

EXHIBIT 4

DECLARATION OF JAMES D. KOLE

2. Defendant, Ian Design, Inc., is a small start-up business selling Dyson vacuum cleaners via the Internet from Toms River, New Jersey. Defendant chose the domain name it uses, originally bestvacuumcleaners.com and now bestChoicevacuums.com, because it believes in the products it sells and wants consumers to know that it stands behind those Dyson products, which it believes are the best vacuum cleaners available.

3. Up until several weeks ago, defendant had no knowledge of Best Vacuum's alleged trademark rights, but since that time has been in frequent communication with Best Vacuum's attorney, David Adler. Before yesterday, defendant's last communication with Mr. Adler was on March 12; accordingly, it came as quite a surprise for defendant to learn by mail that plaintiff was seeking an ex parte order which could completely shut down the business, with such scant opportunity to respond. By filing a complaint (which has not yet been served) and attempting to obtain ex parte relief before defendant can even respond, plaintiff appears to be in a rush to avoid a close look at the merits, which might interfere with its anticompetitive plans.

4. Sure enough, a cursory tour through the elements of a trademark infringement claim reveals several huge problems with plaintiff's claim. First, it is critical to note that plaintiff has failed to prove it has any trademark rights in the generic terms, best vacuum. Indeed, it fails to apprise the court that its application to register the mark, BEST VACUUM, has been refused registration. Attached as Exhibit A are the most recent records showing the US Trademark Office refused registration, even though plaintiff explicitly disclaimed exclusive right to use "Best" or "Vacuum" apart from the mark, BEST VACUUM.

5. Second, plaintiff's counsel fails to tell the court that it initially complained to Ian Design about use of bestvacuumcleaners.com, which defendant adopted without any prior

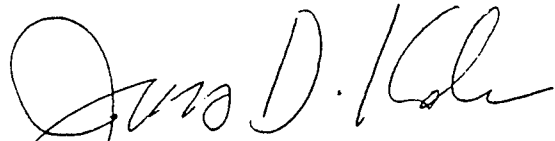
knowledge of the Chicago-based plaintiff's claimed trademark rights. Nor does plaintiff tell the Court that prior to retaining counsel, and in order to avoid costly litigation, Ian Design moved its website to a new URL, www.bestChoicevacuums.com, with bestChoicevacuums.com prominently displayed throughout the site. Plainly bestChoicevacuums.com is distinct from BEST VACUUM; and recall that plaintiff explicitly disclaimed exclusive rights to use "Best" and "Vacuum" apart from that Best Vacuum mark in its sworn application. Attached as Exhibit B are screen print-outs of the bestChoicevacuums.com site and the best-vacuum.com site. It is particularly noteworthy that the two sites concentrate on different lines of vacuum cleaners, plaintiff on Miele and defendant on Dyson exclusively, and both brands not surprisingly lay claim to the title of best vacuum cleaner.

6. Also interesting is plaintiff's claim that it spends \$60,000 on Internet search engine advertising, yet my Google and Overture searches for "best vacuum" result in hits lists with numerous other "Best Vacuums" ahead of plaintiff. Attached as Exhibit C are search results from Google and Overture, which show how commonly the phrase, Best Vacuum, is used in the vacuum cleaner selling business. Indeed, the Google search resulted in 3.5 million hits while Overture lists 17 other retailers before it lists plaintiff's site. Conspicuously absent from the search results is any hit for defendant's site, which undercuts any claimed harm to plaintiff.

7. Now, turning to the keystone of any trademark infringement claim, proof of likelihood of confusion, incredibly plaintiff's papers are dead silent. Plaintiff not only fails to make up for its extremely weak trademark rights with strong proof of consumer confusion, but rather, it presents no evidence bearing on the Polaroid factors of likelihood of confusion, actual confusion, survey evidence, impulse buying, strength of the mark, etc.

