

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE  
TTAB

JAN. 19,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re New Era Cap Co., Inc.

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Serial No. 74/601,726

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**Martin G. Linihan** of Hodgson, Russ, Andrews, Woods &  
Goodyear for applicant.

**Midge F. Butler**, Trademark Examining Attorney, Law Office  
108 (David Shallant, Managing Attorney).

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Before Cissel, Hairston and Wendel, Administrative  
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

New Era Cap Co., Inc. has filed an application to  
register the mark below for "athletic caps."<sup>1</sup>

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<sup>1</sup> S.N. 74/601,726, filed November 21, 1994, claiming first use  
dates of July 1983.



Registration has been finally refused under Section 2(d) of the Trademark Act, on the ground of likelihood of confusion with the mark below, which is registered for "clothing, namely, hats and caps."<sup>2</sup>



Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

As pointed out by the Examining Attorney, and not contested by applicant, there is no issue with respect to the similarity of the goods. The goods are identical.

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<sup>2</sup> Reg. No. 1,916,594, issued Sept. 5, 1995, claiming first use dates of Nov. 1993.

Furthermore, we must presume that these caps travel in the same channels of trade and are encountered by the same prospective purchasers in the same stores.

The only issue before us is whether the marks are sufficiently similar that there would be the likelihood of confusion when the respective marks are viewed in connection with these products. Although the Examining Attorney has emphasized that when the goods are identical or closely related, the degree of similarity of the marks necessary to support a finding of likelihood of confusion is less than with more diverse goods, we find no need to even resort to this principle in the present case.

Since the marks in question are strictly design marks, and are not capable of being spoken, the similarity thereof must be determined primarily on the basis of visual similarity. See *In re Burndy Corp.*, 300 F.2d 938, 133 USPQ 196 (CCPA 1962); *Matsushita Electric Industrial Co., Ltd v. Sanders Associates, Inc.*, 177 USPQ 720 (TTAB 1973). Side-by-side comparison is not the proper test, but rather comparison of the overall commercial impression created by each mark which is likely to be recollected by purchasers. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973).

Here the Examining Attorney points out that each mark consists of a male figure swinging (or holding) a baseball bat while looking over his left shoulder. In addition, the background in each design contains four evenly spaced stars. The boundary for each design is a double-edged rectangle, curved at the corners. The only distinguishing feature is the division of the background in applicant's mark by the bat into two portions, one dark, one light.

Applicant contends that it is this division of the background, such that two distinct portions are created which in turn draw increased visual attention to the bat and the right-hand star, that would result in a different visual and mental impression for applicant's mark.

We do not agree. The overall visual impression created by each mark, and the impression which is likely to be remembered over a period of time, is virtually identical. The baseball figure is in the identical pose in each mark, and the four stars are equally spaced over this figure in each mark. The slight variation in the shading of the background is clearly a minor variation, not likely to be remembered, if even noticed.

Accordingly, we find that there is the likelihood of confusion on the basis of the identity of the goods and the

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virtual identity of the design marks used in connection therewith.

While applicant also argues prior use of its mark and states that consideration has been given to filing a cancellation proceeding, any challenge to the validity of the cited registration is not a matter to be considered in this ex parte proceeding. See *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278 (CCPA 1971).

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Decision: The refusal to register under Section 2(d)  
is affirmed.

R. F. Cissel

P. T. Hairston

H. R. Wendel  
Trademark Administrative Judges,  
Trademark Trial and Appeal Board