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Hearing:
January 25, 2000
9/15/00

Paper No. 43
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Valspar Corporation
v.
Sirius Products, Inc.

Opposition No. 107,846
to application Serial No. 74/626,831
filed on January 30, 1995

John A. Clifford and Scott W. Johnston of Merchant & Gould
for The Valspar Corporation.

Antony J. McShane, Charles M. Stern, Edward L. Adams and
Kristin L. Holland of Katten Muchin & Zavis for Sirius
Products, Inc.

Before Sams, Seeherman and Quinn, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Sirius Products, Inc.
to register the mark ZAP for "preparations for restoring and
cleaning porcelain, fiberglass, tile and grout."¹

Registration has been opposed by The Valspar
Corporation under Section 2(d) of the Trademark Act on the

¹ Application Serial No. 74/626,831, filed January 30, 1995,
alleging a bona fide intention to use the mark in commerce.

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ground that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered mark ZAPZ for "paint primer and stain sealer"² as to be likely to cause confusion. Opposer also has claimed likelihood of confusion with its common law mark ZAP for stain sealing primer paint.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; a declaration and accompanying exhibits (by stipulation of the parties); status and title copies of opposer's pleaded registration, as well as two other registrations owned by opposer, the file history of its pleaded registration, applicant's responses to opposer's interrogatories and requests for admissions, and copies of third-party registrations, all introduced by way of opposer's notices of reliance; and opposer's responses (including supplemental responses) to applicant's interrogatories, and a discovery deposition, with related exhibits, made of record by applicant's notice of reliance.³ The parties filed briefs, and both parties

² Registration No. 1,744,184, issued January 5, 1993; combined Sections 8 and 15 affidavit filed.

³ Applicant also has relied upon its registration of the mark ZAP! for preparations for restoring and cleaning porcelain, fiberglass, tile and grout. Opposer has pointed out that the

were represented by counsel at an oral hearing before the Board.

Opposer is engaged in the manufacture and sale of a variety of products through its three divisions, namely the industrial, packaging and specialties products and consumer divisions. Opposer's consumer products include paints and cleaning preparations. The primer paints have been sold under the mark ZAPZ through a licensee, and under the mark ZAP by opposer itself. The ZAP mark is used in connection with opposer's primer paint sold only at Wal-Mart stores, and these primers have been promoted in advertisements, including free-standing inserts and in-store handouts. Testimony of James Robellard, opposer's director of marketing, consumer division.

Applicant develops and markets cleaning preparations under the mark ZAP. Since its first sales, applicant has sold over one million bottles of its products, with 1998 sales revenues exceeding \$7 million. Advertising expenditures over the years have amounted to \$4.7 million. The products are promoted primarily through direct response

copy of the registration is not a status and title copy as required by Trademark Rule 2.122(d)(2) and, on this basis, has objected thereto. The objection is sustained. We would point out, however, that this evidence is immaterial to the issues in this proceeding. We also note that the registration is currently the subject of Cancellation No. 28,259 brought by opposer. The answer in that case includes a proposed counterclaim to cancel opposer's pleaded registration. Proceedings in that case were suspended pending the outcome herein.

television commercials and infomercials. Testimony of Jeffrey Wycoff, applicant's president.

Before turning to the merits of the likelihood of confusion claim, we direct our attention to an interlocutory matter which arose earlier in the proceeding. Applicant did not file a request for reconsideration of the involved ruling, nor did it formally request the Board at final hearing to revisit the ruling. Nonetheless, after our further review of the chronology surrounding applicant's motion to amend its answer to set forth a counterclaim, we think it appropriate to discuss the matter in this opinion.

In November 1998, applicant moved for leave to amend its answer to assert a counterclaim to cancel opposer's pleaded Registration No. 1,744,184. In moving to amend applicant essentially asserted that it learned of grounds to cancel the registration during a discovery deposition that it conducted the previous month. As grounds for the counterclaim, applicant alleged that the registered mark was abandoned due to opposer's failure to exercise control over the nature and quality of the goods produced under the mark by the licensee.

The Board, in a ruling dated July 6, 1999, denied the motion to amend the answer to assert the counterclaim. The Board found that the deposed witness did not provide any specific information about the license agreement, but rather

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that applicant was aware of the facts surrounding the license agreement long before the Fed. R. Civ. P. 30(b)(6) deposition of Mr. Robellard took place. The Board determined that "[t]he license agreement was set out in the notice of opposition and the agreement itself was provided to applicant in March, 1998" and "[n]o new information came out in the October deposition and it was not until November 1998 when applicant filed its motion." Another factor in the ruling was that the parties continued to abide by the trial schedule and that all testimony periods had closed by the time of the Board's decision. The Board stated that "to reopen the time periods at this late stage in the proceeding would prejudice opposer by having to virtually start the proceeding over, and by the delay and additional cost incurred as a result."

Upon a closer review, it would appear that applicant learned of the grounds for the proposed counterclaim only after the discovery deposition of Mr. Robellard, and that it promptly moved thereafter to amend its answer. Prior to the deposition, the only information in applicant's possession constituted a copy of the license agreement and opposer's response to an interrogatory that it "maintains high quality products and requires that any authorized user of ZAPZ use high quality of ingredients and maintain performance standards which are acceptable in the trade, pursuant to a

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license agreement." Not surprisingly, Mr. Robellard's lack of knowledge at his October 1998 deposition concerning opposer's licensee's activities, in and of itself, raised a question for applicant about the licensing arrangement. Moreover, it was not until after Mr. Robellard was unable to provide sufficient information about the licensing arrangement at his deposition on October 7, 1998 that opposer, on October 23, 1998, supplemented its interrogatory response pertaining thereto. Opposer's three-pages long supplemental response provides a much more detailed picture of the activities surrounding the license agreement. Applicant's motion to amend was filed on November 13, 1998, only 37 days after Mr. Robellard's testimony, and a mere 21 days after opposer's supplemental answer. Thus, we believe that the proposed amended pleading should have been allowed.

Be that as it may, applicant never moved to suspend the proceeding when it filed its motion to amend and, in connection with its motion to amend, applicant never indicated that it would need additional discovery bearing on the license agreement. Rather, the parties moved ahead in the proceeding, even going on to trial. In the course of doing so, the parties introduced testimony regarding the license agreement, acting as though the amended pleading to include the counterclaim had been allowed. This course of action indicates that the parties thought it appropriate to

go forward to trial, including on the issue of abandonment involving the license agreement. Indeed, the Board's ruling on the proposed counterclaim did not issue until after trial had concluded and, thus, the Board's decision had no effect whatsoever on the parties' conduct at trial.

Further, our reading of the record convinces us that the ground raised by the proposed counterclaim was tried by the parties by implied consent as contemplated by Fed. R. Civ. P. 15(b). During its testimony-in-chief, opposer took the testimony of Kenneth Arthur, group vice president-architectural coatings for opposer. Mr. Arthur's testimony deals almost exclusively with opposer's license agreement which is at the heart of applicant's abandonment claim. Applicant took the opportunity to cross examine Mr. Arthur. In addition, the abandonment issue is discussed at length by the parties in their final briefs, and the issue was addressed by the parties at the oral hearing. At no time during trial did opposer object to the introduction of evidence bearing on the license agreement; rather, as noted above, opposer itself introduced pertinent testimony during its case-in-chief. Clearly, opposer cannot claim surprise that applicant continued to question the license.

In sum, notwithstanding the Board's earlier denial of applicant's motion to amend, the totality of the circumstances surrounding this matter demonstrates that the

issue was tried and should be decided by the Board at final hearing. Fed. R. Civ. P. 15(b).

Accordingly, we now turn to applicant's claim that the pleaded registered mark has been abandoned because opposer has failed to exercise quality control over the products produced by its licensee.

Opposer filed in June 1996 an application to register the mark ZAP for a stain-blocking primer. Registration No. 1,744,184 for ZAPZ, then owned by Blue Ridge Talc Company, Inc. ("Blue Ridge"), was cited under Section 2(d) as a bar to registration of opposer's mark. When opposer's mark was refused registration, opposer investigated the option of changing its mark, with the attendant costs and write-offs of such a decision. Given the high costs associated with this course of action, opposer decided, in the winter of 1996-1997, to approach Blue Ridge to consider a mutually beneficial business arrangement. Mr. Arthur testified that he had known about Blue Ridge, a regional paint producer in Virginia, for at least twenty years, and that he had never heard any negative comments about them. Opposer reviewed a Dun & Bradstreet report on Blue Ridge, and then placed its initial call to Blue Ridge in February 1997. Blue Ridge expressed an interest in working with opposer, depending on "how we came to agreement on the value of the trademark and how flexible we might be in not disrupting [Blue Ridge's]

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business." Mr. Arthur then traveled in March 1997 to Virginia for a meeting with Blue Ridge, and a second meeting was held in Virginia in April 1997. At the second meeting, the principals discussed the valuation of Blue Ridge's trademark. Shortly thereafter, the amount of \$250,000 was agreed upon. After the second meeting, opposer undertook a test of Blue Ridge's product by purchasing the product in a store and sending it to opposer's lab. This way, according to Mr. Arthur, opposer was assured that it was not testing a "pre-prepared" or "pre-audited" sample. The blind testing was done by opposer's technical director, Paul Sara, on such characteristics as thickness, gloss retention and adhesion. The test results were verbally communicated to Mr. Arthur who testified that opposer was satisfied that "the quality of the product was in the acceptable range." A final meeting took place in Virginia in May 1997. Opposer paid Blue Ridge \$250,000, the cited registration was assigned to opposer, and opposer licensed back to Blue Ridge the right to use the mark in connection with its primer paint products.

The royalty-free license agreement (ex. no. 25), dated May 28, 1997, provided the following quality control provision:

Blue Ridge will maintain the quality of ingredients, performance, and overall product quality at a level generally acceptable to pass in the trade and not

less than the quality of product sold by Blue Ridge under the ZAPZ name on April 1, 1997. Blue Ridge will furnish [opposer] a sample product, free of charge, for quality evaluation when reasonably requested by [opposer], to occur not more than once annually.

The license also provided that Blue Ridge shall tender a written report once a year on the anniversary of the execution of the agreement indicating Blue Ridge's compliance with the terms of this agreement. According to Mr. Arthur, the agreement was drafted to "keep [Blue Ridge's] selling product in the same manner of distribution that had been historically evident."

Blue Ridge, in a letter dated April 21, 1998, informed opposer that "[it] has remained in compliance with all terms of our May 15, 1997 Trademark License Agreement" and that "[t]his report is being submitted as mandated on page 6, item 8 of said agreement." Mr. Arthur testified that he had no reason to believe that the compliance statement was incorrect. In the time since the agreement was executed, opposer invited officers of Blue Ridge to visit one of opposer's manufacturing facilities for the purpose of getting ideas in some manufacturing techniques. Although the visit has not yet taken place, Mr. Arthur testified that the offer stands.

As indicated above, opposer's first test of Blue Ridge's product was conducted prior to their agreement.

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Second tests were ordered in the Fall of 1998 by Mr. Arthur. These tests were again conducted by opposer's lab, and the results are memorialized in a memo dated November 24, 1998 from the lab's technical director to Mr. Arthur. According to Mr. Arthur, Blue Ridge samples were obtained in the field to insure that the tests were performed on products in the marketplace. The tests involved a double blind study comparing several properties of opposer's ZAP product and Blue Ridge's ZAPZ product. Two significant properties were tested, namely contrast ratio and stain blocking. According to the memo of the lab technical director, the products were found to be "roughly equivalent." Mr. Arthur testified that the products performed "essentially equally" in the properties most important to consumers. Mr. Arthur testified that, based on the test results, opposer is satisfied with the quality of Blue Ridge's product sold under the mark ZAPZ.

