

THIS OPINION
IS NOT A PRECEDENT OF
THE T.T.A.B.

Mailed:
August 31, 2009
jtw

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Johns Manville

Serial No. 78820051

David E. Sipiora and Shelley B. Mixon of Townsend and
Townsend and Crew LLP for Johns Manville.

Paul F. Gast, Trademark Examining Attorney, Law Office 106
(Mary I. Sparrow, Managing Attorney).

Before Grendel, Walsh and Bergsman, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On February 21, 2006, Johns Manville (applicant)
applied to register the proposed mark FORMALDEHYDE-FREE on
the Principal Register for goods identified as "building
insulation" in International Class 17. The application is
based on a claim of first use of the mark anywhere and
first use of the mark in commerce on March 1, 2001.
Applicant seeks registration based on a claim that

Serial No. 78820051

FORMALDEHYDE-FREE has acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

The Examining Attorney has issued a final refusal under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the grounds that FORMALDEHYDE-FREE is merely descriptive of the identified goods and that applicant has failed to establish that FORMALDEHYDE-FREE has acquired distinctiveness under Trademark Act Section 2(f).

Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We affirm.

Procedural History

We begin by recounting some of the procedural history of this application which led to this appeal. The Examining Attorney first refused registration under Section 2(e)(1) in an Office action dated June 7, 2006. Applicant responded on December 7, 2006. Applicant did not dispute the fact that FORMALDEHYDE-FREE was merely descriptive of building insulation, but argued that FORMALDEHYDE-FREE had acquired distinctiveness and submitted evidence in support of that claim. Following that response, the Examining Attorney approved the application for publication, and it published on February 20, 2007.

Serial No. 78820051

In response to publication, Georgia-Pacific Chemicals LLC, Owens-Corning Fiberglas Technology, Inc., and CertainTeed Corp. all filed requests for extensions of time to oppose the application, and the Board approved those requests.

In addition, Georgia-Pacific Chemicals LLC (opposer) filed a notice of opposition. On September 1, 2007, the Board advised opposer that the Office of the Assistant Commissioner for Trademarks had accepted a letter of protest with respect to the application and restored jurisdiction to the Examining Attorney. The Board advised opposer that the notice of opposition was moot as a result of this action and that "... opposer's time for filing an opposition will commence when/if the applicant's mark is republished."

After jurisdiction had been restored to the Examining Attorney, in an Office action dated November 20, 2007, he again refused registration on the grounds that FORMALDEHYDE-FREE was merely descriptive and found that applicant's evidence of acquired distinctiveness was insufficient, that is, the same evidence applicant had submitted prior to publication. The Examining Attorney based the refusal on the evidence of descriptive use of FORMALDEHYDE-FREE provided through the referenced letter of

protest. *In re Candy Bouquet International Inc.*, 73 USPQ2d 1883, 1884 n.2 (TTAB 2004). After applicant responded, the Examining Attorney issued the final refusal which resulted in this appeal. Applicant did not attempt to submit any new evidence in response to the two actions following the withdrawal of the application from publication.

Objections to Evidence

Before addressing the merits of the appeal we must attend to certain evidentiary matters. Although applicant did not submit any evidence in response to the two actions leading to this appeal, applicant did submit new evidence with its appeal brief. Specifically, in its brief applicant refers to several third-party registrations for marks which end in "-FREE," such as, POISON-FREE. The Examining Attorney objects to this evidence because applicant failed to submit copies of the registrations and also because the submission was late.

The Examining Attorney is correct on both counts. The record must be complete prior to appeal, subject to certain exceptions not relevant here. See 37 C.F.R. § 2.142(d). Applicant's submission here is manifestly late. Therefore, we exclude this evidence from consideration. We note further that, even if applicant had submitted this evidence prior to appeal, it is not in acceptable form. The Board

Serial No. 78820051

does not take judicial notice of office records related to third-party registrations; applicants must submit appropriate copies of USPTO records to make registrations of record in an appeal. *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998); *In re Wada*, 48 USPQ2d 1689, 1689 n.2 (TTAB 1998), *aff'd*, 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999).

