



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-008

Korhani Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, November 18, 2008*

TABLE OF CONTENTS

DECISION.....i

STATEMENT OF REASONS1

 PROCEDURAL HISTORY1

 GOODS IN ISSUE1

 ANALYSIS2

 Are the Goods in Issue Articles of Chapter 95?5

 Classification at the Subheading and Tariff Item Levels8

DECISION8

IN THE MATTER OF an appeal heard on February 28, 2008, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 28, 2007, with respect to a request for review of an advance ruling, under subsection 60(4) of the *Customs Act*.

BETWEEN

KORHANI CANADA INC.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Diane Vincent
Diane Vincent
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 28, 2008

Tribunal Members: Ellen Fry, Presiding Member
James A. Ogilvy, Member
Diane Vincent, Member

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President of the Canada Border Services Agency	Agnieszka Zagorska

WITNESSES:

David Hiltz Director, Juvenile Categories Sandylion Sticker Designs	Leslie J. Allen Senior Scientific Advisor Canada Border Services Agency
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STATEMENT OF REASONS

1. This is an appeal filed by Korhani Canada Inc. (Korhani) under subsection 67(1) of the *Customs Act*¹ from a decision made on March 28, 2007, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether various styles and sizes of interactive play mats (the goods in issue) are properly classified under tariff item No. 5703.20.10 of the schedule of the *Customs Tariff*² as machine tufted carpets of nylon, as determined by the CBSA, or should be classified under tariff item No. 9503.90.00 as other toys, as claimed by Korhani.

PROCEDURAL HISTORY

3. On June 15, 2006, Korhani submitted a request for an advance ruling with respect to the tariff classification of the goods in issue. On September 19, 2006, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act* and classified the goods in issue under tariff item No. 5703.20.10 as machine tufted carpets of nylon.

4. On October 3, 2006, Korhani requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*. Korhani requested that the goods in issue be classified under tariff item No. 9503.90.00 as other toys.³ On March 28, 2007, the CBSA issued its decision under subsection 60(4). The CBSA held that the goods in issue were properly classified under tariff item No. 5703.20.10 as machine tufted carpets of nylon, thereby affirming its advance ruling.

5. On June 25, 2007, Korhani filed the present appeal with the Canadian International Trade Tribunal (the Tribunal).

6. The Tribunal held a public hearing in Ottawa, Ontario, on February 28, 2008. Mr. David Hiltz, Director, Juvenile Categories, at Sandylion Sticker Designs, appeared as a witness for Korhani. Prior to his employment with Sandylion Sticker Designs, Mr. Hiltz was employed as the Director of Procurement and Licensing at Korhani.⁴ Mr. Leslie J. Allen, Senior Scientific Advisor with the CBSA, appeared as a witness for the CBSA. Mr. Allen was qualified by the Tribunal as an expert in the analysis of textile composition.

GOODS IN ISSUE

7. The goods in issue are various styles of interactive play mats which are part of Korhani's "K" series of products.⁵ They are mainly supplied by Misr American Carpet Mills of Cairo, Egypt,⁶ and are imported into Canada by Korhani.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

3. On January 1, 2007, a number of amendments to the schedule to the *Customs Tariff* took effect. As a result of these amendments, goods that were previously classified under tariff item No. 9503.90.00 were classified under tariff item No. 9503.00.90. For the purposes of this appeal, the Tribunal will refer to the tariff nomenclature that was in effect when the CBSA issued its original advance ruling, i.e. September 19, 2006.

4. *Transcript of Public Hearing*, 28 February 2008, at 7.

5. In its brief, Korhani made reference to 11 specific styles of interactive play mats, which had the following model numbers: K69900, K02016, K02013, K02015, K69902, K02722, K03549, K02950, K03279, K02560 and K03548. See Tribunal Exhibit AP-2007-008-4A, at para. 7.

6. In certain rare instances, the goods in issue have been manufactured elsewhere in order to meet customer deadlines. See *Transcript of Public Hearing*, 28 February 2008, at 61, 73.

8. The goods in issue are made of 100 percent nylon filament loop pile tufts with an anti-slip gel foam backing and range in size from 1.0 m x 1.2 m to 1.0 m x 2.0 m. The top surface of the goods is printed with various designs which divide the mats into two categories: generic (unlicensed) play mats and licensed play mats.

