

THIS OPINION
IS NOT A PRECEDENT
OF
THE TTAB

February 12, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Healthier Choice Flooring, LLC

Serial No. 78682683

Harry B. Ray of Husch & Eppenberger, LLC for applicant Healthier Choice Flooring, Inc.

Aisha Y. Salem, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Grendel, Drost and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Healthier Choice Flooring, LLC has filed an application to register the mark SOUND SOLUTION (in standard characters) on the Principal Register for

Sound absorbing flooring underlayment made of polyurethane foam and polyurethane foam with attached polyethylene film, sold only through distributors and retailers who specialize in floor covering products and who do not distribute or sell at retail acoustical ceiling and wall tiles for use in the building industry,

in International Class 17 (as amended).¹

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C.

¹ Serial No. 78682683, filed August 6, 2005, based on use (first use and first use in commerce as of February 5, 2003), and upon a foreign registration pursuant to Trademark Act § 44(e).

§ 1052(d), on the ground that applicant's mark so resembles the mark SOUND SOLUTIONS, previously registered for "acoustical ceiling and wall tiles for use in the building industry"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d

² Registration No. 1215822 ("sound" disclaimed), issued November 9, 1982, currently owned by Sound Solutions Canada, Inc. Trademark Act §§ 8 & 9 affidavits accepted, Trademark Act § 15 affidavit acknowledged.

1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999), and cases cited therein.

Evidence

Examining Attorney's Evidence

The examining attorney submitted the following evidence in support of the refusal to register:

1. Three third-party registrations submitted to show a relationship between the goods recited in the subject application and those in the cited registration.

2. Excerpts from eleven web sites, showing the advertising and sale of acoustical underlayment on the one hand and acoustic ceiling or wall tiles on the other.

Applicant's Evidence

Applicant submitted the following evidence in support of registration:

1. The declarations of applicant's President, Craig Poteet, signed August 18, 2006, and February 13, 2007. Mr. Poteet avers in essence that

(a) applicant "has used the trademark SOUND SOLUTION ... to identify its flooring underlayment for over four years";

(b) that he has been employed in the floor covering industry for 5 years;

(c) that to his knowledge "there is no significant overlap in the marketplace between the sale and distribution of flooring underlayment and the sale and distribution of wall and ceiling products";

(d) that "[f]looring underlayment is not typically sold through the same channels of distribution as ceiling and wall products. Generally, flooring underlayment is sold by manufacturers to wholesale floor covering distributors, who in turn sell the flooring underlayment to floor covering retailers. Floor covering distributors and retailers are usually specialized and sell only floor covering products";

(e) that "floor covering retailers do not sell any manner of wall or ceiling products";

(f) that applicant's products are expensive and purchasers are sophisticated;

(g) that despite four years of the parties' concurrent use of their marks on the respective goods, he has not seen any instances of actual confusion.

2. The declarations of eight individuals in the flooring industry, including consultants, the executive director of the American Floorcovering Alliance, and several distributors of floor covering products. These third-party declarations generally track and support Mr. Poteet's declaration.

3. A TESS search result page for the search "live[ld] and floor[gs] not ceiling[gs] not wall[gs]." This result page indicates that the search resulted in 8,335 "hits," and further displays a listing of the first 100 marks (literal portions only) and the associated application and registration number (if any).

4. Copies of 20 registrations from the search in item #3.

5. A TESS search result page for the search "live[ld] and (wall[gs] or ceiling[gs]) not floor[gs]." This result page indicates that the search resulted in 14,218 "hits," and again lists the first 100 marks and application or registration numbers.

6. The full TESS print-out of twenty registrations from the search in item #5.

7. Web pages from five distributors who sell ceiling and wall products, but not floor covering products.

Discussion

I. Similarity of Marks

We consider first whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that its mark is "highly similar" to the mark in the cited registration, "but not identical." Applicant's Br. at 6. Applicant seeks registration for the mark SOUND SOLUTION, while the mark in the cited registration is SOUND SOLUTIONS. We find that the marks are substantially identical in sound, appearance, connotation and commercial impression. The only difference between the marks - the use of the singular word

"SOLUTION" in the subject application as opposed to the plural word "SOLUTIONS" in the cited registration - is an immaterial distinction. *Wilson v. Delauney*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957); *In re Pix of America, Inc.*, 225 USPQ 691, 692 (TTAB 1985).

