

Hearing: August 19, 1999

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TEH

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

White Consolidated Industries, Inc.

v.

Royal Appliance Mfg. Co.

Opposition No. 107,081
to application Serial No. 74/156,648
filed on April 12, 1991

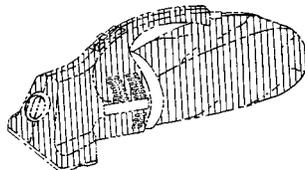
Anthony L. Fletcher of Fish & Richardson for White Consolidated Industries, Inc.

Patrick R. Roche of Fay, Sharpe, Beall, Fagan, Minnich & McKee LLP for Royal Appliance Mfg. Co.

Before Walters, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Royal Appliance Mfg. Co. filed an application under Section 2(f) of the Trademark Act to register the color red as shown below for "hand-held vacuum cleaners," alleging dates of first



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use and first use in commerce of September 1984.¹

The application indicates that the mark consists of the color red as applied to the hand-held vacuum cleaner product, that the drawing is lined for the color red and that applicant seeks to register "red" without limitations to a product configuration.² Registration to applicant was finally refused under Sections 1, 2 and 45 of the Trademark Act on the grounds that the asserted mark is de jure functional and that the evidence of acquired distinctiveness is insufficient to show that the color red is recognized as an indicator of source in applicant. Applicant then appealed.

The Board (in an unpublished opinion) reversed the refusal to register on both grounds, finding that the color red as applied to hand-held vacuum cleaners was not shown to be de jure functional and that applicant had established that the color red had acquired distinctiveness as a trademark.

Following publication of the mark, this opposition was filed by White Consolidated Industries, Inc. Briefs were filed and an oral hearing was held.

In the notice of opposition (as amended), opposer alleges that the parties are competing manufacturers and sellers of vacuum cleaners, including hand-held vacuum cleaners; that applicant has not met the burden of demonstrating secondary

¹ Serial No. 74/156,648 filed April 12, 1991.

²Applicant is the owner of Registration No. 1,761,093 for the configuration of the hand-held vacuum cleaner in the color red.

meaning of the color red as applied to the identified goods; that applicant "has never sold a hand-held vacuum the sole exterior color of which is red"; that the color red is functional in that its exclusive appropriation by one competitor would significantly deplete the colors available to other manufacturers of vacuum cleaners; that competitors of applicant, including opposer, have made and sold vacuum cleaners the basic color of which can be said to fall within "the color red"; that red is the color of choice for marketers striving for visual impact as well as a "communicative function" in marketing and should be available to reflect changing consumer trends.

Applicant admitted that the parties are competing manufacturers and sellers of vacuum cleaners and denied the remaining salient allegations.

The record in this case consists of the pleadings, the application, evidence made of record by notice of reliance, and testimony (with exhibits) taken by each party.

Applicant has submitted the testimony (with exhibits) of Richard Farone, applicant's Director of Marketing and Product Development; and the expert testimony of Daniel McCafferty, Director of Client Services for National Market Measures, Inc., the company which conducted the survey of record in this case.

Applicant has also submitted the declarations of three non-party witnesses: Tony Busch, buyer for Cotter & Company (True Value hardware stores); Camille Thomas, Senior Buyer, Target; and Dennis Dorn, Senior Buyer, K-Mart Corporation, all attesting to

recognition of the color red as a mark originating with applicant.³

Opposer has submitted the testimony and exhibits of Bradley L. Hoare, opposer's Director of Product Planning; and the expert testimony (with exhibits) of Phyllis J. Welter, President of Survey Counsel Inc.

I. PRELIMINARY MATTERS

Before considering the merits, a number of procedural issues need to be addressed. First, pursuant to a discussion which took place during the oral hearing, applicant, on August 30, 1999, filed a motion to amend the application to substitute the following description of the mark: "The mark consists of the color red (PMS 186) as applied to the hand-held vacuum cleaner product."⁴ Opposer has agreed to the amendment. At the same time, opposer emphasizes that the amendment resolves only one issue in the case, that is, the "color depletion" argument as set forth in "point 2" of opposer's brief. The amendment is accepted, and we consider the "color depletion" argument in

³ The parties filed a joint stipulation on November 2, 1998, that the testimony of these witnesses may be submitted in the form of declarations by such witnesses.

