

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte DAVID BOURCHIER BOWKER

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Appeal No. 2002-2188  
Application No. 09/442,970

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HEARD: April 8, 2003

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Before ABRAMS, FRANKFORT and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

David Bouchier Bowker appeals from the final rejection of claims 1 through 6, 8 through 15 and 17 through 20, all of the claims pending in the application.

THE INVENTION

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Application No. 09/442,970

The invention relates to "a method of repairing divots and to a divot repair body for use in this method" (specification, page 1).<sup>1</sup> Representative claims 1 and 11 read as follows:

1. A method of repairing a divot which includes the steps of:

providing a divot repair body which comprises a particulate growing material pre-selected to accommodate turf requirements of a golf course, said body being moulded into a dry, consolidated mass of a pre-measured amount;

depositing the divot repair body into a divot to be repaired; and

crushing the divot repair body and spreading the particulate growing material within the divot, to thereby fill the divot.

11. A divot repair body for use in a method of repairing a divot, which comprises a particulate growing material pre-selected to accommodate turf requirements of a golf course, said body being moulded into a dry, consolidated mass of a pre-measured amount that can be deposited into a divot in a grass covered surface and then be crushed to spread the growing material and thereby fill the divot.

#### THE REJECTION

The appealed rejection, which is not easily paraphrased, is reproduced here verbatim:

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<sup>1</sup> As used in the appellant's specification (see pages 2, 5 and 6 and numeral 12 in Figures 1A and 1C) and claims, the term "divot" refers to the hole or cavity formed in a grass playing surface by a golf stroke which strikes a segment from the surface.

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Claims 1-20 [sic, claims 1 through 6, 8 through 15 and 17 through 20] are rejected under 35 U.S.C. 102(b) based upon a public use or sale of the invention (see Turf Management for Golf Courses, Beard, 1982 ISBN 0-8087-2872-5<sup>2</sup>). The examiner is given official notice that the method and device of the applicant are well known and currently in use.

Whenever divots are made on a golf course, or polo grounds, it is common for the players, groundskeepers, observers, etc to replace the divots caused by the activity. As the applicant rightly pointed out in the specification, many golf courses have instituted rules requiring golfers to replace and or fill in divots with sand provided by the course. The applicant also pointed out that the sand in the bins is often soggy. Soggy sand is known to clump, a trait that is often used informing sand castles at the beach. Soggy, clumped sand and soil also often dries into hardened, formed clumps. Hydrous aluminum silicate is a form of common clay and found naturally in many parts of the world where there would be golf courses.

The claimed method and device are equivalent to taking a clump of dirt, which may have grass seed, sand, hydrous aluminum silicate, nutrients from the groundskeepers or naturally, minerals or compounds which would alter the pH of a substance, and placing the clump of soil, probably with grass attached to the clump of soil, and placing it in the divot hole and smashing it until it conforms with the divot hole to be repaired. The clumps can be found pre-formed on the ground or in a bag or other container having the soil, whether provided by the course or by the golfer. Additionally, it is then common to cover this repair with other bits of grass and dirt or sand, in whatever form it may be (Beard pg 187-188).

It is also well known to use colorant with material for filling divot holes and dressing golf courses (Beard pg 225) to make the grounds more appealing to the golfers [final rejection, Paper No. 5, pages 2 and 3].

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<sup>2</sup> The record (see Paper No. 3) contains the following citation of this reference on a Form PTO-892: "Beard, Turf Management for Golf Courses, 1982, Burgess, pg 187-188, 225)."

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In responding to the arguments advanced on appeal by the appellant, the examiner further explains that

[t]he examiner relies on Beard to show the state of the art. The examiner contends that the method and device as claimed by appellant are currently performed and used many times a day throughout the world by golfers and cites Beard (pp 21, 187) as a reference to the general practice of divot repair. The examiner contends that when a golfer creates a divot by swinging a club, a molded divot repair body having all of the characteristics claimed by appellant is created, being molded by the swing of the club into the turf. This turf will have the precise mix and quantity of soil, sand, seed, colorant, fertilizer and whatever else the greenskeeper has applied to that specific portion of the golfcourse, for that specific portion of the golfcourse; indeed, for that specific divot location. When either the golfer or another retrieves this dry, pre-measured, molded divot repair body and replaces this divot in the divot hole and smashes it down with her foot, the method of appellant is being accomplished. In this way, Beard does in fact teach the method and divot repair body of appellant [examiner's answer, Paper No. 11, pages 3 and 4].

Quite understandably, the appellant (see the main and reply briefs, Paper Nos. 10 and 13) takes great umbrage at all of this.

The finding by the examiner that the subject matter set forth in the appealed claims was in public use or on sale in this country within the meaning of § 102(b) rests on a concoction of the Beard reference, Official Notice and admissions in the appellant's specification regarding the state of the prior art. The examiner's reliance on these seemingly independent

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evidentiary sources to piece together a showing of anticipatory public use or sale is highly suspect.

On a more substantive level, neither of the prior art practices of repairing a divot with the grass segment struck therefrom or with a loose growing material such as sand meets the limitations in independent claims 1 and 11 requiring a divot repair body moulded into a dry, consolidated mass of a pre-measured amount. Simply put, the examiner's determination that the removed grass segment or an agglomerated clump of the growing material constitutes such a divot repair body stems from baseless conjecture as to the physical properties of these entities and a completely unreasonable interpretation of the claim limitations at issue as they would be understood by a person having ordinary skill in the art.

Given the foregoing deficiencies in the examiner's position, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of independent claims 1 and 11 and claims 2 through 6, 8 through 10, 12 through 15 and 17 through 20 which depend therefrom.

#### SUMMARY

The decision of the examiner to reject claims 1 through 6, 8 through 15 and 17 through 20 is reversed.

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REVERSED

NEAL E. ABRAMS	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
CHARLES E. FRANKFORT	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
JOHN P. McQUADE	)	
Administrative Patent Judge	)	

JPM/gjh

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