This factor strongly supports the refusal to register.

II. The Similarity or Dissimilarity and Nature of the Goods

Considering next the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are

in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002). Moreover, when the marks at issue are legally identical, the extent to which the goods of the applicant and registrant must be similar or related to support a finding of likelihood of confusion is lessened. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

A. Nature of Goods

As noted above, the goods at issue are "sound absorbing flooring underlayment made of polyurethane foam and polyurethane foam with attached polyethylene film," while the goods in the cited registration are "acoustical ceiling and wall tiles...."

Applicant's goods and those of the cited registrant are plainly different - applicant identifies a sound-absorbing product, which is to be installed underneath flooring, while the cited registration covers sound-absorbing products to be installed on walls and ceilings.³ Nonetheless, the examining

³ The examining attorney's statement that "registrant's identification of goods is broad enough to include applicant's more narrow identification..." Brief at 7, is incorrect. There are no goods which actually fall within both identifications.

attorney argued that the goods are both "for the purpose of reducing noise." Final Office Action at 3. We agree that the goods are related in this purpose and function. As such, both applicant's goods and the cited registrant's goods would be purchased to reduce noise in a room or building, and may be used as complementary products, one on floors and the other on walls and ceilings, to provide maximum noise reduction.

B. Third-Party Registrations and Market Evidence

In support of her argument that the goods are related, the examining attorney has made of record the following third-party registrations:

Reg. No.	Mark	Goods
2642140	EXPANKO	Cork material products namely floor, ceiling and wall tiles, underlayment, closures and rolls.
2756029	TDC (stylized)	Wooden flooring, wood tile floors and flooring underlayments; non-metal doors; ceiling tiles of clay, glass, gypsum, ceramic, earthenware or wood.
2985571	ROCKFON	Panels, sheets, mats and batts, all made of mineral fibers and for insulation against sound, noise, heat, cold and fire and for acoustic regulation. Wall, floor and ceiling panels of mineral fibers.

Although third-party registrations which cover a number of differing goods, and which are based on use in commerce, are not evidence that the respective marks are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re*

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Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

We first note that Registration No. 2985571 was filed under the provisions of the Madrid Protocol, as implemented in Trademark Act § 66, 15 U.S.C. § 1141f, and no declaration of use under Trademark Act § 8, 15 U.S.C. § 1058, is yet of record in this registration. Because "requests for extension of protection," (*i.e.*, applications) under the Protocol are registered without any requirement for use of the mark in the United States, until the filing of a declaration of use, such registrations are of no use in inferring that purchasers in this country are accustomed to seeing a common source for the goods or services listed, and we have accordingly given this registration no consideration. *Cf. Mucky Duck*, 6 USPQ2d at 1470, n. 6 (registrations issued pursuant to Trademark Act § 44 "have very little, if any, persuasive value" for this purpose).

Registration No. 2756029 identifies flooring and flooring underlayment on the one hand and wall and ceiling tiles on the other. Nonetheless, it is not indicated that the goods in this registration are intended for use in noise abatement, as are the goods at issue in this case. Although grammatically, "sound absorbing flooring underlayment" would appear to be a subset of "flooring underlayment," such is not the case for purposes of registration. "Sound-absorbing flooring underlayment" is in International Class 17, while "flooring underlayment" is in

International Class 19. Indeed, some of the third-party registrations submitted by applicant, *see infra*, include both goods, in their respective classes. Therefore, it is logical to assume that the goods identified in this third-party registration do not encompass "sound-absorbing flooring underlayment" because, if they did, the registration would include a specification of such goods classified in International Class 17.

The examining attorney's last registration, No. 2985571, is somewhat ambiguous as to whether it covers wall, floor, and ceiling treatments for sound insulation. However, even assuming that it does, this and the preceding '029 registration offer only weak support for the proposition that such goods are related.

Applicant submitted two lists of third-party applications and registrations from the USPTO's Trademark Electronic Search System (TESS), and twenty records of registrations from each list, arguing that the "Examining Attorney does not accurately represent the relevant markets." The first list shows the results of a search for records in which the word "floor," but not the words "ceiling" or "wall" appear in the identifications of goods or services. The second list shows the results of a search for records in which the word "wall" or "ceiling," but not the word "floor" appear in the identifications of goods or services.