⁴ "PMS 186" identifies a particular shade of red within the Pantone Matching System color system.

opposer's brief to be withdrawn. In view of the amendment, all further references in this decision to "red" or "the color red" as applied to applicant's product are to the specific color PMS 186 on the Pantone scale.

There are also several evidentiary matters to resolve. First, applicant filed a notice of reliance on its own answers to certain interrogatories and excerpts of the discovery deposition (with exhibits) of its own witness, Mr. Farone. Opposer filed a motion to strike the notice of reliance, claiming that applicant has violated Trademark Rule 2.120(j)(1), (4) and (5), in seeking to rely on this evidence. Applicant maintains that Rule 2.120 permits applicant to rely on its additional responses to interrogatories and the additional portions of Mr. Farone's deposition in order to correct, clarify or rebut the interrogatory responses or the parts of the deposition relied on by opposer.

A party may introduce, by notice of reliance, its own portions of a discovery deposition or its own interrogatory responses to the extent that those portions or responses should "in fairness be considered so as not to make *misleading* what was offered by the inquiring party." (Emphasis added). See Rule 2.120(j)(4) and (5). In addition, the rule requires that a party

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explain in the notice of reliance why there is a need to rely upon each of the additional discovery responses.

Applicant, in its notice of reliance, only addressed the general relevance of the matter it is seeking to introduce. Applicant did not attempt to explain, in accordance with 2.120(j)(4) or (5), why it needed to rely on the additional matter until it filed its response to opposer's motion to strike. Even then, applicant did not sufficiently explain how the responses offered by opposer would otherwise be misleading without consideration of the additional responses. We find that while the additional responses may be relevant to the issues in this case or even specifically related to the portions sought to be introduced by opposer, the originally-submitted responses are not misleading. Moreover, applicant has not asserted that the responses are in fact misleading. Opposer's motion to strike is accordingly granted.

As a further matter, applicant filed a motion to strike certain portions of Ms. Welter's testimony under Fed. R. Civ. P. 37(c)(1). Specifically, applicant seeks to strike those portions of her testimony which critique the methodology used to conduct applicant's survey and the tabulation of certain results of the survey. Applicant claims that those portions of her testimony fall "beyond that contained in her expert report" in violation of

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Fed. R. Civ. P. 26(a)(2)(B). Applicant claims that it was prejudiced by the "surprise" expert testimony, as it was never apprised of these "opinions" until they were elicited by opposer's counsel during Ms. Welter's deposition.

Certain provisions of the federal disclosure rules, including the rules which require expert reports, are not applicable to Board proceedings. See "Effect of December 1, 1993 Amendments to the Federal Rules of Civil Procedure on Trademark Trial and Appeal Board Inter Partes Proceedings," 1159 TMOG 14 (February 1, 1994). While expert witnesses are required to be identified in Board proceedings, there is no requirement for a written report as to the subject matter of their proposed testimony.⁵ In any event, we find that Ms. Welter testified in areas sufficiently related to the information disclosed in the report. Moreover, it is difficult to accept applicant's claim of prejudice as we note that applicant did not object to the testimony during the deposition and, in fact, proceeded to cross examine the witness on those "additional" opinions at trial.

⁵ See, for example, TBMP § 419.

Applicant's motion to strike that portion of Ms. Welter's testimony is accordingly denied.⁶

II. MERITS OF THE CASE

Under certain circumstances, color alone may serve as a trademark. *Qualitex Co. v. Jacobson Products Co., Inc.*, 115 S.Ct. 1300, 34 USPQ2d 1161 (1995). Color is registrable if it is not de jure functional and if it has acquired distinctiveness in connection with the identified goods. *Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985); and *Brunswick Corp. v. British Seagull Ltd.*, 35 F.2d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994), cert. denied, 115 S.Ct. 1426 (1995).