On cross examination of Mr. Arthur, applicant elicited additional information surrounding opposer's acquisition of the registered mark and the license back to Blue Ridge. Prior to the rejection of opposer's application, Mr. Arthur, although aware of Blue Ridge, was not aware of their use of the mark ZAPZ. Mr. Arthur also testified that the sole purpose of acquisition of the cited mark was to essentially pave the way for the registration of opposer's ZAP mark. In

the process of negotiating the agreement, Mr. Arthur requested information about Blue Ridge's consumer base in an effort to keep their market niches separate. Blue Ridge made verbal representations to opposer regarding continuous use of the registered mark since 1978, but opposer did not review any sales records or otherwise undertake any investigation concerning Blue Ridge's use. According to Mr. Arthur, the only documentation reviewed was Blue Ridge's registration. In responding to a line of questions, Mr. Arthur indicated that he never toured Blue Ridge's production facilities, that opposer has not reviewed Blue Ridge's production of the ZAPZ brand product, and that opposer has not reviewed Blue Ridge's quality control techniques for the manufacture of the ZAPZ product.

We find, based on the record before us, that the assignment was valid and that opposer, as licensor, has exercised adequate control over the nature and quality of the goods such that there has been no abandonment.

A valid transfer of a mark does not require the transfer of any physical or tangible assets. All that is necessary is the transfer of the goodwill pertaining to the mark. The assignment document here specifically provided that the assignment involved "all right, title and interest in and to the said mark, together with the good will [sic] of the business symbolized by the mark, and the above-

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identified registration thereof." Further, the simultaneous license back of the assigned mark which enabled Blue Ridge to conduct the same business under the mark was proper. A license back is valid if it satisfies the conditions of validity for trademark licenses generally. The principal requirement is that the licensing agreement provides for adequate control by the licensor over the quality of goods produced under the mark by the licensee. *VISA, U.S.A., Inc. v. Birmingham Trust National Bank*, 696 F.2d 1371, 216 USPQ 649, 652-53 (Fed. Cir. 1982). See generally: J. T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, §18:9 (4th ed. 2000).

As indicated above, the license agreement specifically provided for quality control in paragraph 4. Further, since execution of the agreement, steps have been undertaken to ensure that the quality of Blue Ridge's product sold under the mark ZAPZ has been maintained. As Mr. Arthur testified, the intent of opposer and Blue Ridge in drafting the agreement was to minimize any disruption to Blue Ridge's business, and it appears that there has been no disruption in the continuity of the quality of Blue Ridge's product sold under the mark ZAPZ. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327, 21 USPQ2d 1824, 1830-31 (9th Cir. 1992).

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Moreover, in order to avoid abandonment of its mark, a licensor need not show that its quality control efforts are comprehensive or extensive. *Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon)*, 43 USPQ2d 1440, 1446 (TTAB 1997), *aff'd in unpublished opinion*, (Appeal No. 97-1580, Federal Circuit, March 5, 1998). Control may be adequate where the licensor justifiably relies on the integrity of the licensee to ensure the consistent quality of the goods produced under the mark. *Taco Cabana International Inc. v. Two Pesos Inc.*, 19 USPQ2d 1253, 1259 (5th Cir. 1991), *aff'd*, 505 U.S. 763, 23 USPQ2d 1081 (1993). The rationale behind quality control is that the public has a right to expect a consistent quality of goods associated with a trademark. Again, the record is devoid of any evidence that the quality of Blue Ridge's product has changed. Rather, what evidence is of record indicates that Blue Ridge's business operations have been status quo, and that the ZAPZ product has remained the same, that is, of a quality comparable to opposer's ZAP product.

We recognize that opposer's tests of the quality of Blue Ridge's product in November 1998 occurred shortly after it looked as though applicant was raising the lack of quality control as an issue by way of its proposed counterclaim. Applicant has questioned the timing of opposer's efforts. We would point out, however, that the

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license was not executed until May 28, 1997 and, pursuant to the license agreement, Blue Ridge notified opposer in April 1998 that it remained in compliance. The November 1998 tests confirmed Blue Ridge's compliance. Moreover, there is no indication that in the short period of time that elapsed between the signing of the license agreement and the testing of the product that there was any slippage in the quality of Blue Ridge's product.