8. Given the total lack of proof offered to support plaintiff's claimed trademark rights, its explicit disclaimer of exclusive rights to use Best and Vacuum apart from the applied for trademark, and the lack of any likelihood of consumer confusion, defendant respectfully submits that plaintiff's motion should be denied, and the parties should be encouraged to mediate the case or seek an expeditious settlement.

I declare under penalty of perjury pursuant to 28 U.S.C. Section 1746 that the foregoing is true and correct to the best of my knowledge. Executed on March 31, 2004.



James D. Kole
Sidley Austin Brown & Wood, LLP
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Dated: March 31, 2004

EXHIBIT A



Trademark Electronic Search System(Tess)

TESS was last updated on Tue Mar 30 06:30:08 EST 2004

- [PTO HOME](#)
- [TRADEMARK](#)
- [TESS HOME](#)
- [NEW USER](#)
- [STRUCTURED](#)
- [FREE FORM](#)
- [BROWSE DICT](#)
- [BOTTOM](#)
- [HELP](#)
- [PREV LIST](#)
- [CURR LIST](#)
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Logout Please logout when you are done to release system resources allocated for you.

Start List At: OR Jump to record: **Record 2 out of 3**

Check Status (TARR contains current status, correspondence address and attorney of record for this mark. Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

Word Mark BEST VACUUM

Goods and Services IC 007. US 013 019 021 023 031 034 035. G & S: Residential & commercial sanitization, humidification, and purification products. FIRST USE: 19830526. FIRST USE IN COMMERCE: 19830526

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78279712

Filing Date July 28, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Owner (APPLICANT) Best Vacuum, Inc. CORPORATION ILLINOIS 2646 N. Lincoln Ave. c/o Paul S. Teven Chicago ILLINOIS 60614

Attorney of Record David M. Adler

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BEST or VACUUM" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

[PTO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [Browse Data](#) [TOP](#) [HELP](#) [PREV LIST](#)
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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2004-03-30 16:39:27 ET

Serial Number: 78279712

Registration Number: (NOT AVAILABLE)

Mark (words only): BEST VACUUM

Standard Character claim: No

Current Status: A non-final action has been mailed. This is a letter from the examining attorney requesting additional information and/or making an initial refusal. However, no final determination as to the registrability of the mark has been made.

Date of Status: 2004-02-25

Filing Date: 2003-07-28

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 115

Attorney Assigned:
COLLINS ALICIA Employee Location

Current Location: M6R -TMO Law Office 115 - Review And Amendment

Date In Location: 2004-03-29

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Best Vacuum, Inc.

Address:

Best Vacuum, Inc.
2646 N. Lincoln Ave. c/o Paul S. Teven
Chicago, IL 60614
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Illinois

Phone Number: 773-348-4500

GOODS AND/OR SERVICES

Residential & commercial sanitization, humidification, and purification products

International Class: 007

First Use Date: 1983-05-26

First Use in Commerce Date: 1983-05-26

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: "BEST or VACUUM"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2004-03-25 - Communication received from applicant

2004-03-25 - PAPER RECEIVED

2004-02-25 - Non-final action mailed

2004-02-09 - Case file assigned to examining attorney

2003-10-21 - Applicant amendment prior to exam entered

2003-10-21 - TEAS Preliminary Amendment Received

CONTACT INFORMATION

Correspondent (Owner)

David M. Adler (Attorney of record)

David M. Adler
David M. Adler & Associates
2 N. LaSalle St., Suite 1600
Chicago, IL 60602

Phone Number: 1-312-379-0236

Fax Number: 1-312-255-1994

EXHIBIT B

Miele Authorized Internet Dealer

3



Established 1983
Expert Advice
Superior Products
Competitive Pricing



Free Air Express Shipping Anywhere
in the U.S. for All Miele Vacuums!
Free Ground Shipping on All Other Orders Over
\$60



to the Contiguous 48 States
Central US Shipping Hub for Fastest Delivery

An Authorized Miele Diamond Dealer



Miele Red Velvet S558i
New Product!