A. Whether the color red PMS 186 is de jure functional for hand-held vacuum cleaners.

A product feature, including color, is de jure functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article," that is, if

⁶ In addition, Applicant filed a motion under Trademark Rule 2.120(j)(2) to strike a substantial portion of opposer's "Exhibit P" to Mr. McCafferty's testimony deposition. That exhibit consists of the entire discovery deposition of Mr. McCafferty, a nonparty witness. The motion is uncontested by opposer and in any event appears to be well-taken. Accordingly, opposer's Exhibit P is stricken except for the portion of the deposition (pages 46 and 47) which was apparently used by opposer for impeachment purposes. See Trademark Rules 2.127(a) and 2.120(j)(2).

exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage." *Qualitex Co. v. Jacobson Products Co.*, supra, citing *Inwood Laboratories, Inc.*, 456 U.S., at 850, n. 10.

Opposer's Director of Product Planning, Mr. Hoare, concedes that the color red has nothing to do with the performance, cost or efficiency of hand-held vacuum cleaners. (p. 50 Hoare). Thus, the determination of de jure functionality turns on whether appropriation of the color red, PMS 186, by one party for hand-held vacuum cleaners would otherwise put competitors at a significant competitive disadvantage.

Opposer argues, in this regard, that other manufacturers of hand-held vacuum cleaners have a competitive need to use the color red and that, for many years, manufacturers, including applicant, have chosen red because that color calls attention to the product in a marketing environment. However, as indicated below, the record in this case does not show that there is any competitive need for the particular color applicant seeks to register for hand-held vacuum cleaners to remain in the public domain.

Opposer refers to one of applicant's brochures which contains the statement made by John Balch, former President of applicant, that red was chosen for Dirt Devil hand-held vacuum

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cleaners because it "jumps out at you...[i]t's a hot, action color." (Exh. 19 to Farone test). In addition, opposer's witness, Mr. Hoare, has testified that "...red is always nice to use if...you want your product to really stand out on the shelf, because it attracts the eye. It's a bold color." (Hoare test. p. 37). According to Mr. Hoare, "...if all of a sudden there was a phase where red became very popular...this would put us at an unfair disadvantage if we did not have the ability to use red and it became popular over an extended period of time." (Id. p.38).

However, the concept of de jure functionality based purely on an aesthetic property of the goods has been rejected. *Brunswick Corp. v. British Seagull Ltd.*, supra, citing *In re DC Comics, Inc.*, 689 F.2d 1042, 215 USPQ 394 (CCPA 1982). Instead, the aesthetic property must be shown to result in some competitive advantage in the marketplace. As stated by the Court in *L.D. Kichler Co. v. Davoil Inc.*, 192 F.3d 1349, 52 USPQ2d 1307 (Fed. Cir. 1999), "[m]ere taste or preference cannot render a color--unless it is 'the best, or at least one, of a few superior designs'--de jure functional." [Citing *In re Bose Corp.*, 772 F.2d 866, 872, 227 USPQ 1, 6 (Fed. Cir. 1985). In other words, merely because a red color may have certain visual appeal when applied to hand-held vacuum cleaners does not mean that the color red is de jure functional when applied to those goods.

This case is unlike the Brunswick case, *supra*, in which black outboard engines were found to be more marketable because the color black is compatible with other boat colors and black makes the engines appear smaller; or, for example, the case of *Deere & Co. v. Farmhand, Inc.*, 560 F. Supp. 85, 217 USPQ 252 (SD Iowa 1982), *aff'd*, 721 F. 2d 253 (CA8 1983), in which the Court found a competitive need for the color green for farm machinery in view of the color's compatibility with other farm equipment. In the case before us, there is no evidence of any visual advantage which is unique to either the color red, in general, or red PMS 186, in particular, for hand-held vacuum cleaners. This is not a situation where the color of the product is important to a consumer for its visual properties as it would be in such products as carpeting, living room furniture or clothing. We have no evidence that consumers have a need, or even a desire, to own a hand-held vacuum cleaner in any particular color. Some vague expectation that the color red might become "popular" at some unidentifiable point in the future is far from sufficient to demonstrate the existence of a "significant" competitive disadvantage. Thus, while the testimony and evidence indicates that red may be a desirable or popular color for products in general, opposer has not established that red, in general, or PMS 186, in particular, offers a significant competitive advantage for hand-held vacuum cleaners.

