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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re JELD-WEN, inc.

Serial No. 78773839

Charles G. Zug, Lucas V. Haugh and David A. Harlow of
Nelson, Mullins, Riley & Scarborough, L.L.P. for JELD-WEN,
inc.

Susan Leslie DuBois, Trademark Examining Attorney, Law
Office 111 (Craig D. Taylor, Managing Attorney).

Before Quinn, Holtzman and Walsh, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

JELD-WEN, inc. (applicant) has applied to register the
mark MISSION PRAIRIE in standard characters on the
Principal Register for "decorative glass panels sold as an
integral component of metal doors" in International Class
6.¹ The Examining Attorney has finally refused registration

¹ Application Serial No. 78773839, filed December 15, 2005, based
on a statement of a bona fide intention to use the mark in
commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

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on two distinct grounds. First, the Examining Attorney has finally refused registration on the ground that the mark merely describes the goods under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). In addition, the Examining Attorney has finally refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with Registration No. 2612141 for the mark MISSION in standard characters for goods identified as "non-metal windows" in International Class 19. The cited registration issued on August 27, 2002, and is active.

Applicant has appealed both refusals. Applicant and the Examining Attorney have filed briefs. We affirm as to both refusals.

Before addressing the refusals themselves, we will first discuss the relationship between the refusals in view of applicant's argument that "... the Cited Mark should be considered a weak mark, given the descriptive nature of the term 'mission' in relation to non-metal windows." Reply Brief at 3. For purposes of our consideration of the refusal under Trademark Act Section 2(d), we must assume that the cited mark is entitled to the presumption of validity and other benefits under Trademark Act Section 7(b), 15 U.S.C. § 1057(b). Applicant's implication that it

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is not worthy of protection is an impermissible collateral attack on the cited registration. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). On the other hand, for purposes of our consideration of the refusal under Trademark Act Section 2(e)(1), we must determine the issue based on the record in this case without regard to actions taken on other applications, including the application which resulted in the issuance of the cited registration. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

THE DESCRIPTIVENESS REFUSAL

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute of the goods. *See In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods identified in the application, and the possible significance that the term would have to the average purchaser of the goods. *In re Polo International Inc.*, 51 USPQ2d 1061, 1062 (TTAB 1999); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

When two or more merely descriptive terms are combined, we must then determine whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, then the resulting combination is also merely descriptive. *See, e.g., In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002) (SMARTTOWER held merely descriptive of commercial and industrial cooling towers).

First, we will consider whether each of the individual terms, MISSION and PRAIRIE, is merely descriptive. Then, because we have determined that each is merely descriptive, we will consider whether the MISSION PRAIRIE mark, viewed as a whole, is merely descriptive as well.

MISSION

With regard to MISSION, the Examining Attorney argues that MISSION describes an architectural style which would,

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in turn, describe the style of the identified goods. The Examining Attorney has provided excerpts of articles from the NEXIS data base showing relevant descriptive uses of MISSION, including: an article from *The Post-Standard* (Syracuse NY), dated September 23, 2004, stating, "The furniture has been purchased from Stickley, Audi & Co., and the windows, also mission style, have been designed by John Dobbs, a partner in the new shop, Freedom of Espresso."; an article from the *Daily News of Los Angeles*, dated February 29, 2004, stating, "In addition to mission-style arched windows, there are arched tunnels and hallways, because the inn was literally hewn into the side of a mountain..."; and an article from the *Star Gazette* (Elmira NY), dated October 19, 2003, stating, "The contractor removed a Mission-style window from the rear wall of the living room and relocated it to the Salon..." The Examining Attorney has also provided a description of MISSION-style architecture from about.com. It states:

1890-1920 Spanish Mission House Style

Historic Mission churches built by Spanish colonists inspired the turn of the century house style known as Mission, Spanish Mission or California Mission.

Spanish Mission style houses have stucco walls, arches, and other details inspired by the Spanish mission churches of colonial America.

Spanish Mission Style houses have many of these features:

- Smooth stucco siding
- Roof parapets
- Large square pillars
- Twisted columns
- Arcaded entry porch
- Round or quatrefoil window
- Red tile roof

...

By the 1920s architects were combining Mission styling with features from other movements. Mission houses often have details from these popular styles:

- Prairie
- Craftsman
- Pueblo.

We have also reviewed and take judicial notice of the *Dictionary of Architecture and Construction* (Third Edition 2002).² The definition of "Mission architecture" is generally consistent with the description from about.com. Most notable for our purposes is the description of additional features of Mission architecture, including "grilles covering windows facing the street; a massive wood door at the main entrance, sometimes heavily carved or paneled, often set in an elaborate sculptured portal."

² The Board may take judicial notice of dictionaries and encyclopedias. See, e.g., *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

As we indicated above, applicant effectively concedes that MISSION is merely descriptive here. In its main brief applicant states, "Although Applicant agrees with the Examining Attorney that the term 'mission' could, in some cases be merely descriptive of a specific architectural or furniture style, Applicant's Mark, as a whole, is not merely descriptive of applicant's goods...." Applicant's Brief at 3. Also, as we noted, applicant states, "In addition, the Cited Mark should be considered a weak mark, given the descriptive nature of the term 'mission' in relation to non-metal windows." Reply Brief at 3. Applicant offers no argument or evidence whatsoever to counter the Examining Attorney's determination that MISSION is merely descriptive of the goods identified in the application.

The evidence in this case establishes that MISSION describes an architectural style, including architectural elements, such as windows, doors, and doors with decorative glass panels.

Furthermore, because the goods are "decorative glass panels sold as an integral component of metal doors" we find the evidence specifically related to the significance of MISSION as applied to windows, as well as doors, to be highly relevant and probative of the significance of

MISSION as applied to the goods. It is only logical that the relevant public would view a term, such as MISSION, which identifies an architectural style as having the same descriptive significance as applied to either windows or decorative glass panels in doors, or other features of buildings in the style.

Accordingly, based on the evidence discussed above, we conclude that MISSION is merely descriptive of "decorative glass panels sold as an integral component of metal doors."

PRAIRIE

With regard to PRAIRIE, the Examining Attorney argues, once again, that PRAIRIE describes an architectural style which would, in turn, describe the style of the identified goods.

Among other evidence, the Examining Attorney has provided brief excerpts of articles from the NEXIS database, including: an article from *The Atlanta Journal-Constitution* of February 5, 2006, entitled "New designs convey look of by-gone days," stating, "Homes in West Village have prairie-style windows, doors, floors and ceilings, deep front porches and extended rafters and are priced from..."; an article from the *Contra Costa Times* of January 15, 2006, entitled "A little piece of history in your living room," stating, "A Prairie-style casement

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window, redeemed from a Waterford House, is now a mullioned glass door on a kitchen cabinet.”; and an article from the *South Bend Tribune*, entitled “Building the Wright house, famous architect’s style inspired couple,” stating, “Other Wright-ish touches include Prairie-style windows which they have left unadorned.” See first Office action at 3.

The evidence also includes a longer piece from buffalo.edu captioned “Prairie Style of Architecture in Buffalo, NY.” The piece states:

Prairie houses (1905-1915) may be viewed in a larger context as one type of Arts and Craft (“Craftsman”) style architecture.

The prairie house is one of the few indigenous American styles. The name is key to the style. The stereotypical image of the Midwestern prairie is that of a wide, flat, horizontal, treeless expanse that meets the horizon. To translate that scene into architecture Wright designed a horizontal building that was low to the ground. Thus, the architecture features:

- Broad horizontal forms
- Low-pitched roof, usually hipped with deeply projecting eaves
- Honest use of materials
- Organic ornament
- Two stories, with one-story wings or porches
- Eaves, cornice and facade emphasizing horizontal lines, often with massive square porch supports
- Bands of casement windows
- Large, low chimney that forms the hub of the house
- Free-flowing interior plans
- Seamless transition between indoors and outdoors

- Both Prairie and Craftsman/Arts and Crafts have widely overhanging eaves, but the Prairie style does NOT have exposed rafter tails, or decorative beams or braces under the gables.

The piece also emphasizes the distinction/contrast between the Prairie style and Victorian, both in terms of concept and form. See attachment to first Office action.

On the other hand, applicant argues that its mark is "arbitrary, or at least suggestive" because PRAIRIE "no longer describes an architectural style in the minds of consumers." Applicant's Brief at 3. As noted above, applicant observes that MISSION "could, in some cases, be descriptive of a specific architectural or furniture style." *Id.* The essence of applicant's argument, therefore, is that the "unitary phrase" MISSION PRAIRIE, when considered as a whole, is not merely descriptive. Applicant notes, in particular, that there is no evidence of use of MISSION PRAIRIE, as such.

The principal support for applicant's position is the affidavit of Arthur Cogswell, a registered architect. The affidavit first sets forth Mr. Cogswell's credentials; we have no reason to doubt Mr. Cogswell's credentials and experience in the field. Mr. Cogswell states:

4. At one time, the word Prairie was descriptive of a particular school of

architecture. Specifically, it was at one time identified with the designs of Frank Lloyd Wright, circa 1910-1920, of sophisticated single family dwellings in the more exclusive suburbs of Chicago, and thereafter with Wright's related work in Wisconsin in the immediately following years.

5. However, with the passage of time, just as Wright's work evolved significantly to a wide variety of styles, the term "Prairie" has come to be applied by many individuals to all kinds of styles and designs, to the point where it no longer means much. The term "Prairie" has been applied to works which belong to the "Arts & Crafts" style in England. The "Arts & Crafts" style was developed in roughly the same time period as Wright's work described above, but it was independently developed, and is certainly a different architectural style.

6. Likewise, some people use "Prairie" interchangeably for what should be called "Craftsman". Others have characterized certain elements of the "Mission" style of the American Southwest as "Prairie". You can even find people calling elements of Victorian designs as "Prairie." Frank Lloyd Wright and Victorian are about as antithetical as anything I can imagine in architectural design..

7. ... In my opinion as an architect, the term "Prairie" does not describe particular characteristics of a house design or door design or window design.

Cogswell Affidavit at 2-3.

Mr. Cogswell does not refer to any publication he or any other authority in the field has authored as the basis for his statements. Nor does Mr. Cogswell refer to any usage of PRAIRIE, like those the Examining Attorney submitted, to support his statements.

We have reviewed and take judicial notice of certain dictionaries and other reference works, in particular, works in the nature of encyclopedias, all in the field of architecture.³ Those sources include: the *Dictionary of Architecture & Construction* (Third Edition 2002), referenced above; *The Penguin Dictionary of Architecture and Landscape Architecture* (Fifth Edition 1998); *The Visual Dictionary of American Domestic Architecture* (1994); *Dictionary of Building Preservation* (1996); James Stevens Curl, *A Dictionary of Architecture* (1999); John Milnes Baker, *American House Styles - A Concise Guide* (1994); and *The Abrams Guide to American House Styles* (2004).

Each of these sources includes a definition or description of PRAIRIE-style architecture which is entirely consistent with the description the Examining Attorney furnished from buffalo.edu. We note the following, in particular, from these references:

The *Dictionary of Architecture and Construction* at pages 710-711 refers to the "Prairie style" as a house with, among other features, "a two-story height with wings and/or porches of one story, integrated with its site to provide a low, horizontal appearance ... and often a series of windows below the roof overhang, diamond shaped window panes set in lead comes...";

The Abrams Guide at page 284 identifies the "Prairie style" as "Composed of strong horizontal

³ *Id.*

planes that echoed the flat plains of Illinois ... [with] massive central chimneys, low-pitched roofs with broad overhangs that seemed to hug the ground. Long strips of windows and use of windows at corners blur the distinction between inside and outside.";

The Dictionary of Building Preservation at 354 refers to "Prairie Style" as "... characterized by low-pitched hip roofs with wide eaves, casement ribbon windows and spaces that flow into one another at right angles...";

American House Styles at page 112 refers to "PRAIRIE" style as houses with "... open planning; shallow pitched roofs with broad sheltering overhangs; bands of casement windows, often with abstract patterns of stained glass; and a strong horizontal emphasis...";

The Visual Dictionary of American Domestic Architecture at 202 states, "Wright's work drew on many sources, including Japanese design, the contemporary English Arts and Crafts movement, and the Victorian preoccupation with the relationship of a building to its natural environment. Interpreted in the context of the flat Midwestern landscape—and Wright's own very personal design vocabulary—his Prairie style evolved as a truly original American art form.";

The Penguin Dictionary at page 454 defines "Prairie School" as "Architectural movement in American Midwest between 1900 and 1916, mainly in residential building. Inspired initially by Sullivan, it was given direction by Frank Lloyd Wright. Horizontality, open plans and emphasis on the natural qualities of materials, typified Prairie School buildings. After the first decade they became more varied and personal in expression and less local in scope..."; and

A Dictionary of Architecture also identifies the "Prairie School or style" with Wright and states "It was characterized by low-pitched roofs with wide overhanging eaves, a strongly emphasized horizontality, large hearths separating parts of

the living area, and use of traditional materials."

Based on the above-referenced evidence, including the sources as to which we have taken judicial notice, we conclude that PRAIRIE is merely descriptive of "decorative glass panels sold as an integral component of metal doors." *In re Ricci-Italian Silversmiths Inc.*, 16 USPQ2d 1727 (TTAB 1990) (ART DECO held generic for flatware); *In re Bauhaus Designs Canada Ltd.*, 12 USPQ2d 2001 (TTAB 1989) (BAUHAUS held generic for furniture).

We first note that the application is based on applicant's statement of a bona fide intention to use the mark in commerce. Nowhere has applicant stated that the goods with which it intends to use the mark, in fact, would not be in the PRAIRIE style.

We reject applicant's argument that PRAIRIE has ceased to have any meaning in the architectural field today. The record includes numerous reference works, many of them of recent vintage, which continue to identify PRAIRIE in a consistent manner as a defined architectural style. The excerpts from recent articles confirm the fact that the public continues to refer to the PRAIRIE style.

The fact that the style may be varied or that it may be derived from or share certain characteristics with other

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styles in no way detracts from the descriptive significance of PRAIRIE as applied to the identified goods. *In re Ricci-Italian Silversmiths Inc.*, 16 USPQ2d 1727, 1729 (TTAB 1990) ("It is not necessary, as applicant suggests, that a term must identify a specific pattern of flatware before it can be considered generic... The evidence makes it clear that the ART DECO style is characterized by certain features such as geometric shapes, smooth lines and streamlined forms, and that patterns of flatware containing these features would be recognized as being ART DECO in style."). We are not persuaded by Mr. Cogswell's observation that PRAIRIE has lost all meaning when we consider his conclusion in light of the other evidence.

Furthermore, here also, because the goods are "decorative glass panels sold as an integral component of metal doors" we find the evidence specifically related to the significance of PRAIRIE as applied to windows, as well as doors, to be highly relevant and probative of the significance of PRAIRIE as applied to the goods. It is only logical that the relevant public would view a term, such as PRAIRIE, which identifies an architectural style as having the same descriptive significance as applied to either windows or decorative glass panels in doors, or other features of buildings in the style.

Applicant also appears to argue that PRAIRIE is not merely descriptive here because definitions of "prairie" in general dictionaries, such as *Merriam-Webster's Collegiate Dictionary*, do not include a definition related to an architectural style. As the Examining Attorney correctly notes, the mere absence of a dictionary entry for the relevant term does not establish that the term is not merely descriptive. *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977). In fact, in this case we have evidence in numerous dictionaries in the relevant field which establish the merely descriptive meaning where it counts. We reject this argument.