We find the results of applicant's search⁴ to be of very little relevance. There are undoubtedly many registrations that include certain words but not others, and many of the registrations submitted by applicant involve entirely different goods than those at issue here. But even the registrations for comparable goods do not support applicant's point because ownership of, say, a registration for sound-absorbing flooring underlayment, does not preclude the registrant from owning a different registration for acoustic ceiling tiles or selling such products without a registration. Moreover, the relevant question is not whether a majority of purveyors of applicant's goods also sell the registrant's (and vice versa), but whether there is a significant relationship between the goods or an overlap in their channels of trade, such that confusion is likely.

The examining attorney has also made of record a number of web pages, indicating the marketing and sale of sound-reducing flooring products together with acoustic products for walls and ceilings. For instance:

ACOUSTICAL SURFACES, INC.

Your One-Stop Resource for Soundproofing and Noise
Control Solutions

* * *

⁴ The search result lists are part of the record because the examining attorney raised no objection to their submission, and we have considered them for what they are worth, although they are of little probative value without information such as the associated goods and services, and the name of the owners. Further, we note the result lists indicate that most of the "hits" are applications, which are evidence of little more than their filing. We add, however that inclusion of more of the complete registration records would not change our view that this evidence is entitled to little, if any, weight.

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- Flooring Underlays
* * *
- Ceilings
* * *
- Wall Insulation

www.acousticalsurfaces.com (2/22/06).

OWENS CORNING®
QUIETZONE® PRODUCTS
* * *

QuietZone® Noise Control Batts

- Acoustically engineered to absorb sound vibrations within the wall cavity to control noise in the home.
- Installed between interior walls, floors and ceilings
* * *

QuietZone® Acoustic Floor Mat
QuietZone SOLSERENE® Fabric Ceiling System

QuietZone® Acoustyle® Wood Ceiling Panels

www.owenscorning.com/quietzone/products/products3.asp

(9/18/06).

THE ACOUSTICAL SOURCE
Noise Control Solutions for Soundproofing and Acoustic Applications

- Noise Control Solutions for Walls [link]
- Noise Control Solutions for Floors [link]
- Noise Control Solutions for Ceilings [link]

www.acousticalsource.com (9/18/06).

Silent Source
Offering Quality Interior Acoustical Products Since 1992
* * *

Acoustical Sound Barrier
Sound Barrier is a ... sheet material used to block and reduce sound transmissions through walls, ceilings and floors.
* * *

Ceilings

We have a variety of styles in
Acoustical Ceilings ...

Fabric Wallcoverings

Acoustical wall fabrics available by the bolt or linear
yard...

www.silentsource.com/index.html (9/18/06).

AMI

Acoustic Product Division

* * *

- Wall Soundproofing/Ceiling Soundproofing
- Floor Soundproofing/Footfall Soundproofing

www.soundprooffoam.com (9/18/06).

AVT, Inc.

Acoustics & Vibration Specialists

* * *

Sound/Noise Control

- For Floors, Walls and Ceilings

www.avtinc.net (11/1/06).

Federal Flooring Co.

* * *

Distributor Of Acoustical Tiles, Ceilings,
Insulation, Flooring ...

www.thomasnet.com/heading.html (11/1/06).

Two things are apparent from the examining attorney's Internet evidence: First, there appears to be a distinct market for noise-abatement products and services. While applicant's business is evidence that the noise abatement products market is not entirely separate from the general floor-, wall-, and ceiling-covering market, the existence of specialist purveyors in such products is readily apparent from the evidence of record. Second, at least within the market for noise-abatement products,

it is clear that flooring underlayment is sold at the same time, and for the same purpose, as ceiling and wall products to be used, either as alternatives to or in conjunction with each other.

In sum, while applicant's goods and those of the cited registrant are not identical, the examining attorney's evidence convinces us that they are nonetheless closely related as to their purpose and use, and can be produced or marketed together by the same purveyors. At best, the third-party registrations submitted by applicant prove only that the relationship shown by the examining attorney is not a perfect correlation.

Accordingly, we find that this factor weighs against registration.