Opposer's evidence that other manufacturers, as well as opposer, have produced hand-held vacuum cleaners in the color red is not persuasive of a different result. While the evidence indicates some uses of red for hand-held vacuum cleaners by different manufacturers over time, the evidence fails to establish that the nature or extent of use by any company other than applicant of any shade of red for hand-held vacuum cleaners.

The only testimony of any alleged third-party use of a red color for hand-held vacuum cleaners comes from Mr. Hoare. First, Mr. Hoare was unable to establish, with any degree of certainty, that hand-held vacuum cleaners in a red color were ever actually sold or even put on the market by any of the third-party companies referenced by opposer. For example, Mr. Hoare testified as to the use of the color red on a product identified as a Remington Vic Vac. However, on cross-examination, Mr. Hoare essentially admitted that he would not classify the Vic Vac as a hand-held vacuum cleaner. Moreover, under further cross-examination, Mr. Hoare responded to questions regarding such third-party use as follows: (Hoare test. p. 48).

Q. ...this Panasonic, is it your testimony that you can't date this product?

A. I do not see a date on this catalog sheet.

Q. Do you know how long this [Panasonic] product has been in the marketplace or even if it still is in the marketplace?

A. I can't answer that.

Q. ...could you take a look at the Singer Power Brush hand vac...Do you know how long that's been in the marketplace?

A. No, I do not.

As to opposer's own use, Mr. Hoare states that opposer produced its "Corvette" hand-held vacuum cleaner in a red color.⁷ However, we note that the product was not sold in that color until 1992, long after applicant's first use of red PMS 186 on hand-held vacuum cleaners in 1984, and opposer produced a red product only until 1997.⁸ (Hoare test. pp. 39 and 47). In fact, Mr. Hoare has testified that opposer's company does not currently manufacture any hand-held vacuum cleaners in the color red. The lack of demonstrated third-party use of a red color on hand-held vacuum cleaners provides further support for the position that others do not need to use that color in order to compete effectively in the marketplace.

⁷ Mr. Hoare references a red Eureka "Whisk" model hand-held vacuum cleaner. Although Mr. Hoare identifies the date on which the vacuum cleaner appears in a catalog, he never affirmatively states that the model was ever sold. In any event, the product is not red alone but a distinct combination of two different colors, red and white. (Id. Exh. M).

⁸ Mr. Hoare testified that approximately 3 million hand-held vacuum cleaners were sold by opposer since 1984. There is no breakdown of that figure by color.

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Finally, we note that in evaluating competitive need "we must consider whether alternative colors are available in order to avoid the fettering of competition." Brunswick, supra. The evidence in this case indicates that hand-held vacuum cleaners are generally manufactured in a wide range of colors and combinations of colors, further demonstrating that there is no inherent advantage in using one particular color over another for these products.

Accordingly, we find that applicant's red PMS 186 is not de jure functional for hand-held vacuum cleaners.⁹

B. Whether applicant has established that red PMS 186 has acquired distinctiveness for hand-held vacuum cleaners.

The ultimate burden of persuasion under Section 2(f) on the issue of acquired distinctiveness is on the applicant. Yamaha International Corp. v. Hoshino Gakki Co. Ltd., 6 USPQ2d 1001 (Fed. Cir. 1988). Nevertheless, it is the opposer's burden to produce sufficient evidence or argument whereby, on the entire record, the Board could conclude that the applicant has not met

⁹ We are only deciding the issue of whether a particular shade of red, in this case PMS 186, is de jure functional for the identified products. We make no determination in this case as to how close on the Pantone scale another's use of a different shade of red would have to be for a finding of likelihood of confusion.

its ultimate burden of showing acquired distinctiveness.¹⁰

Goodyear Tire and Rubber Co. v. Interco Tire Corp., 49 USPQ2d 1705 (TTAB 1998).

