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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Milliken & Company

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Serial No. 78097676

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Thomas L. Moses, Esq. of Milliken & Company.

Elissa Garber Kon, Trademark Examining Attorney, Law Office 116 (Meryl Hershkowitz, Managing Attorney).

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Before Simms, Hairston and Drost, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Milliken & Company (applicant), a Delaware corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark SOFTEX for "fabrics for use in the manufacture of automotive upholstery."[1] The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC

[1] Application Serial No. 78097676, filed December 11, 2001, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

§1052(d), on the basis of Registration No. 2,182,981, issued August 18, 1998, of the mark SOFTEC for "brocade, calico, cheese cloth, crepe cloth, felt cloth, flax cloth, hemp cloth, sail cloth, silk cloth, woolen cloth, cotton fabric, curtain fabric, nylon fabric, polyester fabric, rayon fabric, woolen fabric, fabric for boots and shoes, silk fabric for printing patterns, fiberglass fabric for textile use, fabric table runners, flannel, frieze, taffeta, textile linings for garments, jersey material, linen, textile used as lining for clothing, sackcloth, tulle, and velvet," arguing that applicant's mark so resembles the registered mark for the respective goods as to be likely to cause confusion, to cause mistake or to deceive. Applicant and the Examining Attorney have submitted briefs, but no oral argument was requested.

The Examining Attorney argues that the marks SOFTEX and SOFTEC are essentially phonetic equivalents, with "SOFT" suggesting something soft to the touch, while applicant's suffix "-TEX", which is similar to "-TEC", sounds like or could be a fanciful spelling of the plural of "TEC". The Examining Attorney argues that the differences in the marks are not sufficient to avoid the likelihood of confusion.

With respect to the goods, the Examining Attorney argues that the goods are identical in part and otherwise closely related. In this regard, the Examining Attorney maintains that some of registrant's goods are broadly described and could encompass applicant's fabrics for automotive upholstery. That is to say, while the uses of some of registrant's goods are specified, in some cases no end use is indicated for the specific fabric listed. When no end use is stated, the Examining Attorney argues, one can presume that there may be any use for that fabric which is typical for that product, and that that fabric may be sold in all normal channels of trade for that product. Thus, registrant's broadly described "fabrics" may include fabric intended for use in the manufacture of automotive upholstery. In this regard, the Examining Attorney has made of record evidence that some of the fabrics listed in registrant's description of goods may be used in the manufacture of automotive upholstery. For example, the Examining Attorney has introduced evidence that automotive upholstery may be made from cotton, wool, polyester, nylon and other textiles, and that fiberglass is used as a substrate in the automotive industry. The Examining Attorney has also made of record some evidence indicating that manufacturers produce textiles and fabrics for a wide

range of uses including apparel, home furnishings, furniture upholstery and automotive upholstery. While the Examining Attorney concedes that fabrics for the manufacture of automotive upholstery are not impulse purchase items directed to consumers at large, the Examining Attorney maintains that even sophisticated purchasers are not immune to confusion as to source. The Examining Attorney also asks us to resolve any doubt in favor of registrant.

Applicant, on the other hand, argues that the respective marks are spelled and pronounced differently and convey different commercial impressions, applicant's mark suggesting a relationship with textiles ("-TEX"), while registrant's mark may suggest a relationship to technology ("-TEC"). Applicant argues that "-TEX" is not a fanciful spelling of the plural of "-TEC", but rather is a shortened version of "textile."

With respect to the goods, it is applicant's position that the price of its fabrics, which counsel says are sold in bulk to other companies for resale under their own brand names, as well as the sophistication and professional nature of the purchasers of applicant's goods militate against a finding of likelihood of confusion. Applicant also argues that there is no evidence that fiberglass

fabric for textile use is used in the manufacture of automotive upholstery.

Our determination under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood-of-confusion issue. *See In re Majestic Distilling Co., Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that confusion is likely.

Turning first to the marks, the marks SOFTEX and SOFTEC have obvious similarities in sound and appearance. While it is possible that, after some thought, one may glean different suggestive meanings from these two marks, these possible differences in suggestive connotation are

not that important when weighed with the similarities of the marks in sound and appearance.

Concerning the goods, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or asserted to actually be. *See Octocom Systems Inc. v. Houston Computer Services Inc.,* 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); *CBS Inc. v. Morrow,* 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.,* 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.,* 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where registrant's goods are broadly described as to their nature and type, or are set forth without limitation, it is presumed in each instance that the registration encompasses not only all goods of the nature and type described, but also that the identified goods may move in all channels of trade which would be normal for those goods, and that they would be purchased by all potential buyers thereof. *See In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981). There is no limitation in

registrant's identification of goods as to the channels of trade or classes of purchasers of some of its fabrics. Therefore, we must presume that registrant's nylon, wool and polyester fabrics may be sold to the automotive industry for use in the manufacture of automotive upholstery.

As noted above, the Examining Attorney has introduced evidence that such fabrics as nylon, wool and polyester, which are all fabrics listed in registrant's identification of goods, can be used in making automotive upholstery. It is possible, therefore, that registrant's SOFTEC polyester, nylon or wool fabric, for example, could be sold for the manufacture of automotive upholstery. Also, there is evidence of record that fabric and textiles are produced by manufacturers for a wide variety of uses including use as automotive upholstery.

Although purchasers of fabric for use in making automotive upholstery must be considered somewhat sophisticated, even sophisticated purchasers may confuse SOFTEX upholstery fabric and SOFTEC fabric that may be used for the same purpose.

Finally, as the Examining Attorney notes, to the extent we have doubt as to the presence of likelihood of confusion, we resolve that doubt against the newcomer

(applicant) and in favor of the prior user and registrant. *See In re Pneumatiques, Caoutchouc Manufacture,* 487 F.2d 918, 179 USPQ 729, 729 (CCPA 1973)("If there be doubt on the issue of likelihood of confusion, the familiar rule in trademark cases, which this court has consistently applied since its creation in 1929, is that it must be resolved against the newcomer or in favor of the prior user or registrant."). *See also In re Hyper Shoppes,* 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.,* 748 F.2d 1565, 223 USPQ 1289, 1290-1291 (Fed. Cir. 1984).

Accordingly, in the absence of some limitation in the channels of trade or classes of purchasers of registrant's goods, we conclude that confusion is likely.

Decision: The refusal of registration is affirmed.