Introducing Miele's newest
SoftTouch lacquer finish
canister. A powerful mid-size
with S236 Powerbrush.
Free Next Day Air Shipping
on this item!



Miele Aluminium S548i
Limited Edition!

S500 Series performance
with a unique textured
metallic aluminium silver
finish.
Free Next Day Air Shipping
on this item!



Miele vacuum cleaners
offer the finest filtration
available, in addition to the
best cleaning performance.
New Miele Models!

Dyson Vacuum Cleaners Dyson
RootCyclone™ vacuum cleaners have the only
quick-draw hose and are hygienic and easy to
empty. And the lifetime HEPA filters mean
there are no bags or filters to buy.

Bosch Vacuum Cleaners With a variety of
models to suit specific tastes and cleaning
requirements, Bosch vacuums address the
real world problems you encounter every day.

Lindhaus Vacuums Used by leading healthcare
facilities worldwide.

Nilfisk Vacuums Models for home and
industry, including contamination control in

Bissell Vacuum Cleaners For a limited time,
you can buy the ProLite upright and
ProPartner canister combination for just
\$279.95!

Sharp Plasmacluster Air Purifiers combine
passive air filtration with active air treatment to
help clear the air of pollen and many airborne
irritants.

Blueair Air Purifiers HEPA and ozone-free
ionizing technologies in a single unit with the
highest AHAM ratings for clean air delivery.

The C.A.R.E. 2000 Air Purifiers The first
residential air purifier with a germicidal
ultraviolet light to eliminate disease-causing
microbes.

Panasonic Air Purifiers With the exclusive
Micro Dust Sensor Air Quality Monitor.

research labs, cleanrooms and other dust-sensitive areas.

SEBO upright and canister vacuum cleaners offer outstanding cleaning power, first-class filtering systems and ease of use.

Eureka Oxygen canister and upright and Eureka 6984 canister vacuum cleaners offer True HEPA filtration in a sealed system that's also available with a washable HEPA filter.

Wood's Millennium Electronic Dehumidifiers are ideal for basements with their low temperature operation and electronic controls

Ebac Dehumidifiers provide pre-engineered dehumidification solutions for industrial, commercial and heavy residential applications.

DeLonghi Portable Air Conditioners Portable, best-of-class units that provide cool comfort where and when central or window air conditioning can't.

Arctic Front Portable Air Conditioners Portable air conditioners that provide unbelievably cold air with whisper-quiet operation.

Soleus Portable Air Conditioners offer the quality and dependability that have made Soleus the #1 private-label supplier in the US.

Sunpentown Portable Air Conditioners offer excellent performance and value in a variety of sizes for most home and office needs.

Austin Air HealthMate Air Purifiers Remove 99.97% of harmful particles, including dust, mold spores, dust mites, pet dander and other troublesome allergens.

AllerAir The 5000 Sentinel has a host of standard features commonly ordered as options on AllerAir units destined for hostile environments in order to reduce potent airborne contaminants.

IQAir The world's most uncompromising line of room air cleaners.

Airfree Extraordinary new technology uses just heat to destroy up to 85% of airborne micro-organisms in just 2-3 weeks.

Air-O-Swiss offers the only HEPA air purifier and humidifier combination, plus a new airwasher that washes the air while it humidifies.

Slant/Fin Warm Mist Humidifiers The only humidifiers to use ultraviolet light to deliver virtually 100% germ-free mist.

Venta-Airwasher Air Purifier/Humidifier A two-in-one unit with the only evaporation system in the world without filter pads.

Verilux Natural, full spectrum lighting, healthful lamps and incandescent, fluorescent and quartz halogen bulbs.

Ott-Lite TrueColor lamps have a special phosphor blend that is perfect for color-critical applications, including quilting, sewing, arts and crafts.