To prove distinctiveness under Section 2(f) of the Trademark Act, applicant may submit any "appropriate evidence tending to show that the mark distinguishes [applicant's] goods."¹¹

Trademark Rule 2.41(a). Applicant, in this regard, has submitted evidence including a consumer survey, length and exclusivity of use, advertising expenditures, sales volume and promotional materials.¹²

We find that applicant has met its burden of proof and has produced sufficient evidence that purchasers associate the color red PMS 186 for hand-held vacuum cleaners with applicant.

¹⁰ Contrary to applicant's claim, the issue to be decided in this case is not whether the Board "erred" in its decision on appeal. The prior ex parte decision is not determinative of the outcome herein.

¹¹ The evidence relied on to support a claim that a designation is nonfunctional can be the same as that used to support claim of acquired distinctiveness. Kasco Corp. v. Southern Saw Service Inc., 27 USPQ 2d 1501 (TTAB 1993).

¹² Applicant also submitted the results of a "phone log," where over a six-week period, applicant's staff tracked references in consumer telephone calls to the color red. The staff recorded 662 references to red out of approximately 10,000 total phone calls. We agree with opposer that the results of the phone log should be given no probative weight. It is impossible to determine which Dirt Devil model, out of the entire Dirt Devil line, generated the customer responses on which applicant seeks to rely.

i. Survey

As described by Mr. McCafferty, applicant conducted a "mall intercept study" in late-May and early-June 1993 in a Chicago shopping mall. Respondents were approached in the mall (from walk-by traffic) and screened for either the recent purchase of a hand-held vacuum cleaner or the intention to purchase a hand-held vacuum cleaner within the next year. A total of 480 men and women were recruited for the study. Mr. McCafferty states that the purpose of the study was twofold, to determine (1) the degree to which consumers associate a red color "with applicant's Dirt Devil products" and (2) if hand-held vacuum cleaners are a separate and distinct category of product.

(a) Part 1 of the survey

Five of each of the following brands of hand-held vacuum cleaners, for a total of 25 vacuum cleaners, were purchased from retail stores: Dust Buster (a Black & Decker product), Dirt Devil, Sears/Kenmore, Hoover, and Eureka. The brand names and any other identifiable markings were removed and each of the five brands was painted to appear in each of five colors, red, white, blue, black and beige. An individual display consisted of the five different prototypes with each prototype appearing in a different color. The following illustration (taken from an

unknown. Once the response was volunteered, the follow-up question was asked, "Why do you say that?" However, Mr. McCafferty considered the responses to that question to be "inconclusive." (McCafferty test. p. 26). Therefore, the responses were not incorporated in the survey report and were later apparently destroyed.¹³

Mr. McCafferty concluded from responses to this part of the study that consumers are more likely to associate the color red with Dirt Devil vacuum cleaners than they are with other brands or manufacturers of hand-held vacuum cleaners.

Opposer's expert, Ms. Welter, on the other hand, was critical of several aspects of the survey including the "universe" of the population, claiming that as a "nonprobability" survey, the results are not projectable to the general population; and she was critical of Mr. McCafferty's interpretation of the results of the survey, concluding that shape as well as color must have been a variable determining respondent's answers in the study.

As explained in *McCarthy on Trademarks and Unfair Competition*, § 32:165 (4th ed. 2000) a "mall intercept" survey is

¹³ According to Mr. McCafferty, respondents "came back...in great numbers saying simply because I just know it is..." or "because it is." (Id p. 26).

typically known as a "non-probability" survey.¹⁴ The results of such a survey may not be generalized to the population at large because it does not require a random selection of persons to question. Nevertheless, shopping mall surveys have been found to be sufficiently reliable and have been endorsed as adequate in a number of decisions. See *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445 (TTAB 1986) and cases cited therein; and *McCarthy on Trademarks and Unfair Competition*, supra, at § 32:165. In view of the issue involved, there is nothing in the record to indicate that a mall intercept survey is inappropriate.

We turn then to a consideration of the results of the survey. For ease of reference, one of the many tables of data produced from the survey is reproduced below.