III. The Similarity or Dissimilarity of Established, Likely-to-Continue Trade Channels

Both the applicant's identification of goods and that of the cited registrant include limitations in their respective channels of trade. The cited registrant's goods are limited to goods "for use in the building industry," while applicant's goods have been amended to include those "sold only through distributors and retailers who specialize in floor covering products and who do not distribute or sell at retail acoustical ceiling and wall tiles for use in the building industry." Applicant argues that because of these limitations, the channels of trade for their respective products are distinct, thus reducing or eliminating any potential confusion.

A. Declarations

Before turning to the specific language of the identified goods at issue, we note again that applicant submitted eight third-party declarations in support of registration. The declarations are substantially similar in significant part,⁵ and allege as follows:

¶4. "[T]here is no significant overlap in the marketplace between the sale and distribution of flooring underlayment and the sale [sic] distribution of wall and ceiling products," and that "the floor covering industry" does not overlap with the construction or building supply industries.

¶5. [C]ommercial flooring underlayment is not typically sold through the same channels of distribution as ceiling and wall products.

¶6. The declarant is unaware of the sale of wall or ceiling products by any floor covering retailer. "[W]all and ceiling products would generally be sold through commercial building supplies distributors, and such ... distributors would not typically sell flooring underlayment."

¶7. "Purchases of floor covering supplies involve significant expenses. These purchases are typically made by sophisticated purchasers and are made after careful deliberation."

¶8. The declarant is unaware of any confusion regarding applicant's SOUND SOLUTION mark.

The declarations were signed by people employed in "the floor covering industry" for between 13 and 39 years (average 27.25 years). Declarations ¶¶ 2, 3. Despite the fact that the declarants appear to have considerable experience in the "floor

⁵ One declaration, that of Lee Phillips, is slightly different form the others, resulting in one less paragraph than the others, although it attests to essentially the same facts.

covering industry," it is not at all clear to what extent this includes experience in the field of noise abatement products. As noted above, the evidence of record indicates that there is a channel of trade for noise abatement products, which would include floor, wall and ceiling products, distinct from the market for general floor, wall, and ceiling treatments. Thus, the declarants' statements are of limited value.

Put simply, this record shows that there is a significant overlap in the customary trade channels for the goods at issue, and consequently an overlap in the purchasers for such products.

B. Channels of Trade, Use of the Goods, and Consumers

When determining registrability, we must presume that - unless limited - the identified goods or services to move in all channels of trade normal for such items, and that they are purchased by all of the usual consumers for such goods. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958).

The identification of goods and channels of trade in the subject application and in the cited registration are limited as follows:

Application	Registration
<ul style="list-style-type: none">• ... sold only through distributors and retailers who specialize in floor covering products and• who do not distribute or sell at retail acoustical ceiling and wall tiles for use in the building industry.	<ul style="list-style-type: none">• ... for use in the building industry.

The prior registrant's ceiling and wall tiles are limited to those sold "for use in the building industry." Accordingly, they are construed to be sold to the entire range of purchasers in that industry, including those involved in large-scale commercial, industrial, and home construction, as well as those involved in building, remodeling and renovating individual homes, and would be sold in the usual channels of trade for such goods, including noise abatement specialty distributors.

Applicant's only sells its sound absorbing flooring underlayment through distributors and retailers specializing in floor covering products who do not sell ceiling and wall tiles for use in the building industry. Nevertheless, the fact remains that applicant's flooring underlayment may still be sold to purchasers for use in the building industry, because applicant's goods are not restricted to particular uses or users.

Further, as discussed above, while applicant's goods would not be sold under the same roof as the registrant's, the evidence establishes that there are businesses that manufacture and sell together sound absorbing products for use on floors, walls and ceilings. Therefore, consumers in the building industry, accustomed to seeing similar goods sold in the same channels of trade, are likely to encounter both applicant's and registrant's products - albeit not in the same store - and believe that the goods share a common source.

While the examining attorney's case would obviously be stronger if the respective goods were sold under the same roof, sale of the goods in the same stores is not required to support a finding of likelihood of confusion. We find that the restrictions in the application and the cited registration do not obviate confusion. Goods of the type at issue here are commonly sold together by others in the marketplace, and there is clearly an overlap in both applicant's and the registrant's purchasers.

This factor thus supports the refusal to register.