In sum, the registered mark has not been abandoned because opposer's mark has not ceased to function as an indication of origin and the quality of the goods has, according to Blue Ridge's statements and opposer's testing, remained at a consistently acceptable level. *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 59 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984).

We next turn to the issue of priority. Inasmuch as we have determined that opposer owns a valid and subsisting registration, there is no issue regarding opposer's priority at least with respect to the mark ZAPZ for paint primers and stain sealers. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Opposer also urges, however, that it has priority of use of the mark ZAP by virtue of tacking. Opposer did not commence use of its ZAP mark on paint primers and stain sealers until 1996. On the other hand, Mr. Wycoff testified

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that applicant first used its mark ZAP on its product "around June 5, 1995." Thus, the only way for opposer to prevail on its claim of priority of the ZAP mark is by tacking on its use of the ZAPZ mark to use of the ZAP mark. We find that opposer cannot succeed on this claim.

The issue is whether the mark ZAPZ for paint primers and paint sealers is the legal equivalent of ZAP for the same products. The standard of legal equivalence for the purpose of tacking the prior use of one mark onto that of another is higher than that used in evaluating two competing marks. The previously used mark must be the legal equivalent of the mark in question or indistinguishable therefrom, and the consumer should consider both as the same mark. For the purposes of tacking, even if the two marks are confusingly similar, they still may not be legal equivalents. Instead, the marks must create the same, continuing commercial impression, and the later mark should not materially differ from or alter the character of the mark attempted to be tacked. Tacking in general should be allowed only in rare instances. *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866 (Fed. Cir. 1991); and *American Paging Inc. v. American Mobilphone Inc.*, 13 USPQ2d 2036 (TTAB 1990), *aff'd*, 17 USPQ2d 1726 (Fed. Cir. 1990).

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Based on the record before us, we find that the marks ZAPZ and ZAP are not legal equivalents. Although the marks differ by only one letter, the difference in this case is sufficient to render the marks not legally equivalent. Opposer has presented no evidence to show that consumers would view the marks ZAPZ and ZAP as the same mark. Based on a visual comparison of the two marks, our view is that they are not the same.

Inasmuch as opposer does not have priority with its ZAP mark, it cannot prevail on the basis of this mark, and no further consideration need be given thereto. In sum, opposer's priority rests with its ZAPZ mark only, and our consideration of likelihood of confusion will be based solely on this mark.

We now turn to the issue of likelihood of confusion. Our determination under Section 2(d) of the Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As dictated by the evidence, different factors may play dominant roles in determining likelihood of confusion. Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). The factors deemed pertinent in the proceeding now before us are discussed below.

Although we have found, as indicated above, that the marks ZAPZ and ZAP are not legal equivalents, we nevertheless conclude that the marks are similar. The marks differ only by the letter "Z" appearing in opposer's mark. The marks sound similar. Further, the marks have the same meaning, connoting that opposer's stain blocking primers and applicant's cleaners stun or defeat stains or dirt with quick action. In this connection, we grant applicant's request that we take judicial notice of *Webster's New World Dictionary* listing for the word "zap": "to move, strike, smash, kill, etc. with sudden speed."

Given the meaning of the term "zap," we agree with applicant that, when applied to the parties' goods, the marks are suggestive. We view the marks, however, as being only slightly suggestive. In any event, even suggestive marks are worthy of protection and, in the present case, the marks convey the same suggestion. In spite of this suggestiveness, we also point out that the record fails to show what applicant characterizes as a "crowded" field of ZAP marks.⁴

Opposer argues that its mark ZAPZ is a strong, well known mark entitled to broad protection. To the extent that

⁴ During the prosecution of the involved application, applicant listed third-party registrations which it discovered by way of a search report. Applicant failed to submit copies of these registrations during trial and, therefore, the cited registrations cannot be considered. *TBMP* §§703.01 and 703.02.

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opposer is suggesting that its mark is famous, the evidence clearly falls short. Simply put, we cannot conclude, based on the evidence of record on this point, that the ZAPZ mark has achieved the status of a famous mark. Compare: *Kenner Parker Toys v. Rose Art Industries*, supra at 1456.