¹⁴ Professor McCarthy further explains that a probability survey involves the mathematically random selection of persons from the defined universe which permits a statistical projection of the results to the universe as a whole. The most common use of probability sampling is in telephone surveys. Persons in each selected household must be contacted and an appointment made for an in-person visit. (Id. § 32:164)

Dirt Devil Color Test, Research Results

Exhibit 1

% NAMING DIRT DEVIL / ROYAL

<u>COLOR</u>	<u>Black & Decker</u>	<u>Dirt Devil</u>	<u>Eureka</u>	<u>Sears Kenmore</u>	<u>Hoover</u>
Beige	0%	37%	0%	0%	1%
Red	7%	76%	31%	10%	30%
White	0%	57%	5%	0%	5%
Blue	2%	52%	1%	1%	4%
Black	1%	61%	4%	2%	3%

% NAMING DUST BUSTER / BLACK & DECKER

<u>COLOR</u>	<u>Black & Decker</u>	<u>Dirt Devil</u>	<u>Eureka</u>	<u>Sears Kenmore</u>	<u>Hoover</u>
Beige	84%	4%	1%	8%	7%
Red	77%	2%	3%	6%	9%
White	86%	0%	4%	9%	5%
Blue	84%	2%	4%	7%	2%
Black	81%	6%	6%	10%	13%

The table shows that 76% of respondents correctly identified the Dirt Devil hand-held vacuum cleaner when it appeared in a red color. The correct identification of the Dirt Devil product diminished when other colors were used, with the highest recognition rate at 61% for black Dirt Devil product and the lowest recognition at 37% for beige Dirt Devils.

In criticizing the survey, Ms. Welter claims that the high recognition rate for red Dirt Devil hand-held vacuum cleaners is due at least in part to respondents' recognition of the shape of the Dirt Devil. In her attempt to eliminate shape as a possible factor, Ms. Welter subtracted the percentage of respondents which correctly identified the black Dirt Devil (61%) from the percentage which correctly identified the red Dirt Devil (76%).

Thus, Ms. Welter concluded that, at best, there is only a 15% recognition rate for color alone.

Ms. Welter also contends that the 77% recognition rate for red Dust Buster hand-held vacuum cleaners would further "indicate that shape is playing in." (p. 14 Welter test.); and that this percentage of respondents associating red with the Dust Buster product raises a question as to whether people are more likely to associate red with Dirt Devil. It is also Ms. Welter's contention that the fact that the Hoover and Eureka hand-held vacuum cleaners resemble a Dirt Devil in shape explains the high degree of misidentification of red Hoover hand-held vacuum cleaners (30%) and red Eureka hand-held vacuum cleaners (31%) as Dirt Devil products and the low rate of misidentification of red Dust Buster hand-held vacuum cleaners (7%) and red Sears/Kenmore product hand-held vacuum cleaners (10%) as Dirt Devil products.

An examination of the results of the survey does not lead us to a clear understanding of the extent to which shape actually played a part in the respondents' identifications of products. Not having the benefit of the responses to the question which followed the identification of each product is an aggravating factor. At the same time, we will not just completely dismiss the results as having no persuasive value. On the balance, we find it reasonable to infer that the results support some degree of association of the color red with applicant.

We note that there is a significant difference between the size and shape of the Dust Buster and the size and shape of the

Dirt Devil, Eureka and Hoover. It is interesting to note that regardless of the color, the Dust Buster was correctly identified by a high percentage of respondents (up to 86% for white). We also note, as the Board did in the decision on appeal, that when the Dust Buster appeared in red, it was correctly identified by the lowest percentage of respondents. Ms. Welter has neither rebutted nor even attempted to explain this finding.

Moreover, if the similar shape of the Hoover, Eureka and Dirt Devil products produced responses which were based to some degree on the shape of the product, we do not understand (and Ms. Welter was unable to explain) why not one respondent incorrectly identified a beige Eureka as a Dirt Devil and not more than 1% incorrectly identified a beige Hoover as a Dirt Devil. In fact, the recognition rate is low for all non-red Eureka and Hoover products reaching only a high of 5% for a white Eureka. When asked to explain this result in light of her claim that shape is an influencing factor in the process Ms. Welter said, "I don't know." (Welter test. p. 46). Thus, the significance of shape as a variable in the study has not been clearly established.

