

NOTEBOOK

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Knock Off the Knockoffs

Premium tool makers are serious about curbing “tool counterfeiting”

by David Dobbs

Twenty years ago, before Makita established its successful line of power tools in the U.S., you were about as likely to see an aqua-blue tool on a job site as you were an elephant. Now “Makita-blue” tools — some Makita, some other brands — are as common as nails. The same is true of yellow tools these days, ever since Black & Decker reestablished the DeWalt line as a standard-bearer of quality.

Imitation may be the sincerest form of flattery, but tool manufacturers sometimes sue companies whose tools copy the look of their own too closely. In the late 1980s, for instance, Makita sued Jepson for making tools with casings of a blue similar to Makita's. Makita lost when the court ruled that color alone wasn't necessarily a distinctive “trade dress.” Yet last year when Black & Decker sued Pro-Tech Power Tools (a sub-

sidiary of a Taiwanese company) over its use of yellow-and-black casings similar to the DeWalt line of tools, the court sided with Black & Decker.

The contrast between the two decisions is revealing, for the DeWalt-Pro-Tech decision seems to confirm an increasingly strong legal protection given to the trade dress with which manufacturers try to distinguish their products. Manufacturers say that this not only helps premium tool makers protect their turf but protects consumers' ability to distinguish one product from another as well.

The problem is not confined to power tools. The Association of German Tool Manufacturers, for instance, recently launched a publicity campaign to counter deceptive imitation of high-quality hand tools by so-called “gray-market” tool makers. The organization found dozens of

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As this photo from the Association of German Tool Manufacturers shows, tool counterfeiting is sometimes blatant. The original, high-quality tools are at right. At left are some imitators that the association claims are of far inferior materials and manufacture. In some cases, not only the tools but their cases and packaging are closely copied.



Masonite Settles Shingle Suit

In January, Masonite Corporation settled a class-action lawsuit involving its now discontinued Woodruf line of imitation cedar shingles. Manufactured from 1980 until 1994, first in Ukiah, Calif., and later in Laurel, Miss., the 12x48-inch press-board shingles were alleged to prematurely develop problems such as cupping, swelling, delaminating, uplifting, cracking, or flaking apart.

According to Masonite General Counsel Sharon Ryan, Woodruf shingles were primarily marketed in mountain states such as Colorado. Under the terms of the settlement, claimants must file for an inspection to be done by an independent inspection service. Unless installed incorrectly, Masonite will issue a pro-rated cash settlement based on the age of the roof and the original product warranty of 25 years (except for shingles produced from 1992 to 1994, which carried a 15-year warranty), that includes installation and repair costs. Unlike the outcomes of some other industry class-action lawsuits, this settlement is open-ended and does not set a maximum payout for Masonite.

Claimants have until 2009 to file the paperwork for arranging an inspection. As of late May, about 1,000 requests for inspection had been filed. For more information call Masonite at 800/256-6990 or view its settlement Web site at www.kinsella.com/masonite.

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what it said were low-quality tools (with softer metals and rubbers, off-center parts, and rough surfaces) that blatantly copied both the appearance and packaging of reputable lines of hand tools.

Most imitations, however, are less obvious. Perhaps encouraged by the Makita-Jepson decision that said copying color alone isn't punishable, quite a few tool makers over the last decade or so have been producing low-cost (and often low-quality) tools with casing colors similar to those of established tool lines. Among the "deals" recently offered in one widely



ANDREW KLINE

You get what you pay for. This "Makita-blue" 12-volt cordless drill — not a Makita, but rather an unlabeled "gray-market" generic model that costs \$59 — smokes impressively every time it's used. "Every time I start it up," says the owner, who wishes to remain anonymous, "I think it's dying." The battery (which is taped into place because it often falls out of the handle) doesn't hold a charge well and requires 12 hours to recharge. "Not one of my better purchases," the owner confesses.

circulated tool catalog, for example, was a yellow-and-black cordless circular saw priced at \$69.99, a fraction of what a similarly specced (and colored) DeWalt costs; a red 16.8-volt cordless drill was also advertised at \$69.99, just over a third of the price of the Milwaukee 14.4-volt unit it resembles.