Furthermore, even if we had considered this evidence, we would reach the same conclusions in this appeal. Actions by examining attorneys on other applications do not dictate the Board's determination in an appeal. We must decide each case on its unique facts and record. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Also, with its appeal brief applicant submitted copies of a listing of results of a search for FORMALDEHYDE-FREE BUILDING INSULATION from the Google® Search Engine and copies of selected pages from the greenerbuldings.org website. Applicant offers this evidence to show that a high percentage of the top-listed results refer to applicant. Although the Examining Attorney has not objected to this evidence, neither has the Examining Attorney discussed it or otherwise treated it as part of

the record. Accordingly, we also exclude this evidence from consideration as late.

Here too, we add that, even if we had considered this evidence, we would reach the same conclusions in this appeal. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Bayer asserts that the list of GOOGLE search summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results - which may provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link - may be insufficient to determine the nature of the use of a term or the relevance of the search result to registration considerations.").¹ Also, the frequency and placement of results associated with a particular entity, which are a function of the internal operation of the search engine, lack probative value.

Summary of Arguments

Turning to the merits, the Examining Attorney argues that FORMALDEHYDE-FREE is not only merely descriptive but highly descriptive, and therefore, that applicant's

¹ Applicant also appears to argue that the search-engine evidence was not previously available. We find this premise dubious at best, and we reject this argument. If applicant wished to present new evidence, the procedure for doing so would be to request a remand for that purpose. See 37 C.F.R. § 2.142(d). Applicant has not done so.

Serial No. 78820051

evidence of acquired distinctiveness is insufficient to support registration under Section 2(f).

Applicant argues that its evidence that FORMALDEHYDE-FREE has acquired distinctiveness is sufficient, specifically, its prima-facie claim of substantially exclusive and continuous use under Section 2(f), its evidence of substantial sales, and its evidence of extensive advertising and promotion of FORMALDEHYDE-FREE as a mark.

Applicant also makes the following assertion repeatedly in one form or another: "Applicant is the sole seller of the complete line of 'FORMALDEHYDE-FREE' building insulation products. Customers and competitors both recognize Applicant as the sole manufacturer of FORMALDEHYDE-FREE building insulation products, as evidenced by the sales figures and advertising expenditures." Applicant's Brief at 5.

Applicant also argues that we should disregard all of the evidence included with the letter of protest, which the Examining Attorney submitted for the record, because most of this evidence post dates the sales and advertising evidence applicant presented, because the uses by competitors fail to show "use in commerce" and for other reasons.

Applicant also presents arguments as to specific items of evidence. For example, applicant argues that we should disregard evidence of use of FORMALDEHYDE-FREE by Dow Chemical because, "... this document does not show use of the term as a trademark." Applicant's Brief at 9. We will address these specific arguments, as appropriate, below.

Background Regarding Formaldehyde and Building Insulation

Before proceeding further it would be helpful to review the evidence regarding the properties of FORMALDEHYDE itself. The Examining Attorney has provided a dictionary entry from Dictionary.com indicating that FORMALDEHYDE is "a colorless, toxic, potentially carcinogenic, water-soluble gas, CH₂O, having a suffocating odor, usually derived from methyl alcohol by oxidation: used chiefly in aqueous solution, as a disinfectant and preservative, and in the manufacture of various resins and plastics." FORMALDEHYDE is present in many forms of building insulation. There is no dispute on these basic points. Also, as we stated, applicant did not dispute the fact that entire term, FORMALDEHYDE-FREE, is merely descriptive. The questions before us are the degree of descriptiveness and the sufficiency of applicant's evidence of acquired distinctiveness.

Evidence That FORMALDEHYDE-FREE Is Highly Descriptive

The Examining Attorney relies on the following evidence, received through the letter of protest, that FORMALDEHYDE-FREE is highly descriptive of building insulation:

A page from the dow.com website, retrieved 1/25/2007, connected with Dow Chemical discusses building insulation and states: "Further, all Dow core materials are **formaldehyde-free** and are not known food sources for mold or mildew.

An undated brochure from Dow Chemical includes the following statement: "Dow produces insulating foams that: ... are **formaldehyde-free**" under the heading "Build Green with Dow."

A page from cocooninsulation.com, retrieved 1/16/2007, discusses building insulation and states: "Cocoon insulation: It's your absolute best defenses against rising utility costs. ... safe, non-toxic, non-carcinogenic and **formaldehyde-free...**"

A page from guardianbp.com, retrieved 1/16/2007, connected with Guardian Building Products discusses building insulation and states: "Attic Guard® is non-corrosive, non-combustible, non flammable and pest resistant. It is also **formaldehyde-free.**"

A page from bondedlogic.com, retrieved 1/25/2007, connected with Bonded Logic discusses building insulation and states: "The Insulator brings fire, fungi and corrosive resistance to an insulation product that is **formaldehyde and resin-free.**

A brochure from Armacell Engineered Foams, with a copyright notice dated 2005, discusses insulation for use in healthcare facilities and states: "AP Armaflex is and always has been **formaldehyde-free.**"

An undated leaflet with the title "Questions and Answers About Formaldehyde and Fiber Glass Insulation," from CertainTeed Corp., reports information from the World Health Organization, International Agency for Research on Cancer (IARC) and states: "On June 9, IARC announced that it reclassified formaldehyde from a 2A, Probable Human Carcinogen, to 1, Known Human Carcinogen." The leaflet also states that, "There is a small amount of free formaldehyde present in today's fiber glass insulation products." The leaflet ends with the following: "Will CertainTeed launch a **formaldehyde-free** product? CertainTeed is and has been evaluating **formaldehyde-free** resins for the past ten years. We see no technical advantage in implementing such a change as our products are essentially **formaldehyde-free** today."

Pages from knaufusa.com, retrieved 1/16/2007, connected with Knauf Insulation discusses building insulation and states: "What about so-called **formaldehyde-free** insulation products?" The response uses **formaldehyde-free** three more times.

A page from ecoproducts.com, retrieved 1/25/2007, a site connected with Eco-Products, discusses building insulation and states: "Our cotton insulation is made from all natural fibers. Using recycled trimmings from the Denim industry our cotton insulation is **formaldehyde free**."

A brochure from Eco-Products, dated December 28, 2006, includes a bullet point " • **Formaldehyde-free**" under the heading "Compared to fiber glass."

A page from homedepot.com, retrieved 1/25/2007, related to Reflectix Insulation, discusses building insulation and refers to the product as being "fiber and **formaldehyde free**."

A page from advancedbuildings.org, retrieved 1/29/2007, discusses building products and includes the heading "**Formaldehyde-Free** MDF," a

photo caption stating "**Formaldehyde-Free** MDF is used in institutional, commercial and industrial designs" and includes one further use of "**formaldehyde-free**" in the text.

Pages from thegreeguide.com, retrieved 1/29/2007, include the following statement: "**Formaldehyde-free**: labeled products may contain chemicals like benzaldehyde, closely related to carcinogenic formaldehyde."

Two undated pages of charts connected with the "Ca Integrated Waste Management Board" presents one chart addressing "Structural Fiberboard: Acoustical Ceiling Tiles" where "**Formaldehyde-Free**" is referenced, and another chart addressing "Fiberglass Insulation" where the reference indicates "no formaldehyde" in relation to applicant and certain of its competitors' products.

A "Fact Sheet," dated August 2004, titled "REDUCING YOUR EXPOSURE TO FORMALDEHYDE," from the California Environmental Protection Agency includes the following statements: "Consider using **formaldehyde-free** materials such as solid wood, gypsum board... Use **formaldehyde-free** insulation."

Another publication from the California Environmental Protection Agency, also dated August 2004, titled "Formaldehydes in the Home," discusses insulation and other building products and states: "Use **formaldehyde-free** building materials."

Pages from peakstoprairies.org, retrieved 1/29/07, includes a check list for building with the following item under "STRUCTURE: Insulation": "Is the insulation that will be used **formaldehyde-free**?"

Pages from insulation.org, retrieved 1/29/2007, the website of the National Insulation Association, include an article, dated March/April 2004, with the following statement:

"When you think about sustainable design you look for products that are **formaldehyde-free...**"

A publication of the United States Environmental Protection agency, dated March 2006, titled "Residential Green Building Guide," includes the following reference under the heading "Insulation": "Recycled Content, **Formaldehyde-free** Fiberglass Search Terms."

Pages from greenhomeguide.com, retrieved 1/16/2007, discuss Cocoon insulation from U.S. GreenFiber and state: "Because the product uses a **formaldehyde-free** binder, indoor air quality concerns are limited..."

Pages from motherearthnews.com, retrieved 1/25/2007, from *Mother Earth News* discuss building insulation and state: "Some manufacturers, such as Owens Corning and Johns Manville, have introduced **formaldehyde-free** insulation products."

Pages from formaldehyde-free.org, retrieved 1/29/2007, a website connected with the "Formaldehyde-Free Coalition" includes references, such as "If you are interested in becoming a member of the **Formaldehyde-Free** Coalition please call..." and "Recent News, October 23, 2006, "CARB [California Air Resources Board]... determines substituting **formaldehyde-free** wood products adds only 0.2 percent to overall costs..." and "NRDC joins **Formaldehyde-free** Coalition" and several more similar uses of **formaldehyde-free**.

An article, dated Fall 2004, at *Home in the Capital Region* titled "Green on the Inside" states, "By using building materials that are non-toxic and **formaldehyde-free**, plus proper ventilation, ... you can prevent mold, mildew, allergens and other indoor air quality problems."

A pamphlet, dated 10.03.02, from MANNA discussing PATH, a program funded by the U.S. Department of Housing and Urban Development, with a heading "PATH's 10 Low Cost/No Cost Starter Steps to

Promote Green Building" includes the following statements: "Use **formaldehyde-free** insulation." and "**Formaldehyde-free** insulation eliminates formaldehyde emissions."

and

Pages from checnet.org, dated February 7, 2007, with an article from *CHEC's HealthHouse*, titled, "Managing the Hazards of Insulation: Alternatives and Solutions" includes the statement: "**Formaldehyde-free** insulation is also on the market."

Attachments to Office Action of November 20, 2007 (emphasis in bold added).

The Examining Attorney had also provided seven examples from websites of descriptive uses of FORMALDEHYDE-FREE with the first Office action in the case. Applicant argued then and still argues that six of the seven examples refer to applicant's products. For purposes of our decision, we assume that these six examples do refer to applicant's products. Nonetheless, we conclude that FORMALDEHYDE-FREE is used descriptively in these examples. Ultimately, we need not rely on this evidence as a basis for our decision here in view of the other evidence now in the record.

In view of the nature of the term FORMALDEHYDE-FREE, as well as the extensive descriptive use of that term by third parties, we find that FORMALDEHYDE-FREE is highly

Serial No. 78820051

descriptive when used in connection with building insulation.

Evidence of Acquired Distinctiveness

On the other hand, applicant bases its claim of acquired distinctiveness on a prima facie claim of substantially exclusive and continuous use and evidence of sales and advertising related to its FORMALDEHYDE-FREE products.

First, with regard to applicant's prima facie claim under Section 2(f), the claim is not only insufficient under the circumstances of this case, but it is fundamentally defective. Applicant submitted the claim in an affidavit accompanying its response of December 7, 2006. The affidavit, in relevant part, states, "The mark FORMALDEHYDE-FREE has become distinctive of the goods sold under the mark through Applicant's substantially exclusive and continuous use in commerce **for a period of in excess of four and one half years** prior to date of execution of this declaration." Attachment to Response of December 7, 2006 (emphasis in bold added).

In applicant's response which included this declaration, applicant refers to its claim of use "**for a period of in excess of four and one half years**" and states: "Such exclusive and continuous use is sufficient for

Serial No. 78820051

Applicant to demonstrate acquired distinctiveness. See 15 U.S.C. § 1052(f) (stating 'the commissioner may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive use thereof as a mark by the applicant in commerce for **the five years preceding the date on which the claim of distinctiveness is made.**')." Response of December 7, 2006 at 2 (emphasis in bold added). For the purpose of the prima facie claim, the statute requires use for at least five years, not a period of "in excess of four and one half years." Thus, applicant's claim is defective. Furthermore, although applicant had ample opportunity to correct or update this statement, applicant did not do so. Furthermore, we note applicant's dubious claim that its use ever was substantially exclusive. The record belies that claim. Also, we reject applicant's argument that other uses are either insignificant or infringing as recognized in *L.D. Kichler Co. v. Davoil Inc.*, 52 USPQ2d 1307 (Fed. Cir. 1999). In this case, the evidence of widespread use of FORMALDEHYDE-FREE by a diverse group of parties also belies that argument.

More importantly, even a proper prima facie, five-year claim of substantially exclusive and continuous use would

Serial No. 78820051

not be sufficient under the circumstances of this case. The Examining Attorney has the discretion to reject and should reject such a claim in a case such as this one where the designation at issue is at least highly descriptive. *In re Gray Inc.*, 3 USPQ2d 1558 (TTAB 1987) (“... a showing considerably stronger than a prima facie statement of five years’ substantially exclusive use is required...” to register PROTECTIVE EQUIPMENT for “alarm security and surveillance systems, namely, burglar and fire alarms” and “burglar and fire alarm surveillance services”).

Apart from the prima facie, five-year statement, we may consider long use, along with other evidence, in determining whether a mark has acquired distinctiveness. In this case, we have considered applicant’s use of FORMALDEHYDE-FREE from March 1, 2001, applicant’s claimed date of first use in commerce, up to the present. Here again, we find this evidence, along with applicant’s other evidence, insufficient to show acquired distinctiveness. *Stuart Spector Designs Ltd. et al. v. Fender Musical Instruments Corp.*, __ USPQ2d __, Opposition No. 91161403 et al., Slip Opinion at 60 (TTAB, March 25, 2009) (use for fifty years held insufficient to show mark had acquired distinctiveness); *In re Packaging Specialists, Inc.*, 221 USPQ at 920 (use of “Packaging Specialists, Inc.” for

sixteen years held not sufficient to establish acquired distinctiveness). Accordingly, we find that applicant's use for nearly eight years, when considered with the other evidence, is not sufficient to establish that FORMALDEHYDE-FREE has acquired distinctiveness.

In its affidavit, dated December 4, 2006, applicant also presents evidence with regard to sales and advertising. Specifically, applicant states:

2. Johns Manville's sales of goods bearing the mark FORMALDEHYDE-FREE have totaled in excess of \$2 billion since 2002. Annually sales of FORMALDEHYDE-FREE branded products have ranged from approximately \$420 million to well over \$600 million. In terms of unit volume, Applicant has sold more than 57 million units of product bearing the mark FORMALDEHYDE-FREE over the past four and one-half years and has sold those products in all 50 states.

3. Since 2002, Applicant has devoted considerable time and energy into promoting its mark. Johns Manville has promoted FORMALDEHYDE-FREE through, among other means, promotion on John Manville's website, advertising, tradeshow, and word of mouth. Attached please find some examples of our promotional literature that feature our mark FORMALDEHYDE-FREE. Johns Manville has distributed thousands of copies of these materials and/or similar materials bearing the mark FORMALDEHYDE-FREE during the past four years in connection with the promotion and sale of building insulation products bearing the mark. Since 2002, Johns Manville has spent at least \$28 million in advertising for FORMALDEHYDE-FREE products.

Affidavit of Scott DeShetler, Director, Marketing Communications, attached to Response of December 7, 2006.

High sales are of little probative value in a case such as this; high sales do not necessarily translate into recognition of highly descriptive wording, such as, FORMALDEHYDE-FREE, as a mark. *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007) (“... the sales figures show only the popularity of applicant's product, not that the relevant customers of such products ... have come to view the term ULTIMATE POLO as applicant's source-identifying mark.”). See also *Braun Inc. v. Dynamics Corp. of America*, 975 F.2d 815, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992); *Pingel Enterprise Inc.*, 46 USPQ2d 1811, 1822 (TTAB 1998). Accordingly, we find that applicant's sales, when considered with the other evidence, are not sufficient to establish that FORMALDEHYDE-FREE has acquired distinctiveness.

Also, with regard to applicant's advertising, we find no evidence that any of applicant's advertising has been directed to the promotion of FORMALDEHYDE-FREE, in particular, as a mark. The examples applicant provided, like the specimen, show use of FORMALDEHYDE-FREE merely to identify a highly desirable attribute of its products. *In re Packaging Specialists, Inc.*, 221 USPQ at 920. Applicant asserts that the use of the ™ symbol with FORMALDEHYDE-FREE in these ads is significant. We disagree. We find this

argument too facile. This device cannot transform an otherwise highly descriptive term into a trademark. Accordingly, we find that applicant's advertising and promotional efforts, when considered with the other evidence, are not sufficient to establish that FORMALDEHYDE-FREE has acquired distinctiveness.

Analysis/Conclusions

The applicant bears the burden of establishing acquired distinctiveness. *Yamaha Intl. Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004-1008 (Fed. Cir. 1988); *In re Packaging Specialists, Inc.*, 221 USPQ at 919 ("'Packaging Specialists, Inc.' is highly descriptive of distributorship services for packaging material and equipment, contract packaging services, and design services for design of packages."). We conclude that applicant has failed to meet that burden in this case.

We find the evidence that FORMALDEHYDE-FREE is highly descriptive overwhelming while we find the evidence that FORMALDEHYDE-FREE has acquired distinctiveness not only underwhelming, but seriously lacking in credibility.

We stop short of stating whether this evidence shows that FORMALDEHYDE-FREE is generic only because the refusal at issue does not go that far. *Cf. See Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998) (MASSFLO held

Serial No. 78820051

generic for flowmeters for the measurement of flow of mass of fluids); *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC held generic for automatic sprinklers for fire protection); *Stromgren Supports Inc. v. Bike Athletic Co.*, 43 USPQ2d 1100 (TTAB 1997) (COMPRESSION held generic for hosiery); *In re Reckitt & Colman, North America Inc.*, 18 USPQ2d 1389 (TTAB 1991) (PERMA PRESS held generic for soil and stain removers for permanent press fabrics); *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd*, 10 USPQ2d 1879 (Fed. Cir. 1989) (ANALOG DEVICES held generic for a wide range of electronic products).

The simple dictionary meanings of the components of FORMALDEHYDE-FREE and applicant's own use evidence the fact that the relevant public would perceive FORMALDEHYDE-FREE as highly descriptive as applied to building insulation. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). In view of the carcinogenic concerns related to FORMALDEHYDE in building insulation and other products, it is obvious that products which are FREE of FORMALDEHYDE or FORMALDEHYDE-FREE are desirable. The use of FORMALDEHYDE-FREE by applicant on the specimen of record and elsewhere simply communicates that the product possesses this attribute.