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Best Vacuum Inc.
2646 N. Lincoln Avenue, Chicago, IL 60614
888.205.3228 FAX: 773.348.4504
service@bestvacuum.com
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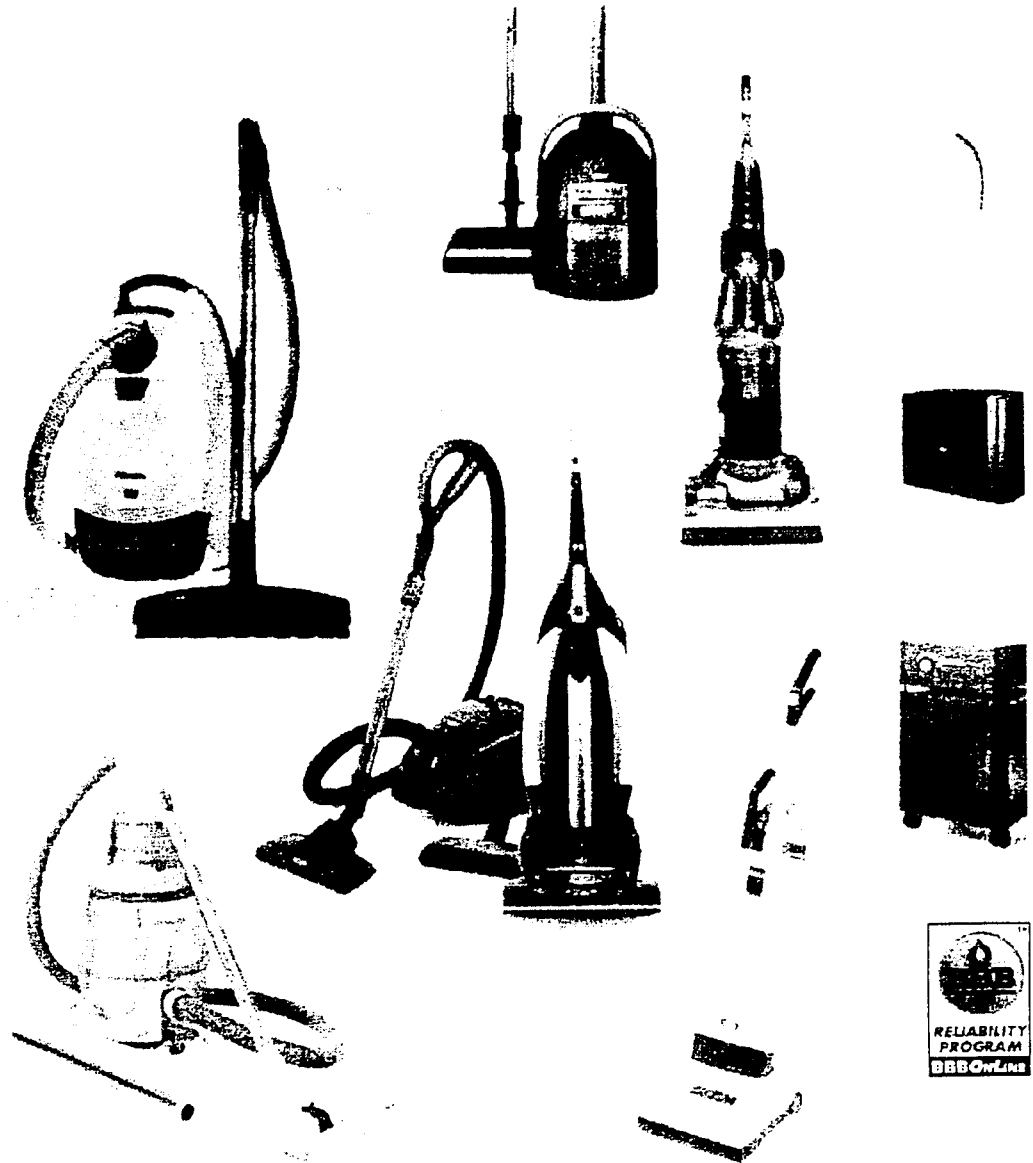
Authorized Miele Diamond and Internet Dealer