Crossing the Line

Up to a point, first-line tool companies are willing to take a certain amount of imitation in stride. "It's a nuisance we put up with," says Makita marketing specialist Jim Griffin. "These knockoffs aren't a huge market, and for the most part our buyers, especially the professionals, recognize the differences and aren't likely to buy them. But we do worry sometimes that people will get confused."

It was precisely this worry about confusing customers that led Makita to sue Jepson in the late 1980s, and Black & Decker to sue Pro-Tech. Unlike Makita, however, Black & Decker prevailed. Three things probably made the difference. First, the DeWalt tool line is distinguished not merely by the color yellow (as Makita's is by the color blue), but by a consistent and distinctive use of black elements that contrast and complement the yellow color. Second, Black & Decker came to court armed with surveys that showed that Pro-Tech's color scheme had led many consumers to believe the two companies' tool lines were associated. And third, in the years since the Makita decision, the U.S. Supreme Court had ruled, in a decision about two makers of ironing board covers, that if a color's use is distinctive enough, color can indeed constitute a protected "trade dress."

Black & Decker argued that Pro-Tech "intentionally and deliberately"

copied its tool line's distinctive color scheme, and in doing so confused consumers. The U.S. District Court of Eastern Virginia agreed — forbidding Pro-Tech from selling the color-copied line of tools in the U.S. (an appeal by Pro-Tech is pending).

Who's Confused?

Contractors and other professional tool users, of course, tend to get less confused than other tool buyers about what's quality and what's not — though it's always possible that your "gofer" will return from the home center with an Elfwing instead of an Estwing. As Specialty Tools & Fasteners Distributors Association executive director Morrie Halvorsen says, "Most professionals are savvy tool buyers who wouldn't be caught dead with the cheap stuff."

However, contractors and other pros are affected to the degree that tool pirating harms the companies that produce their favorite tools. And while brands that sell almost strictly to professionals suffer little in this way, companies that sell significant percentages of their tools to quality-conscious do-it-yourselfers, such as DeWalt and Makita, can get hurt by competitors that use imitation to fool consumers into buying their stuff.

This explains why companies sometimes get a bit excited when some competitor flatters them with a close imitation. "Color branding, graphic design, the other things we do to create a distinctive look — those are very important, very protected things in the tool world," says Bob Risley, a regional sales manager for Milwaukee Electric Tool. "We tend to guard them carefully."

Dave Dobbs, a freelance writer in Montpelier, Vt., writes frequently on construction topics.

Factory-Built Housing Trends

A recent study by the U.S. Department of Housing and Urban Development (HUD) contrasts factory and site-built home building trends around the country using data collected in 1996. That year, the average size of a single-wide manufactured house was just over 1,120 square feet. Double-wides averaged 1,680 square feet, or 85% of the median conventional home size of just under 2,000 square feet. As might be expected, the study found that site-built homes had taller walls, more window openings, and better amenities. Manufactured homes were sided with vinyl in 1996 at a rate almost three times as high as conventional homes — while almost half of conventional homes had brick exteriors, compared with none for manufactured homes.

One particular area of difference was in sheathing material. As the chart shows, almost half of manufactured housing producers chose to use no wall sheathing or fiberboard wall

sheathing, while site builders split fairly evenly between the full variety of available options. For floor sheathing, almost half of manufactured homes get particleboard; most site builders use plywood. OSB sheathing accounts for 93% of factory-built roofs, while more than a third of conventional site-built roofs are still sheathed with plywood.

Overall costs. The study compares several different cost scenarios between site-built, modular (factory-built parts lifted by crane and assembled on site), and manufactured (delivered on wheels) housing costs. Predictably, prices are lower when more work is done on the factory floor than at the job site. And while many think that much of the cost difference is tied to the fact that manufactured homes usually don't have foundations, this study concludes that the differences are deeper than that. Calculated costs, using the same foundation and lot estimates for "identical" 2,000

square-foot homes, show site-built costs of \$144,728 (\$38.57/sq.ft.), compared with \$129,822 (\$32.78/sq.ft.) for modular and \$106,673 (\$23.64/sq.ft.) for manufactured housing. Reduced overhead and administration costs account for \$6,000 of the lower cost for manufactured homes, while actual construction costs account for almost \$30,000 of the difference.

Entry-level competition. In 1996, only 21% of new homes under \$100,000 were built on site; for homes priced between \$100,000 and \$150,000, 34% were site-built. At the high end, however, production of homes costing more than \$250,000 was dominated by small builders. For the most part, the competition threshold between factory and site-built companies occurs at the maximum size of a double-wide manufactured home — roughly 2,000 square feet. Beyond that point, typical trailer-style manufactured housing is not a viable option.



Manufactured homes, like this double-wide recently spotted at a highway rest area, account for most new affordable homes around the country. Competition with site-built residential contractors is more noticeable for homes with around 2,000 square feet. Homes costing \$250,000 or more are almost always built on site.

Wall Sheathing Materials in New Conventional Single-Family Housing and Manufactured Housing, 1996

Sheathing Material	Conventional Housing	Manufactured Housing
OSB	32.3%	12.8%
Plywood	18.8%	15.7%
Foam	29.3%	14.2%
Fiberboard - 1/2"	5.6%	26.3%
Foil-Kraft - 1/8"	2.8%	7.3%
Gypsum	0.7%	0.4%
Cementitious	0.1%	—
Boards - 1"	0.1%	—
Panel Siding	—	10.3%
Steel Siding	—	12.9%
SIPS	7.7%	—
Other	2.6%	0.1%

SBCCI Reverses Buried Foam Ban

by Bill Robinson

The Southern Building Code Congress International (SBCCI) has reversed its 1998 ban on using foam below grade. In a move pushed by the insulated concrete forms (ICF) industry, the 1999 *Standard Building Code* has new guidelines for building with ICFs or foam panels, both above and below grade, that



permits the use of foam products in areas with heavy termite infestations.

In 1998, SBCCI officials banned foam because it can provide undetected passage for termites traveling from the ground to the wood in the structure (see "Insect Infestations in Buried Foam," 10/98).

In its about-face, Section 2603.3.1.1 of SBCCI's new code states that foam may be used below grade as long as "an approved method of protecting the foam plastic and structure from subterranean termite damage is provided." Deciding what constitutes an approved method, however, is left to local code officials, who are being supplied with independent evaluation service reports from foam manufacturers detailing termite-resistant products and construction techniques.

One measure agreed upon by all parties is the need for minimum 6-inch bare concrete inspection strips at grade, whether or not foam is used below grade or only above grade. Mickey Gay, regional manager for AAB (maker of Blue Maxx foam forms) in Charlotte, N.C., suggests five additional steps that, used either together or separately, may meet the "approved method" requirement for ICFs:

- Install a 60-mil waterproofing membrane below grade to restrict termite access to the foam.
- Use monolithic slabs for slab-on-grade construction. The cold joint between a footing and slab leaves an ideal passage for termites.
- Use borate-treated or termite-resistant material for door and window bucks.
- Install "bait systems" at the perimeter.
- Treat footings and backfill with termiticide.

Roland Holt, a local code official in St. John's County, Fla., remains skeptical. "ICFs should be outlawed below grade," says Holt, pointing to difficulties in locating inspection strips when final grade is unknown at the time of construction. Holt also stresses the ineffectiveness of termiticides since chlordane was banned because of its excessive toxicity.

Bill Robinson, a remodeling contractor in Arroyo Grande, Calif., is a corresponding editor to the *Journal of Light Construction*.

OFFCUTS

The national home ownership rate keeps climbing. From 1998 to 1999, home ownership continued to expand to all-time record levels, from 65.9% to 66.7%.