Applicant argues that the trade dress of the marks is different, and that opposer's mark is used with a house mark. Suffice it to say, the marks which we must compare do not involve either the use of trade dress (both marks are in typed form) or the use of a house mark. Thus, applicant's arguments are to no avail.

We next turn to a comparison of the goods. Opposer's goods are identified as "paint primer and stain sealer" and applicant's goods as "preparations for restoring and cleaning porcelain, fiberglass, tile and grout." The question of registrability of applicant's mark must be decided on the bases of these identifications. *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Opposer's stain-blocking primer is an intermediate coat applied between the surface and the final coat of paint. Mr. Robellard testified that consumers often use a cleaner to remove stains from a surface to be painted. With troublesome stains, a primer is applied to put an

impermeable barrier between the stain and the paint. This way, the stain will not bleed through the paint.

Applicant's product is a consumer cleaning preparation or restorer which removes stains and restores underlying surfaces. Mr. Wycoff testified that applicant's product destroys paint, and that it is not used in conjunction with paints.

It is clear that opposer's paint primers and applicant's cleaners are specifically different products. The issue to be determined here, however, is not whether the goods in question are likely to be confused, but rather whether there is a likelihood that purchasers or potential purchasers thereof will be misled into the mistaken belief that they emanate from the same source. In considering the goods, we start with the premise that they need not be identical or even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are so related or that conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. *Hercules Inc. v. National Starch and Chemical Corp.*, 223 USPQ 1244, 1247 (TTAB 1984).

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We find that the record establishes a sufficient relationship between the parties' products that, when sold under the marks ZAPZ and ZAP, consumers in the marketplace are likely to be confused as to source. The products are broadly related in that, as pointed out by opposer, they both eliminate unwanted stains on a surface, albeit in different ways. Opposer's stain-blocking primers are used to cover and block stains for which cleaning was not entirely effective, and applicant's product removes and cleans stains, among other things. Mr. Robellard testified that a consumer wishing to remove a stain is likely to first try to clean the stained surface with a cleaner. In this manner, Mr. Robellard testified that the products may be viewed as complementary. Opposer's product labels instruct consumers to clean the surface before painting.

Opposer has introduced copies of third-party registrations showing that in at least eleven instances an entity has registered the same mark for both types of goods involved in this proceeding. As pointed out by applicant, these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. Further, some of the registrations appear to be for house marks covering a variety of products. Nevertheless, at least four of the registrations have probative value to the extent that they serve to suggest that the goods listed

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therein are of a kind which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Indeed, opposer itself has registered the mark PREP STEP for both "interior and exterior primer paints" and "concrete, masonry and asphalt surface cleaning solution."⁵

Although applicant argues that the goods are sold in different channels of distribution, we again note that the goods are compared in terms of the identifications of goods in the involved registration and application. Neither includes any limitations bearing on channels of trade or classes of consumers. Thus, we must assume that the parties' products move through all the ordinary and usual channels of trade for such goods to all the usual customers for these products. *Saab-Scania Aktiebolag v. Sparkomatic Corp.*, 26 USPQ2d 1709, 1711 (TTAB 1993). When compared in such fashion, the goods are assumed to move through similar channels of trade, such as hardware and home improvement stores, to the same classes of purchasers. Indeed, the record shows that the goods are purchased by the same classes of consumers.

Those customers include the public at large, who would not be considered sophisticated purchasers. Further, the

⁵ Registration Nos. 2,025,918 and 2,022,235, respectively.

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parties' products are relatively inexpensive, both selling for under twenty dollars. See: Moore v. The Proctor & Gamble Co., 193 F.2d 194, 92 USPQ 137, 140 (CCPA 1951)[Purchasers of inexpensive goods such as washing and cleaning compounds are not expected to exercise the degree of care and discrimination in making their purchases as would be exercised in the selection by them of more expensive and rarely purchased articles].

Lastly, to the extent that there is any doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of opposer as the prior registrant. Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984).

Decision: The opposition is sustained and registration to applicant is refused.

J. D. Sams

E. J. Seeherman

T. J. Quinn
Administrative Trademark
Judges, Trademark Trial
and Appeal Board