Applicant appears to argue further that, because "prairie" has meanings in other "fields," it is not merely descriptive here. The fact that the mark may have meanings in another context is not relevant for purposes of our determination. *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007). We must determine whether the mark is merely descriptive as applied to the goods identified in the application. *In re Bright-Crest, Ltd.*, 204 USPQ at 593. Accordingly, we reject this argument.

Lastly, applicant has objected to the Examining Attorney's reliance on listings of results from searches in the Google search engine as evidence that its mark is

merely descriptive, citing *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002). Thus far, we have not referred to this evidence, nor need we rely on it. In *Remacle*, the Board stated, "The Examining Attorney's print-out of the results of an Internet search by the Yahoo search engine are of little probative value, largely because insufficient text is available to determine the nature of the information and, thus, its relevance." *Id.*

Likewise in this case, more complete examples from web pages located by the search, rather than the listing of results, would have far superior probative value, and we strongly prefer evidence in that form. Nonetheless, here, as the Board has done in *Remacle* and other cases, we decline to exclude the evidence entirely, but rather, we view it as having very limited probative value. However, to the extent the listings of record have any probative value, they do support the conclusions we have reached based on the other evidence.

For example, one listing referencing amazon.com states, "Art and Crafts Prairie Style Stained Glass Panel"; another listing referencing tdstainedglass.com states, "These "Prairie Style" stained glass windows were produced for one of the spec home..."; another listing referencing gommstudios.com states, "The other doors were in the

Prairie Style of the same era..."; and still another listing referencing ebay.com states, "Add a delightful touch to you (sic) home's decor with the colorful Prairie style panel inspired by Frank Lloyd Wright..." See attachments to final Office action. However, we hasten to reiterate that we would reach the same conclusions in this case with or without consideration of these listings.⁴

MISSION PRAIRIE

Finally, we consider whether MISSION PRAIRIE as a whole is merely descriptive. We conclude that it is. We find unpersuasive applicant's argument that the combination of MISSION and PRAIRIE is somehow distinctive and not merely descriptive.

Again we find unpersuasive Mr. Cogswell's statement that the combination of MISSION with PRAIRIE merely "blurs" the meaning of PRAIRIE. In fact, the evidence from about.com states specifically that the MISSION and PRAIRIE styles were often combined in the same house.

Likewise, we find Mr. Cogswell's observation that he has never previously encountered this combination of terms unpersuasive. As the Examining Attorney correctly points out, the mere fact that one is the first to use a designation does not, by itself, render the designation

⁴ The same applies to the Google listings related to MISSION.

distinctive. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) ("The fact that applicant may be the first and only user of this highly descriptive or generic designation does not justify registration if the term projects only merely descriptive significance.").

On this record, we find nothing in the combination of these terms which is at all incongruous, unusual or distinctive. See, e.g., *In re Tower Tech, Inc.*, 64 USPQ2d at 1317 (SMARTTOWER held merely descriptive of commercial and industrial cooling towers). Even Mr. Cogswell states, "Others have characterized certain elements of the 'Mission' style of the American Southwest as "Prairie." Cogswell Affidavit at 2-3. Furthermore, nowhere has applicant specifically stated that the goods with which it intends to use the mark will not incorporate elements of the MISSION and PRAIRIE styles or be compatible with those styles. Accordingly, we conclude that MISSION PRAIRIE is merely descriptive of "decorative glass panels sold as an integral component of metal doors."

LIKELIHOOD OF CONFUSION

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to

be likely, when used on or in connection with the goods of the applicant, to cause confusion..." 15 U.S.C. § 1052(d). In *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977), the Court set forth the factors to consider in determining likelihood of confusion. See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Below, we will consider each of the factors as to which applicant or the Examining Attorney have presented arguments or evidence.

The Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant argues that the marks differ in appearance in that the cited mark consists of one word with seven letters versus applicant's mark consisting of two words and fourteen letters. Applicant argues further that the common element, MISSION, is "... weak in that it could be descriptive of the design style of each party's goods." Applicant's Brief at 11-12. Applicant also argues that the marks differ in sound, again because of the additional word in applicant's mark. In addition, applicant argues,

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"Because the 'PRAIRIE' component of Applicant's Mark is dominant, the parties' marks are dissimilar in meaning and commercial impression." Applicant's Brief at 13.

Applicant elaborates by arguing that the suggestive associations connected with PRAIRIE and the PRAIRIE style would differ from those connected with MISSION alone.

Applicant thus argues that the marks are not similar overall.

On the other hand, the Examining Attorney argues that the marks are similar because they share the same first term, MISSION, and because PRAIRIE, a descriptive term is insufficient to distinguish the marks. The Examining Attorney thus argues that the marks, when viewed in their entireties, are similar.

We conclude that the marks are similar. First, as we noted above, we must accord the cited registered mark the applicable statutory presumptions, including the presumption that it is a valid mark. See *In re Fiesta Palms LLC*, 85 at 1363. At the same time we acknowledge that MISSION is a weak mark in view of our discussion above. In this context, it is perhaps appropriately characterized as, at the very least, highly suggestive. Nonetheless, even weak marks are entitled to protection from registration of a similar mark for related goods. See

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King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

In fact, on this record, we conclude that MISSION and PRAIRIE are of roughly equivalent strength when viewed without regard to their relative positions in applicant's mark. However, we concur with the Examining Attorney that MISSION is of greater importance in determining whether the marks are similar in this case because it is the first element in applicant's mark and the only element in the cited mark. See *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("...[it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692.

Furthermore, we reject applicant's arguments based on the word and letter counts in the marks. This misses the point. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975) ("... it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this

necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks."). Although there are differences in appearance and sound, we find that the similarities in appearance and sound, and especially, the similarities in connotation and commercial impression are more important. It is likely that potential purchasers would view the marks as referring to the same source, perhaps to variations on products from that same source. Accordingly, we conclude that the marks are similar.

The Goods

The goods of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from the same source. *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in comparing the goods and channels of trade we must consider the goods as identified in the

application and registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

Applicant identifies its goods as "decorative glass panels sold as an integral component of metal doors." The goods identified in the cited registration are "non-metal windows."

Applicant does acknowledge that we must consider the goods as identified in the application and cited registration in determining likelihood of confusion. Nonetheless, applicant provided evidence through affidavits from two of its officials, Kevin Pine and Shane Thomas, in an apparent attempt to show that the registrant, in fact, uses its mark only in connection with "high-end windows"

and that a set of the registrant's windows for a home "... would typically cost in excess of \$20,000." See, e.g., Pine Affidavit at 1-2. The witnesses also suggest that the registrant provides its windows through certain limited trade channels. To the extent applicant bases its arguments on this evidence regarding the registrant's actual goods and trade channels, we reject those arguments in their entirety. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected).

In general, applicant's arguments with regard to the goods focus principally on differences in the trade channels for the respective goods, that is, that consumers do not purchase windows and doors at the same time.⁵ Reply Brief at 5. Applicant also argues that architects, homebuilders or professional installers would often be involved in the purchase of both types of goods and that this involvement would diminish the likelihood of confusion.

⁵ The remainder of applicant's arguments regarding distinctions in trade channels appear to depend on consideration of extrinsic evidence regarding the registrant which we cannot consider.

On the other hand, the Examining Attorney states, "... while not identical, the goods at issue are clearly related in four critical ways. In short, the goods share the same basic function; the goods are not limited to any particular specialized channels of trade; they are available in the same commercial setting; they are produced by the same entities..." Examining Attorney's Brief at 7. Furthermore, the Examining Attorney argues that, under these circumstances, consumers "would assume unity of source" if the respective marks were used on the identified goods.