IV. The Nature and Extent of any Actual Confusion

Applicant states that it is aware of no actual confusion through four years of concurrent use of its mark and applicant's mark on their respective goods. However, as we have pointed out before, such evidence is of little relevance in an *ex parte* appeal:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an *ex parte* proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion.

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-1027 (TTAB 1984)
(citations omitted).

Accordingly, this factor is entitled to little or no weight in our analysis.

V. The Fame of the Prior Mark

The Court of Appeals for the Federal Circuit has held that when the prior mark is famous, that factor is entitled to great weight in determining whether confusion is likely. *E.g. Recot, Inc. v. M.C. Becton*, 214 F.3d 1322; 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). Here, applicant claims that the converse is true, namely that confusion is not likely because the mark in the cited registration is not famous. In *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003), the Court of Appeals rejected this reasoning:

[W]e find no evidence in the record to substantiate Majestic's counsel's argument that [the prior registrant's] marks are not famous. Even if such evidence were of record, though, it would have little probative value. Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, *DuPont*, 476 F.2d at 1361, 177 USPQ at 567 (factor five), we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark's not being famous.

65 USPQ2d at 1205.

As was the case in *Majestic*, aside from the lack of legal support for applicant's major premise, we have little evidence in the record from which we could make a factual determination about the fame of the cited registrant's mark. While each of the declarations submitted by applicant contains the statement that the declarant "had never [previously] heard of or otherwise been made aware of the company Sound Solutions Inc. or its mark SOUND

SOLUTIONS," Declarations ¶ 9, there is no record evidence indicating the nature and extent of the registrant's sales, its relevant advertising expenditures, market surveys, or any other evidence which might be available to the cited registrant. Such evidence is rarely, if ever, available in an *ex parte* proceeding, which by its nature precludes participation by the cited registrant. *Cf. In re Thomas*, 79 USPQ2d 1021, 1027, n. 11 (TTAB 2006) ("Because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark.")

Accordingly, we consider this *du Pont* factor neutral.

VI. **Strength of the Cited Mark**

Applicant argues that the mark in the cited registration "is a relatively weak mark and is not entitled to an overly broad scope of protection." Applicant's Br. at 10 ("The Cited Mark ... is suggestive of the ... [g]oods in that [it] suggests that the [goods] are related to a *solution* to a problem with the transmission of *sound*.") However, even relatively weak marks are entitled to protection, *King Foods, Inc. v. Town & Country Food Co., Inc.*, 159 USPQ 44 (TTAB 1968), and we note again that the marks at issue here are legally identical, while the goods are closely related. While applicant argues that the registrant's mark is weak because it is suggestive of the goods, applicant's virtually identical mark carries the same suggestive quality. Even if we were to conclude that neither mark is inherently

strong, confusion is not avoided if the marks are essentially identical and the goods are closely related. To conclude otherwise would give the prior registration virtually no scope of protection.

We likewise consider this factor neutral.

VII. Sophisticated Purchasers

Applicant argues that its goods are bought by sophisticated purchasers, who make buying decisions only after careful deliberation. The only evidence supporting applicant's argument appears to be the statement in each of the declarations filed by applicant that "[p]urchases of floor covering supplies involve significant expense. These purchases are typically made by sophisticated purchasers and are made after careful deliberation." Declarations ¶ 7.

There are two problems with this argument: First, there is no record evidence of the price of the relevant goods or what the affiants consider to be "significant expense" or "careful deliberation." Further, as noted above, the goods in the application and cited registration are not limited to those sold to large-scale commercial purchasers. As such, they include sound abatement products for smaller projects, including single homes or even single rooms, and may be purchased by small contractors, handymen, and do-it-yourself homeowners.

Second, merely because the goods may be expensive or purchased after careful deliberation does not mean that the

purchasers are sophisticated, or that confusion as to source would therefore be avoided. Even consumers who exercise a high degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion. *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers); *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988) ("Being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks.").

Because we are not able to conclude that this factor benefits applicant in any significant way, we consider it neutral.

Conclusion

After careful consideration of the briefs and the entire record, we conclude that in view of the essentially identical marks at issue, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods. To the extent we harbor any doubt, that doubt must be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The refusal under Section 2(d) of the Act is affirmed.