(b) Part 2 of the survey

We come to the question of whether the survey demonstrates that hand-held vacuum cleaners constitute a separate category of vacuum products. Ms. Welter has criticized applicant's use of a leading question to obtain a favorable response.

In this part of the survey, respondents were asked, among other questions, "If you needed to replace your hand-held vacuum cleaner to do main [sic] job, what kind of product would you buy to replace it?" For this question, the interviewers were instructed to prompt the responses by reading from a list of nine choices, varying the order from respondent to respondent. The choices included items such upright vacuum cleaners, canister vacuum cleaners, brooms/mops/rags and "another hand-held vacuum cleaner." In response to this question, 83% of respondents answered "another hand-held vacuum cleaner" and 5% answered "upright vacuum cleaner." The remaining 12% of respondents identified products in the other categories.

Despite Ms. Welter's contention, we do not find the challenged question to be leading. Because the order of the prompt was varied for each respondent, the question did not obviously direct the respondent to the specific answer, "another hand-held vacuum cleaner." Moreover, the results of this part of the survey support the other evidence introduced by applicant which establishes that hand-held vacuum cleaners are indeed a separate category of product, distinguished from the rest of the line of vacuum cleaners by the size, shape, cost and purpose of the product.

For example, applicant has submitted an excerpt from *Consumer Reports*, which separates hand-held vacuum cleaners and upright vacuum cleaners into two distinct categories; a *Market Advantage* report which indicates that hand-held vacuum cleaners

are advertised in the industry at a much lower rate than most other types of vacuum cleaners; Mr. Farone's testimony that hand-held vacuum cleaners are typically less expensive than upright vacuum cleaners, and are significantly smaller in size, and can be sold in different aisles in stores; *Trend Data* report, an independent data collection company, reporting major market share as two distinct categories, uprights and hand-held vacuums; and a report from *Market Facts*, a company conducting independent "top-of-mind awareness studies" that separates uprights and hand-held vacuum cleaners into two categories.

*ii. Extent of Sales and Advertising Expenditures;
Length and Exclusivity of Use*

Applicant has submitted evidence of over 13 years of continuous use of its red color hand-held vacuum cleaners from the years 1984 to 1997. For eight of those years, from 1984 to 1992, applicant sold hand-held vacuum cleaners almost exclusively in a red color. Applicant has reported substantial sales and advertising expenditures for that time period. The evidence shows that applicant spent over \$35 million in television advertisements alone for red hand-held vacuum cleaners. Sales of red hand-held vacuum cleaners during that time period approached \$400 million with nearly 12 million red hand-held vacuum cleaners sold.

Between 1993 and 1997, applicant sold its hand-held vacuum cleaners in a variety of colors in addition to red. However, the

sales of hand-held vacuum cleaners in other colors does not appear to have diminished or diluted the impact of the red hand-held vacuum cleaners in the marketplace. The evidence shows that sales of applicant's red hand-held vacuum cleaners remained high during those years and constituted a substantial percentage of the total hand-held vacuum cleaners which were sold during that time.¹⁵

Applicant first introduced its Dirt Devil hand-held vacuum cleaners in a red color in 1984. Opposer has been unable to provide clear evidence of any third-party use of red on hand-held vacuum cleaners prior to that date. Mr. Hoare testified as to the use of red on hand-held vacuum cleaners by third parties. However, this testimony is speculative and not well-supported, and the nature and extent of any such uses are unclear.

The only consequential evidence of third-party use of red on hand-held vacuum cleaners after 1984, is opposer's own use of red on the Corvette hand-held vacuum cleaner. That use began in 1992, eight years after applicant's first use of a red color on its hand-held vacuum cleaners. Mr. Hoare testified that between the years 1992 and 1997, opposer sold a total of 600,000 of these products in the color red.¹⁶ We have no evidence of the nature or

¹⁵ Applicant's precise sales figures and percentages for those years have been made of record under seal.