9. The generic play mats are the “City Life”, “Canadian Tire City Life” and “Rona Warehouse City Life” play mats. Each play mat is printed to depict a city setting with features such as roads, houses, a hospital, a police station and an airport. The “Canadian Tire City Life” and “Rona Warehouse City Life” play mats also depict their respective stores in the centre of the mat.

10. The licensed play mats feature characters from ©Disney (Winnie the Pooh, Cinderella and Cars), Nickelodeon (SpongeBob SquarePants and Dora the Explorer) and Marvel Comics (Spider-Man). Each play mat is printed with a map-like setting consisting of pathway or roadway scenes with licensed characters. The play mats show various locations relating to the television show, movie, etc. in which the characters appear.

11. Korhani filed six samples of interactive play mats from its “K” series as physical exhibits.⁷ Although these exhibits did not cover Korhani’s entire range of interactive play mats, Mr. Hiltz stated that the physical characteristics of the play mats submitted were indicative of the physical characteristics of all “K” series interactive play mats.⁸ Korhani also filed two additional physical exhibits of goods which were not in issue but were used for comparative purposes.⁹

12. The CBSA filed one physical exhibit that was a sample of an interactive play mat analysed by the CBSA’s Laboratory and Scientific Services Directorate.¹⁰

ANALYSIS

13. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which provides a comprehensive list of goods divided into sections and chapters. Each chapter contains a list of goods categorized in headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to come to the proper tariff classification.

15. Subsection 10(1) of the *Customs Tariff* reads as follows: “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[11] and the Canadian Rules^[12] set out in the schedule.”

7. Exhibit A-1: “Cars Interactive Play Rug”, model No. K03548; Exhibit A-2: “Pooh’s Trail Play Mat”, model No. K03549; Exhibit A-3: “Canadian Tire City Life Play Rug”, model No. K69902; Exhibit A-4: “City Life Play Mat”, model No. K69900; Exhibit A-5: “Rona Warehouse City Life Play Mat”, model No. K02722; and Exhibit A-6: “SpongeBob SquarePants Play Mat”, model No. K02560.

8. *Transcript of Public Hearing*, 28 February 2008, at 78.

9. Exhibit A-7: “Disney Princess Beautiful Aurora Mat”, model No. K02903; Exhibit A-8: “Breyer Stablemates Play Mat”, model No. 59230.

10. Exhibit B-1: “SpongeBob Interactive Play Mat”, model No. K02013.

11. S.C. 1997, c. 36, schedule [*General Rules*].

12. S.C. 1997, c. 36, schedule.

16. The *General Rules* comprise six rules. Classification begins with Rule 1, which reads as follows: “. . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.” If the Tribunal cannot determine the classification of the goods in accordance with Rule 1, it must move on to Rule 2, and so on.¹³

17. Section 11 of the *Customs Tariff* states the following: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[14] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[15] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Therefore, unlike section and chapter notes, the *Classification Opinions* and the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise, and it is reasonable to conclude that the same treatment should apply to the *Classification Opinions*.¹⁶

18. Once the Tribunal has used this process to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

19. As previously stated, the issue in this appeal is whether various styles and sizes of interactive play mats are properly classified under tariff item No. 5703.20.10 as machine tufted carpets of nylon, as determined by the CBSA, or should be classified under tariff item No. 9503.90.00 as other toys, as claimed by Korhani. Consequently, the dispute between the parties arises at the heading level.

20. The nomenclature of the *Customs Tariff* which Korhani claims should apply to the goods in issue reads as follows:

95.03 Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.

...

9503.90.00 -Other

21. The nomenclature of the *Customs Tariff* which the CBSA ruled applicable to the goods in issue reads as follows:

57.03 Carpets and other textile floor coverings, tufted, whether or not made up.

...

13. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level.

14. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

15. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].

16. In *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), the Federal Court of Appeal stated as follows: “. . . the Explanatory Notes are intended by Parliament to be an interpretative guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretative purpose, and to ensure harmony within the international community, the Explanatory Notes should be respected unless there is a sound reason to do otherwise. . . . Expert evidence can, in some circumstances, provide such a reason. However, even in a case where the Tribunal could reasonably choose not to apply the Explanatory Notes, it does not have the authority to rewrite or ignore such Notes by redefining their terms.”