Glulam scraps can now be resawn into lumber, due to a new grading standard. For example, a leftover 8-foot piece of 5¹/₈x24-inch glulam can now be ripped twice to produce four 3x12-inch lengths of nominal lumber that are then reggraded.

Wilsonart has sued an imitator for allegedly producing low-quality flooring stamped with the Wilsonart trademark. The Texas-based laminate flooring producer recently sought to amend its lawsuit against a Latin American company, Rexcel, S.A., to include Rexcel's allegedly fraudulent advertising claim that the products in question met industry quality standards.

Recent water heater dip-tube failures will likely cause builders some callback headaches (see *Notebook*, 7/99). Specific toll-free numbers for dip-tube failure questions are available for several water heater manufacturers: American Water Heater (800/999-9515); A.O. Smith (800/323-2636); Bradford-White (800/531-2111); Rheem (800/621-5622); State (800/821-2019).

Mortgage rates hit a two-year high, according to a recent report by the Reuters news service. As of July, a fixed rate 30-year mortgage increased to an average 7.71%; the 15-year rate increased to 7.34%. The same report cited speculation by a Freddie Mac economist that rates might drop again if inflation remains tame.

New Laws Help Independent Lumberyards

According to the Northeastern Retail Lumber Association (NRLA), New York and Connecticut have now passed sales tax reforms intended to help independent construction material retailers. Under the new laws, lumberyards in these states do not have to pay tax on a sale until a buyer has actually paid his/her bill. A third state, Michigan, recently passed a similar law that gives construction material retailers a three-month grace period on sales taxes.

NRLA estimates that its 1,300 members conduct 75% of their business on credit, with payments on monthly mailed billings taking an average of 52 days. In the past, lumberyards have run into cash flow problems and have had to use short-term loans to pay state taxes on sales that had not yet been paid for. Lumberyards typically feel the worst affects during slow periods, because cash sales fall off substantially and thereby lower overall cash flow levels.

Cash flow is not a problem for big-box companies, who typically don't directly give contractors open credit. Instead, big companies use third-party financing options, such as credit cards tied to banks, which ensure next-day payment on all sales. According to Rita Ferris, NRLA's director of legislative and regulatory affairs, the new sales tax laws "are a tremendous improvement for independent lumberyards. Retailers can use savings from their improved cash flows to invest in their businesses so that they can compete better against the big boxes."

Self-Cleaning Rooms

In Newburg, Oregon, not far south of Portland, an inventor has been working for 40 years to develop equipment that makes it possible for a house to clean itself. From closets that act as washer/dryers for the clothes they store, to cabinets that wash the dishes stored in them, to rooms that clean and dry themselves, Frances Gabe has done it all — 68 devices so far, according to MIT's inventor Web page (web.mit.edu/invent). Inventor Gabe lives in her patented prototype house and is in the process of finishing a book that will detail her various inventions for building self-cleaning features into house designs.



Shown here in the kitchen of her model self-cleaning house, Gabe shows off the general room-washing apparatus (inset). Connected to a pipe that supplies liquids and air, the device functions like a rotary sprinkler to spread soapy cleaning water, clean rinse water, and warm drying air — or cold air for air conditioning, or water for fire suppression. Room floors are sloped towards the corners to drain excess water. Objects susceptible to water damage are stored under glass.

What Makes You Want to Go to Work?

	Manager	Employee
Appreciation of work	8	2
Feeling "in" on things	10	3
Sympathetic help on personal problems	9	10
Job security	2	6
Good wages	1	8
Work that keeps you interested	5	1
Promotion and growth in company	3	4
Personal loyalty to employees	6	7
Good working conditions	4	5
Tactful disciplining	7	9

The University of Chicago and the University of Maryland recently surveyed 15,000 people in 600 communities on what they want from their jobs. Reported on by the National Association of Home Builders, the study ranked the ten most important job motivators for both managers and employees (1 = most important).