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Free Air Express Shipping Anywhere in the U.S. for Miele Vacuums! [Click Here for Details!](#)
FREE Ground Shipping on All Other Orders Over \$60 to the Contiguous 48 States
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Steam Cleaners
Air Purifiers
Heaters
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Air Conditioners
Bosch Appliances
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bestChoiceVacuums.com

Buy your Dyson Vacuum Cleaner for Less
Fast Service. Low Prices. Secure Shopping

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- > Home
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- > Comparison Chart
- > Dyson Story
- > FAQs
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Home

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Welcome to bestChoiceVacuums.com

Our Pledge of Service

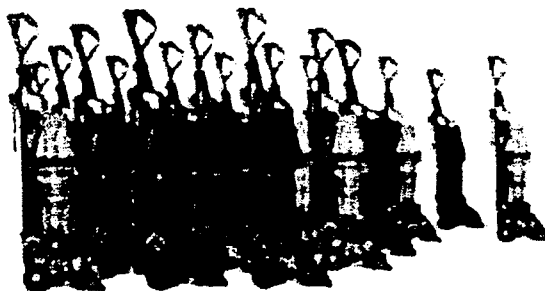
At bestChoiceVacuums.com we are dedicated to providing our customers with the best possible shopping experience we can provide.

- We offer Low Prices.
- Fast service.
- Secure shopping environment.
- No hidden charges.
- Free Shipping on all of our Products.

We take great pride in our store. We hope to provide a pleasurable shopping experience that is informative, provides for wise choices, and delivers superior products directly to your home, economically, safely and reliably.

Dyson [
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price. Re

We Feature the Dyson Root8Cyclone™ - the first vacuum cleaner that doesn't lose suction.



Dyson
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We are the place to shop for a Dyson Vacuum Cleaner!

For an explanation of the technology that allows Dyson vacuums to provide twice the constant suction of other vacuums, click on [Dyson Vacuums](#).

For a description of the advantages, features and attachments with each of the five Dyson DC07 US models, click on [Dyson Vacuums](#). Choose the vacuum you want. Click on the model name in the gray box located at the top of the page.

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For a graphic chart depicting the features and attachments included

with each model, click on [Comparison Chart](#).

Choose from one of the **Featured Sale Items** pictured on the right side of every page by clicking on the model illustration.

Seriously considering buying a Dyson? Read the [FAQs](#) for important warranty service information and other commonly asked about topics.

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Dyson
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EXHIBIT C



Web

Results 1 - 10 of about 3,510,000 for **best vacuum**. (0.11 seconds)

The Best Vacuum Cleaners, Vacuums

The **Best Vacuum Cleaners** for Your Home. See all products on sale now: on sale now. ... Our **best value vacuum** cleaners for those with mostly carpets. ...
www.allergybuyersclub.com/all-vacuum-cleaners.html - 101k - [Cached](#) - [Similar pages](#)

The Best Vacuum Cleaners, Canister Vacuums

Best vacuum cleaners and canister **vacuums** by reviews, ratings, advice - find all major canister **vacuum** cleaner brands such as Miele, Sebo, EIO, Eureka at ...
www.allergybuyersclub.com/all-canister-vacuum-cleaners.html - 101k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)
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The Best Vacuum for Pet Hair

The **Best Vacuum** for Pet Hair, Living Better...for Less! Hundreds of articles to save you time and money. ... The **Best Vacuum** for Pet Hair.
...
www.stretcher.com/stories/02/02aug26b.cfm - 35k - [Cached](#) - [Similar pages](#)

Best Vacuum Lighting Furniture - Prices and Reviews at DealTime

Compare shop for **Best Vacuum** Lighting Furniture at DealTime - read reviews and compare prices from stores all across the Web. ...
www.dealtime.com/xDN-Furniture--lighting-best_vacuum - 83k - [Cached](#) - [Similar pages](#)

Best Vacuum - Compare Prices & Read Reviews at DealTime

Compare **Best Vacuum** prices to other stores across the Web and read **Best Vacuum** reviews by other consumers - at DealTime. ...
www.dealtime.com/xMR-Best_Vacuum~MRD-302439~S-1 - 65k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)
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Miele Vacuum Cleaners - Miele - Vacuum Cleaners - Vacuums

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www.best-vacuum.com/ - 10k - [Cached](#) - [Similar pages](#)

Vacuum Cleaners • reviews & best Vacuum Cleaner prices • onino ...