5703.20 -Of nylon or other polyamides

5703.20.10 - - -Machine tufted

22. As submitted by the parties, the notes relating to Section XI (which includes Chapter 57) and to Chapter 57 are relevant for the purposes of determining in which heading the goods in issue are to be classified.¹⁷

23. Note 1(t) to Section XI reads as follows:

1. This Section does not cover:

...

(t) Articles of Chapter 95 (for example, toys, games, sports requisites and nets);

...

24. Note 1 to Chapter 57 reads as follows:

1. For the purpose of this Chapter, the term “carpets and other textile floor coverings” means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

25. While Korhani agreed that the goods in issue are made of nylon filament loop pile tufts with an anti-slip gel foam backing and are thus *prima facie* classifiable in heading No. 57.03 as tufted carpets, it argued that, on the basis of Note 1(t) to Section XI, it is necessary to first determine whether the goods in issue are considered articles of Chapter 95. In other words, it submitted that the goods in issue cannot be classified in Section XI unless it is first determined that they cannot be classified in Chapter 95. Korhani also submitted that there are no notes to Section XX (which includes Chapter 95) and that the notes to Chapter 95 do not exclude the goods in issue from classification therein.

26. The CBSA took the position that the design of the goods in issue should not result in their classification in heading No. 95.03 as other toys, as this would be contrary to Note 1 to Chapter 57. The CBSA argued that, even if the goods in issue are intended for use for other purposes, the application of Note 1 to Chapter 57 means that they must still be considered textile floor coverings and should thus be classified in heading No. 57.03 as tufted carpets.

27. In the Tribunal’s view, it is clear that Note 1(t) to Section XI precludes articles of Chapter 95 from being classified in Section XI (i.e. in Chapters 50 to 63). Although Note 1 to Chapter 57 is relevant for the purposes of determining whether goods can be classified in that chapter, it must be interpreted in a manner that gives effect to Note 1(t) to Section XI.

17. The Tribunal notes that an amendment to Note 1 to Chapter 95, which took effect on January 1, 2007, could potentially have an impact on the classification of the goods in issue after this date. However, while advance rulings are prospective in nature, the Tribunal will not consider this amendment in the context of the present appeal as the decision under appeal was made on the basis of the legislation in force when the advance ruling was issued (i.e. September 19, 2006). This is clear from the CBSA’s March 28, 2007, decision, which states that “. . . [the] decision is based on the 2006 Tariff of the Harmonized Schedule (HS) as it relates to the date of the disputed Advance Ruling”

28. Accordingly, the Tribunal will first determine whether the goods in issue are articles of Chapter 95 and, in particular, whether they can be classified in heading No. 95.03 as other toys. If the Tribunal determines that the goods in issue are in fact such “other toys”, they will be precluded from classification in Chapters 50 to 63, and the Tribunal will then determine the proper classification at the subheading and tariff item levels. If the Tribunal determines that the goods in issue do not constitute “other toys”, it will then determine whether they can be classified in heading No. 57.03.

Are the Goods in Issue Articles of Chapter 95?

29. Korhani submitted that the *Explanatory Notes* to Chapter 95 and heading No. 95.03, the Tribunal’s previous decisions regarding toys and dictionary definitions of the word “toy” indicate that toys are objects that children or adults play with to derive amusement and pleasure. In its view, the goods in issue satisfy these criteria, as they are designed and marketed as play surfaces upon which a child can interact with the various printed designs by positioning toys, such as cars, road signs, action figures and dolls, along the pathways, roadways or in other identifiable locations printed on the goods in issue. Korhani also submitted that, contrary to the CBSA’s contention, the amusement value derived from the goods in issue is more than visual, as the goods assist in play with action figures and toys as would a doll house, a child’s race track or a puppet theatre.

30. The witness for Korhani testified that the goods in issue were created to provide play value. He indicated that all aspects of the goods in issue, such as the artwork, the construction, the size and the scale, were designed to achieve that purpose. Korhani also made reference to two U.S. classification rulings which, it submitted, supported its position.¹⁸

31. The CBSA submitted that the goods in issue are not toys, but rather carpets with colourful designs or patterns that appeal to children and have a soft and comfortable playing surface. It argued that the visual amusement derived from the goods in issue is no different from that derived from similar designs printed on children’s bedding, draperies, headboards/footboards, storage bins, wallpaper, wall hangings, sleeping bags, light fixtures, etc. Relying on the Tribunal’s decision in *Regal Confections Inc. v. Deputy M.N.R.*,¹⁹ the CBSA submitted that, while the goods in issue may provide visual amusement, this quality alone does not make them toys. In this respect, it noted that the goods in issue are not sold as sets with toys, such as cars, road signs or action figures. The CBSA also made reference to a U.S. classification ruling in support of its position.²⁰

32. In the Tribunal’s opinion, the *Explanatory Notes* to Chapter 95 and heading No. 95.03, as well as dictionary definitions of the word “toy”, help delineate the scope of application of heading No. 95.03. The *Explanatory Notes* to Chapter 95 read as follows: “This Chapter covers toys of all kinds whether designed for the amusement of children or adults. . . .” The *Explanatory Notes* to heading No. 95.03 are similar and read as follows: “This heading covers toys intended essentially for the amusement of persons (children or adults). . . .” The *Concise Oxford Dictionary* defines a “toy” as “a plaything, [especially] for a child.”,²¹ and the *Canadian Dictionary of the English Language* defines a “toy” as “[a]n object for children to play with.”²² On the basis of the foregoing, the Tribunal considers that heading No. 95.03 covers objects that children or adults play with.

18. Tribunal Exhibit AP-2007-008-4A, tab 5.

19. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT).

20. Tribunal Exhibit AP-2007-008-6A, tab 7.

21. Ninth Edition, s.v. “toy”.

22. S.v. “toy”.

33. This view was also held by the Tribunal in *Franklin Mint Inc. v. President of the Canada Border Services Agency*,²³ where it considered the play value of an object as an identifying aspect of it being a toy. In the Tribunal's view, such play value can be ascertained by examining the intended use of the goods as well as their actual use. Factors that may be taken into consideration for the purposes of determining the intended use of the goods include the design of the goods and the manner in which they are marketed, packaged and advertised.

34. Korhani's evidence focussed on such factors. Although the goods in issue have various themes, each is essentially a floor mat that depicts either a city setting (e.g. the urban area near a Canadian Tire store) or a map-like setting consisting of pathway or roadway scenes with licensed characters (e.g. Winnie the Pooh's 100 Acre Wood). According to Korhani, the goods in issue are designed to allow children to interact with the printed designs by manoeuvring or positioning various toys on the pathways, roadways or other identifiable locations printed on the goods in issue.

35. At the hearing, Mr. Hiltz testified that the goods in issue were developed with the specific intent of creating a product that would provide play value for children between three and six years of age.²⁴ Mr. Hiltz further stated Korhani's intent with respect to the goods in issue as follows:

... In the imaginative play that children have as part of their growing up process, they simulate and replicate the situations they see in shows.

It was that imaginative play that we wanted to tap into. Knowing that, we intentionally set out to make play mats in a fashion that would have character homes, locations that are frequently viewed in a series, that would allow children to duplicate that imaginative play.

So in the case of Spongebob Squarepants, a character or a series from the successful series from Nickelodeon, he lives under the sea and has a pineapple home and there is a paddy shack and there are all kinds of different locations that the characters live and have situations in.

So we duplicated that situation, as we did with cars, and so on. That was a concerted plan to promote that type of product in that way.²⁵

36. Mr. Hiltz testified that, moreover, in order to allow children to have imaginative play with the goods in issue, the art elements printed on the goods (e.g. roadways, pathways and other locations) were created using the scale which is most commonly used in the toy industry. For example, the Rona Warehouse City Life play mat, which has various roads leading to a fire station, a heliport, houses, a construction zone and a police station, and which has a Rona warehouse as its primary focal point, was specifically designed to accommodate 1/64th scale vehicles.²⁶ According to Mr. Hiltz, this is a benchmark scale in the toy industry and is used by Mattel to manufacture its Hot Wheels, which are sold in the millions.²⁷

37. With respect to the construction of the goods in issue, Mr. Hiltz explained that a loop pile construction was used in order to provide a firm surface on which to move vehicles and characters, as well as to allow for better-defined artwork.²⁸ Mr. Hiltz drew a distinction between this type of construction and a cut pile construction, which was used on the Beautiful Aurora²⁹ rug that Korhani also carries and that is not in issue. According to Mr. Hiltz, while such a cut pile construction results in a more luxuriant and decorative

23. (13 June 2006), AP-2004-061 (CITT).

24. *Transcript of Public Hearing*, 28 February 2008, at 10, 71.

25. *Ibid.* at 11-12.

26. *Ibid.* at 29.

27. *Ibid.* at 30.