To support her position, the Examining Attorney submitted excerpts from applicant's website showing that applicant itself sells both doors and windows, including wood (non-metal) windows, and of course, metal doors with decorative glass panels. See attachment to final Office action. Thus, the scope of applicant's own business is strong evidence that the respective goods are related, that is, that the respective goods could and do come from the same source under the same mark. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

The Examining Attorney also submitted excerpts from the websites of third parties. The excerpt associated with Pella shows that this entity offers a variety of both

windows and doors. The excerpt from Marvin also indicates that this entity offers a wide variety of both windows and doors, including doors with decorative glass panels. The excerpt also indicates that Marvin sells doors and windows for both new construction and replacement doors and windows.⁶

The Board's observations in the *Amcor* case apply here:

Thus, there is in the present situation products, although different, that are promoted in a similar fashion to similar "specifiers" in the construction industry and which can be used in the construction or renovation of the same commercial structures. Thus, if these "specifiers" were to be interested in windows and in concrete or glazed block for incorporation in the same structure [it should be noted that windows can be set in block], and they were to come across these products under the same arbitrary designation "AMCOR", it would not be unreasonable for them to assume mistakenly that they are products emanating from the same producer.

Amcor, Inc. v. Amcor Indus., Inc., 210 USPQ 70, 78 (TTAB 1981) (AMCOR for glass windows and doors having metal frames held confusingly similar to AMCOR for concrete construction block and glazed block and other construction materials). See also *In re Johns-Manville Corp.*, 180 USPQ 661, 662 (TTAB 1973) (WEATHER KING for asphalt shingles

⁶ The Examining Attorney also refers to third-party registrations showing marks registered for both types of goods, but we did not find this evidence in the record.

held confusingly similar to WEATHER-KING for building doors and panels therefor).

Accordingly, based on the evidence of record, we conclude that applicant's goods are related to the goods identified in the cited registration and that the channels of trade for the respective goods overlap and are otherwise related.

Conditions of Purchase

In a similar vein, applicant also argues that the types of goods identified in both the application and the cited registration are relatively expensive, and that purchasers will exercise more thought and care in purchasing the products, thus diminishing the likelihood of confusion. As we noted, applicant has also argued that the purchasers often are either experts or advised by experts. We are not persuaded by these arguments. The Board has stated, "The law has long recognized that even technically sophisticated and careful purchasers of industrial equipment and products are not necessarily expert in trademark evaluation or immune from source confusion." *In re Pellerin Milnor Corporation*, 221 USPQ 558, 560 (TTAB 1983). See also *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). In particular, we find the relative cost of the products and the sophistication of purchasers would not diminish the

likelihood of confusion. *Amtcor, Inc. v. Amtcor Indus., Inc.*, 210 USPQ at 78.

Actual Confusion

Applicant also argues that confusion is not likely because there is no evidence of actual confusion to date. First we note that the application is based on applicant's statement of a bona fide intention to use the mark in commerce. Although applicant has indicated that it has used its mark for over one year, there is no evidence that there has been a true opportunity for confusion. More importantly, as the Court of Appeals for the Federal Circuit has stated:

... uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See *In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context.

In re Majestic Distilling Company, Inc., 65 USPQ2d at 1205. Accordingly, we reject applicant's arguments asserting the absence of actual confusion.

Fame

Applicant also argues that the absence of evidence of fame of the cited mark favors a finding that there is no likelihood of confusion. The Federal Circuit addressed this argument also in *Majestic*, stating:

Even if such evidence [of a lack of fame] 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.

Id. Accordingly, we also reject applicant's arguments regarding the absence of a showing of fame.

Conclusion

Finally, based on all evidence of record in this case related to the *du Pont* factors, we conclude that there is a likelihood of confusion between applicant's MISSION PRAIRIE mark when used in connection with "decorative glass panels sold as an integral component of metal doors" and the cited MISSION mark when used in connection with "non-metal windows."

Decision: We affirm the refusals to register applicant's mark under both Trademark Act Sections 2(d) and 2(e)(1).