¹⁶ We note Mr. Farone's unsupported claim that others' use of the color red for hand-held vacuum cleaners began as a result of the "commercial success" of applicant's use of red. However, there is no evidence of intentional copying of applicant's product by any company in the record for this case and the claim has accordingly been given no consideration.

geographic scope of those sales, and there is no indication that the color of the Corvette product sold had a substantial, if any, impact in the market or on the sales of applicant's red hand-held vacuum cleaners.

Thus, applicant's use of a color red for hand-held vacuum cleaners was first, and appears to have been otherwise substantially exclusive over the entire period of use.¹⁷

iii. Advertisements and Promotional Materials

Applicant has advertised extensively on national television and in nationally distributed consumer magazines and trade journals. Opposer points out that many of those advertisements do not specifically draw attention to the color red. The color

¹⁷ We note opposer's contention that the surfaces of the DIRT DEVIL and DUST DEVIL hand-held vacuum cleaners are not solely red but rather a combination of designs, marks and colors, including red. It appears to be opposer's position that distinctiveness cannot be acquired in a proposed mark which has not even been used. Applicant's reliance on TMEP § 1202.04(e) in response to this argument misses the point. Nevertheless, opposer's argument is not well taken. Merely because the color red does not cover the entire surface of the products or the fact that other marks may appear on the goods does not mean that the color cannot acquire distinctiveness for those goods. The color red covers a substantial portion of the surface of the products so that the overall commercial impression of the vacuum cleaners is essentially of a red product. The record shows that applicant has specifically called attention to the color itself so as to set the color apart from the other markings on the vacuum cleaners. The ultimate question is whether the evidence is sufficient to convince us that the color red, whether or not applied to the entire surface of the goods, is recognized as a mark for those goods.

is, however, prominently featured in virtually every advertisement and we find that this use reinforces the association of the red color with applicant. For example, the red devil's tail nearly always appears as part of the overall product display, and it is the entire focus of at least one advertisement. (See, e.g., Farone test. Exh. 13).

Moreover, a significant number of advertisements specifically call attention to the red color of the product. An example of this use is shown in one of applicant's televised commercials. The commercial opens with an entire screen of red, pulling back to show a red balloon with the voice-over reading "What's bright red, feather light and comes with an extra long cord? Guess again, it's the powerful DIRT DEVIL hand-vac." Mr. Farone states that a similar print advertisement also appeared in such nationally distributed magazines as *People* and *Ladies' Home Journal*.

One consumer print advertisement features a line of Dirt Devil vacuum cleaners including the hand vacuum, and contains the headline "When You See Dirt, See Red" followed by the text "you'll be amazed how good the place looks when you add a touch of red."

Another consumer print advertisement contains the headline "Everyone Knows Red And Green Are Complementary Colors" followed by the text "Stock up on Dirt Devils and you'll soon see that our color sense makes business sense....So order up some bright red Dirt Devil Vacuums and see how much green power red can have."

We find that the cumulative effect of applicant's promotional efforts clearly demonstrate use of red PMS 186 as a source-indicator for hand-held vacuum cleaners.¹⁸ The evidence in its entirety establishes that red PMS 186 has acquired distinctiveness as applicant's mark for hand-held vacuum cleaners. We are not persuaded otherwise by the evidence that applicant has also sold hand-held vacuum cleaners in other colors, that some of applicant's advertisements tout the superior performance of the vacuum cleaners rather than the red color, or that other advertisements promote the entire line of Dirt Devil vacuum cleaners.

IV. Conclusion

On the basis of the record, we conclude that applicant's red PMS 186 color is not de jure functional for hand-held vacuum cleaners. We are also persuaded that, in view of the totality of the evidence submitted by applicant, and since opposer has not sufficiently rebutted this evidence, purchasers associate applicant's red color PMS 186 with a single source, applicant, for hand-held vacuum cleaners.

¹⁸ The three dealer declarations submitted by applicant have also been considered. Suffice it to say that this evidence, while not persuasive standing on its own, lends further support for the perception of a red color as a mark for applicant's hand-held vacuum cleaners.

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Decision: The opposition is dismissed.

C. E. Walters

D. E. Bucher

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal