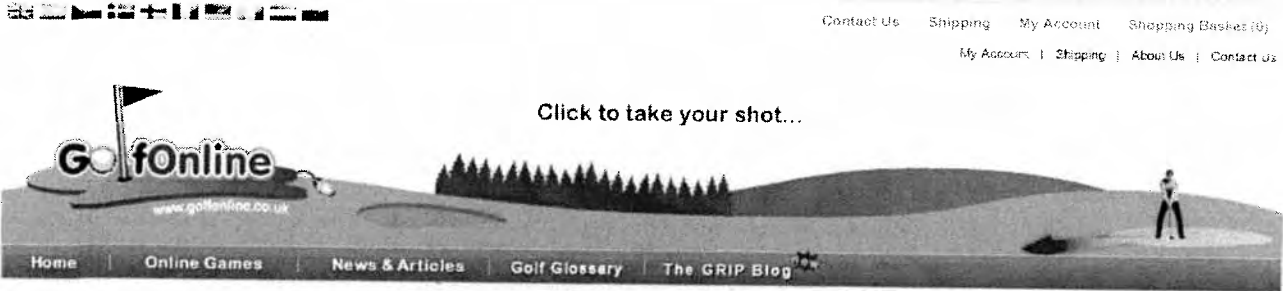
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Bushnell Golf Scope RangeFinder



Product Information

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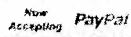
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