TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2199425
BY OPEN INTERACTIVE LIMITED TO REGISTER
A TRADE MARK IN CLASSES 9, 16, 38, 39, 41 & 42

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DECISION AND GROUNDS OF DECISION

On 7 June 1999, Open Interactive Limited of 34 - 35 Farringdon Street London EC4A 4HJ applied under the Trade Marks Act 1994 to register the trade mark OPEN TICKETS in respect of the following goods and services:

Class 9. Publications by electronic means; CD ROM's; compact discs; optical discs; cassettes; computer discs and tapes; media for storing, carrying or transferring information, data, signals, images, sound and machine readable media; television sets; set top boxes; amusement machines for use with television receivers; apparatus for coding, decoding, receiving or sending television signals; audio visual teaching apparatus; apparatus for handling video, audio or video and audio signals.

Class 16. Printed matter; publications; periodicals; magazines; newsletters; books; directories; pamphlets; graphic reproductions; graphic prints; stationery; posters, pictures; advertisement boards; boxes.

Class 38. Communication services; provision of information about communication, broadcasting and electronic media; electronic mail; broadcasting services; news agencies; computer aided transmission of messages and images; message sending; electronic communication services; telecommunication services; communication of fashion information; weather forecasts and information; communication of sports news and information, financial news and information; entertainment news and information; communications utilising computers; rental of communications and broadcasting apparatus; advising, consultation and information services relating to the aforesaid; providing access to on-line communication services.

Class 39. Provision of information relating to travel; travel agency services; travel reservation services.

Class 41. Publication of texts; rental of sound recordings; rental of motion pictures; organisation of competitions; providing amusement arcade services; production of television and radio programmes; dubbing; educational information; education services via television, video or the internet; film production; television entertainment; provision of information relating to fashion; provision of information relating to entertainment; reservation services for entertainment.

Class 42. Providing access to on-line information; news reporting services; horoscope casting; hotel reservations; fashion information; weather forecasting and information; reporting of sports news and information, financial news and information, entertainment news and information.

Objection was taken under paragraphs (b) and (c) of Section 3(1) of the Act on the grounds that the mark is a sign which may serve in trade to designate the intended purpose of the goods and services eg goods and services relating to open tickets for use in travel, entertainment etc.

Objection was also taken under Section 5(2) of the Act but this objection was subsequently waived in full and so I need make no further reference to it.

At a hearing at which the applicants were represented by Mr J Barry of Olswang, their trade mark agents, the objections under Section 3(1)(b) and (c) of the Act were maintained. Following refusal of the application under Section 37(4) of the Act, I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Marks Rules 2000 to state in writing the grounds of decision and the materials used in arriving at it.

No evidence of use has been put before me. I have, therefore, only the prima facie case to consider.

Section 3(1)(b) and (c) of the Act reads as follows:

"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".

The mark consists of ordinary dictionary words which, individually, are so well known that I believe that I do not need to set out full separate dictionary references. A particular meaning of the word "open" given in Collins English Dictionary (Millennium Edition) is given as meaning "29. (of a return ticket) not specifying a date for travel". But the word "open" does not necessarily only mean open in terms of time. For example, some hotel chains provide vouchers or tickets that can be used in any of their hotels, and so "open" in this context would mean that the ticket could be used at any location. The term, as a totality, OPEN TICKETS, is therefore likely to convey the meaning, to the general public, that when applied in relation to tickets, the ticket on offer is intended to be without restriction.

The agent argued at the hearing and in later correspondence that the term OPEN TICKETS is acceptable within the meaning of Sections 3(1)(b) and (c) of the Act in respect of the goods and services claimed, if a restriction is placed in the specifications to exclude goods in Classes 9 and 16 being, or relating to, sporting or travel tickets, and services in Class 39 relating to the

reservation of tickets for transportation. I rejected this proposal and set out in an official letter dated 22 November 2000 the following exclusions to the specifications applied for that I would be prepared to accept:

Classes 9 and 16

"But not including any of the aforesaid goods being, or relating to, tickets".

Classes 38, 39, 41 & 42

"But not including any of the aforesaid services relating to tickets".

I explained that the restrictions proposed by the agent related only to a limited range of tickets which do not, in my view, go far enough to ensure that the term will be perceived as a trade mark for all goods and services claimed. The agent's proposals would still allow trade mark registration rights of the term OPEN TICKETS in respect of other tickets that could be considered "open" by the general public (ie tickets without restriction). It seems to me that if the term OPEN TICKETS would be taken to be a descriptor, but the product or service relates to non open tickets (ie for use at a specified time and on a specified date) then the term would not serve its essential function of a trade mark by denoting trade origin. For example, a cinema or theatre ticket bearing the sign OPEN TICKETS would, in the prima facie, convey the meaning that the ticket is "open" and may be used at the purchaser's leisure, even if that is in fact not the intention of the issuing authority. And even if "open tickets" have not been used in the past, in for example cinemas and theatres, there is no reason to believe that service providers may not begin to issue "open tickets" for the convenience of the customer. This could easily be seen by the general public as a new marketing initiative in my view.

Consequently, I maintained that for this application to proceed to publication in respect of all goods and services claimed, an exclusion relating to all tickets (ie for any event or purpose) must be imposed. The very fact that the applicant refused to accept this restriction is indicative of the applicant's intention to use the term in relation to other types of tickets to those mentioned in the agent's proposed exclusions. At no time did the agent offer any explanation of the actual goods and services provided or proposed to be used by the applicant, which might have allowed the application to proceed with a positively limited specification.

In this decision, I bear in mind the comments of Mr Geoffrey Hobbs QC in the AD 2000 Trade Mark Case [1997] RPC 168 at page 176, lines 9 to 23:

> "Although Section 11 of the Act contains various provisions designed to protect the legitimate interests of honest traders, the first line of protection is to refuse registration of signs which are excluded from registration by the provisions of Section 3. In this regard, I consider that the approach to be adopted with regard to registrability under the 1994 Act is the same as the approach adopted under the old Act. This was summarised by Robin Jacob Esquire QC in his decision on behalf of the Secretary of State in *Colorcoat Trade Mark* [1990] RPC 511 at 517 in the following terms:

> "That possible defences (and in particular that the use is merely a bona fide description) should not be taken into account when considering registration is very well settled, see eg *Yorkshire Copper Work Ltd's Trade Mark Application* [1954] RPC 150 at 154 lines 20-25 per Viscount Simonds LC. Essentially the reason is that the privilege of a monopoly should not be conferred where it might require "honest men to look for a defence"."

I have also considered the comments of Mr Justice Jacob in the TREAT judgement [1996] RPC 281 where he said:

> "Next is TREAT within Section 3(1)(b). What does *devoid of distinctive character* mean? I think the phrase requires consideration of the mark on its own, assuming no use. Is it the sought of word (or sign) which cannot do the job of distinguishing without first educating the public that it is a trade mark? A meaningless word or word inappropriate for the goods concerned ("North Pole" for bananas) can clearly do. But a common laudatory word such as "TREAT" is, absent use and recognition as a trade mark, in itself, (I hesitate to borrow a word from the old Act *inherently* but the idea is much the same) devoid of any distinctive character".

In this decision I have considered all documents filed by the agent and, for the reasons given, it is refused under the terms of Section 37(4) of the Act because it is debarred from registration under Section 3(1)(b) and (c) of the Act.

Dated this 19TH day of June 2001

JANET FOLWELL
for the Registrar
the Comptroller General