The evidence that the Examining Attorney presents shows at least highly descriptive use of FORMALDEHYDE-FREE by applicant, by applicant's competitors, by a retailer, by federal and state regulatory authorities, by the insulation industry trade association, by public interest groups and by the press. In the face of this evidence applicant claims that its use is "substantially exclusive" and that the relevant public will perceive FORMALDEHYDE-FREE as a source identifier. Based on the record, we find applicant's claims lacking in both credibility and evidentiary support.

As we noted, applicant argues repeatedly that it "... is the sole seller of the complete line of 'FORMALDEHYDE-FREE' building insulation products." This argument is not only unpersuasive, but it misses the point. We cannot and do not render an opinion here as to whether applicant's claim in this regard is true. Nor can we or do we render an opinion as to whether applicant or any of its competitor offer a product which is truly FORMALDEHYDE-FREE. The argument does point to the fact that FORMALDEHYDE-FREE is a desirable, and perhaps even essential, attribute of building insulation products. The argument supports, rather than contradicts, the conclusion that FORMALDEHYDE-FREE is at least highly descriptive. The record also

suggests that the most common way to identify this attribute is by identifying the product as FORMALDEHYDE-FREE. Accordingly, we reject this argument.

Applicant's attacks on the evidence that FORMALDEHYDE-FREE is highly descriptive also largely miss the point. The point of the evidence is to show that the relevant public will perceive FORMALDEHYDE-FREE as highly descriptive in relation to building insulation. The fact that competitors are not using FORMALDEHYDE-FREE as a trademark is not relevant. The fact that competitors and so many others are using FORMALDEHYDE-FREE in a highly descriptive manner is relevant because this evidence shows that consumers will likely perceive applicant's use as highly descriptive also.

We likewise do not understand applicant's argument that the uses are not "in commerce." The widespread use by a diverse group in a public forum supports the conclusion that the relevant public both use and perceive FORMALDEHYDE-FREE as a term which is at least highly descriptive. Accordingly we reject this argument.

Also, even if applicant had claimed to be the first and only user of FORMALDEHYDE-FREE, we would reach the same conclusion here because it is highly descriptive. See *In*

Serial No. 78820051

re Sun Microsystems, Inc., 59 USPQ2d 1084, 1087 (TTAB 2001); *In re Acuson*, 225 USPQ 790, 792 (TTAB 1985).

We also reject applicant's arguments regarding the timing of the evidence. On the one hand, applicant attempts to introduce new evidence, the Google® search engine results listing, to show the current state of affairs with regard to FORMALDEHYDE-FREE. On the other hand, applicant asks us to reject the Examining Attorney's evidence because it "post dates" its promotional efforts. Based on the record as a whole, we conclude that FORMALDEHYDE-FREE was, at all relevant times, at least highly descriptive of building insulation. The evidence, which is dated, covers a range of dates from the time early in applicant's claimed period of use to more recent times. We do not assume that the materials retrieved from websites appeared first or only on the dates those materials were retrieved. We infer, due to the nature of the materials, that they appeared earlier than the retrieval date and that they were available for some period of time. We recognize, as applicant argues in one instance, that certain of the materials may no longer be available online. This is a circumstance we take into account in all cases where we must consider evidence from online sources.

More generally, we find applicant's claim that it was "blind-sided" by this evidence not credible. Applicant's Response of May 20, 2008 at 1. As a leader in the building insulation industry, applicant must have been aware of the widespread use of FORMALDEHYDE-FREE. We find it hard to believe that all of these uses arose suddenly from nowhere.

We also reject applicant's arguments with regard to uses which may relate to building materials other than insulation. The vast majority of the uses are in relation to building insulation. These is the most probative uses. The few uses in relation to other types of building materials, such as wood products, are still somewhat probative.

Finally, based on all evidence of record, we conclude that FORMALDEHYDE-FREE is highly descriptive of building insulation and that applicant has failed to establish that FORMALDEHYDE-FREE has acquired distinctiveness as a source indicator for its building insulation products.

Decision: We affirm the refusal under Trademark Act Section 2(e)(1) and the finding that applicant's evidence of acquired distinctiveness is insufficient.