28. *Ibid.* at 12, 54.

29. Exhibit A-7: Disney Princess Beautiful Aurora Mat, model No. K02903.

product, it is not suitable for interactive play, as its high pile does not define small details very well and does not allow for the easy movement of vehicles or characters.³⁰

38. Concerning marketing, packaging and advertising, Korhani filed in evidence product labels and marketing materials for many of the goods in issue indicating that they are intended for interactive play. For example, the product label for the “Canadian Tire City Life” play mat includes the following description: “It’s a rug. It’s a toy. It’s a game, it’s fun.”³¹ In addition, the illustration on the label shows children playing with toy vehicles and characters on the mat. Another example includes the description of the “City Life” play mat on the Home Depot Web site, which reads: “Fun rugs with a creative interactive play area.”³² Another example is the description of the “Dora the Explorer” play mat in a Toys “R” Us flyer, which reads: “Spend hours of family fun time on these large colourful carpeted playmats.”³³ The illustration in the flyer shows a young girl sitting and playing on the mat.

39. Regarding the actual use of the goods in issue, Korhani filed in evidence reviews of the “City Life” play mat submitted by parents on the Home Depot Web site which indicate that this particular product is actually used as a toy. One review read as follows: “I bought this mat for my youngest son, and now both of my children get hours of enjoyment out of this mat. . . .”³⁴ Another review stated as follows: “My son plays with his cars on this mat for at least an hour a day. The mat has a home for every vehicle-airplane, firetruck, tow-truck and lots of traffic patterns to keep little minds busy. . . . A real life-saver. This is my 3 1/2 year olds most favourite thing.”³⁵

40. On the basis of the above evidence, the Tribunal is of the opinion that the goods in issue provide play value and should thus be considered toys. The evidence clearly demonstrates that the goods in issue have been both designed and marketed with the specific intent that they be used by children as objects to play with. There is also some evidence to confirm that this objective has in fact been achieved, in that children have actually been using the goods in issue to play with.

41. In addition to being used as toys, the goods in issue can be used as carpets in the traditional sense. However, the fact that the goods in issue may also have a utilitarian function does not, in the Tribunal’s view, preclude them from being classified as toys. Because the goods in issue satisfy the terms of heading No. 95.03, Note 1(t) to Section XI automatically precludes them from classification in heading No. 57.03.

42. Both parties submitted U.S. classification rulings in support of their positions. The Tribunal notes that these are administrative rulings by government officials and not decisions by an independent quasi-judicial body. Further, even if they were such decisions, since they are drawn from another jurisdiction, they would not constitute valid jurisprudence in the Canadian context. Parties are free to use such rulings to support their positions if they believe that they will be useful in helping to explain their arguments. However, parties should not expect that the Tribunal will give them significant weight in its own decisions.

30. *Transcript of Public Hearing*, 28 February 2008, at 54-55.

31. Tribunal Exhibit AP-2007-008-17A, tab 2.

32. Tribunal Exhibit AP-2007-008-4A, tab 1.

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*

43. In any event, the Tribunal notes that the U.S. ruling provided by the CBSA concerns the classification of a product that is different from the goods in issue and is therefore not relevant to this appeal.³⁶

44. In light of the foregoing, the Tribunal finds that the goods in issue are properly classified in heading No. 95.03 as other toys and, by the application of Note 1(t) to Section XI, precluded from classification in heading No. 57.03.

Classification at the Subheading and Tariff Item Levels

45. Having determined that the goods in issue are properly classified in heading No. 95.03, the Tribunal must now turn to the classification at the subheading and tariff item levels. Heading No. 95.03 has nine first-level subheadings. However, as eight of those subheadings pertain to specific types of toys or toy sets that do not include the goods in issue, the goods in issue must be classified in the remaining subheading as other toys. Therefore, pursuant to Rule 6 of the *General Rules*, the goods in issue are classified in subheading No. 9503.90.

46. As subheading No. 9503.90 is not further divided at the tariff item level, the goods in issue are classified under tariff item No. 9503.90.00.

DECISION

47. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 9503.90.00 as other toys.

48. The appeal is therefore allowed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Diane Vincent
Diane Vincent
Member

36. The product is described as a rug having a cut pile surface and featuring a check design and the Walt Disney character and the words "Mickey Mouse". There is no indication that there are any interactive elements printed on the rug. See Tribunal Exhibit AP-2007-008-6A, tab 7.