Onino.co.uk: the **best Vacuum** Cleaner reviews, shops and prices - **Vacuum Cleaners**. Do your research before you buy. **Vacuum Cleaners** ...
home-appliances.onino.co.uk/vacuum_cleaners.html - 45k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)

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Oreck.com

Get a free compact canister **vacuum** when you buy an 8 lb Oreck XL.
www.oreck.com

What's the best vacuum?

We discuss the differences and advantages of today's vacuums.
www.ineed2know.org

Which vacuum cleaner?

Picks and **vacuum** reviews price range vacuum ratings at ABC
www.abcvacuumwarehouse.com

Clearance Prices

Save up to 80% on bedding, clothes, electronics, jewelry, watches, etc.
www.SmartBargains.com

Vacuum Compare

Compare Prices and Save Money. Find the Best Deals at BizRate.com!
BizRate.com

Compare Vacuum: at SEARS

We'll match any price on brand name large and small appliances at Sears
www.sears.com

Name brand vacuums cheap

Save on new **vacuum** cleaners at our affiliated US retail shop links
buyfinder.com/hover.html

Buy an Oreck vacuum now

Try it 30 days, get a cordless iron Low monthly payments. Affiliate.
Oreck.com

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Miele Vacuums and Austin Air Cleaners at Best Vacuum

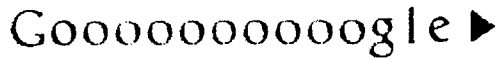
Best Vacuum - Featuring Miele HEPA filtration vacuum cleaners. The world's finest vacuums. Also featuring Austin Air Filters. Miele Authorized Internet Dealer. ...
www.erols.com/cleanair/ - 12k - [Cached](#) - [Similar pages](#)

Compare Prices and Read Reviews on Best Vacuum at Epinions.com

Epinions has the **best** comparison shopping information on **Best Vacuum**. ... **Best Vacuum**. Overall store rating: Reviewed by 242 Epinions users, Ease of Ordering: ...
www.epinions.com/ Best_Vacuum_Online_Stores_and_Services - 29k - [Cached](#) - [Similar pages](#)

Best Vacuum

Return to the Appliances Forum | Post a Follow-Up **Best Vacuum**. Posted by laur54 (My Page) on Sun, Feb 1, 04 at 8:25. ... Follow-Up Postings: RE: **Best Vacuum**. ...
ths.gardenweb.com/forums/load/ appl/msg020825384229.html - 72k - [Cached](#) - [Similar pages](#)



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Web

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The Best Vacuum Cleaners, Vacuums

... The first, completely sealed, true hepa commercial upright vacuum cleaner - Eureka's **best upright vacuum cleaner** for wall-to-wall, deep pile carpets. ...
www.allergybuyersclub.com/all-vacuum-cleaners.html - 101k -
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The Best Vacuum Cleaners, Canister Vacuums

... Hepa canister vacuum cleaner by reviews, ratings, price, advice - find the **best vacuum cleaner** brands such as Eureka oxygen, mighty mite, and sanitaire vacuums ...
www.allergybuyersclub.com/all-canister-vacuum-cleaners.html - 101k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)
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Vacuum Cleaners • reviews & best Vacuum Cleaner

prices • onino ...
Onino.co.uk: the **best Vacuum Cleaner** reviews, shops and prices - **Vacuum Cleaners**. Do your research before you buy. **Vacuum Cleaners ...**
home-appliances.onino.co.uk/vacuum_cleaners.html - 45k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)

Ristenbatt Vacuum Cleaner Service Home Page - Your best source for ...

Ristenbatt Vacuum Cleaner Service Home Page - Your **best** source for vacuum cleaners. When Really Clean is Important, Get the Facts About Vacs. ...
www.ristenbatt.com/ - 57k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)

Vacuum Cleaners reviews, ratings, guide - advice and online ...

... Choose from features like filter system, dust capacity, power and find the **best vacuum cleaner** for your home. Buy your new vacuum cleaner online. ...
www.dooyoo.co.uk/electronics/vacuum_cleaners/ - 79k - [Cached](#) - [Similar pages](#)

America's best upright vacuum cleaners and other small appliances ...

Find Oreck vacuum cleaners, air purifiers and other small appliances at Oreck.com. Whether you are looking for the **best** hand vac, Oreck vacuum bags or other ...
www.oreck.com/index.cfm - 21k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)

Miele Vacuum Cleaners - Miele - Vacuum Cleaners - Vacuums

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FAX: 773.348.4504 ~ service@bestvacuum.com. ...
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[Oreck.com](#)
Buy an Oreck XL upright and get a compact canister vac free!
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We Test, Rate HEPA Vacuum Cleaners. Free Shipping. Helpful Staff. Call.
www.allergybuyersclub.com

[Help Me Select a Vacuum Model Selection Help](#)
Picks and reviews at ABC Vacuum
www.abcvacuumwarehouse.com

[Dirt Devil Vacuums](#)
Affordable, lightweight and durable uprights, hand vacs and shampooers.
www.dirtdevil.com

[Sears Official Site](#)
We'll match any price on brand name large and small appliances at Sears
www.sears.com

[Vacuum Cleaners On Sale](#)
Wide Variety Of Top Names. All New. Low Price Guarantee. FactoryDirect2you.com

[What's the best vacuum?](#)
We discuss the differences and advantages of today's vacuums.
www.ineed2know.org

[Vacuum Cleaner Sale](#)
Great selection, information and low prices on quality vacuums
EverythingHome.com

[See your message here...](#)

Miele at **Best Vacuum**: Miele **Vacuum Cleaners** Product Line

Choose the Miele **vacuum cleaner** that suits your needs. **Best Vacuum** offers a complete line of Miele **vacuum cleaners**. ...
users.erols.com/cleanair/products.html - 15k - [Cached](#) - [Similar pages](#)

Yahoo! Directory **Vacuum Cleaners** > Retailers and Makers

... What's The **Best Vacuum Cleaner?** - offers a buying guide for **vacuum cleaners** and a **vacuum** forum. ... What's The **Best Vacuum Cleaner?** ...
dir.yahoo.com/.../Maintenance/Cleaning/Services/Carpet_and_Upholstery_Cleaning/Products/Vacuum_Cleaners/ - 32k - [Cached](#) - [Similar pages](#)

Hoovers / **Vacuum Cleaners** - **Vacuum Cleaner** Reviews at Review ...

Read consumer reviews of hoovers and **vacuum cleaners** so that you can choose **best** **vacuum cleaner** for you. ...
www.reviewcentre.com/products6.html - 98k - Mar 29, 2004 - [Cached](#) - [Similar pages](#)



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System Tray Update

Your computer clock may be wrong. Would you like to keep it accurate?
Advertisement

best vacuum

View Advertisers: Max 8/11

Other Categories:

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[Education & Career](#)
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You searched for **best vacuum**.

Search: 1/14

Get listed in these results and reach 80% of active Internet users on sites like MSN, Yahoo!, InfoSpace and AltaVista.

1. **Oreck: Vacuum Cleaners**
Oreck.com features the new Oreck XI. Make house cleaning easy with a new powerful Oreck vacuum cleaner. Buy now and get 0% interest for 12 months.
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