

Hearing:
February 11, 2003

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Power Play International, Inc.

Serial No. 75/431,077

John K. McCulloch of Reising Ethington Learman & McCulloch
for Power Play International, Inc.

Shari L. Sheffield, Trademark Examining Attorney, Law
Office 109 (Ronald R. Sussman, Managing Attorney).

Before Cissel, Hairston and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Power Play International, Inc. seeks registration on
the Principal Register of the term MRS. HOCKEY as applied
to "men's, women's and children's clothing, namely T-
shirts, sweatshirts, and caps," in International Class 25.¹

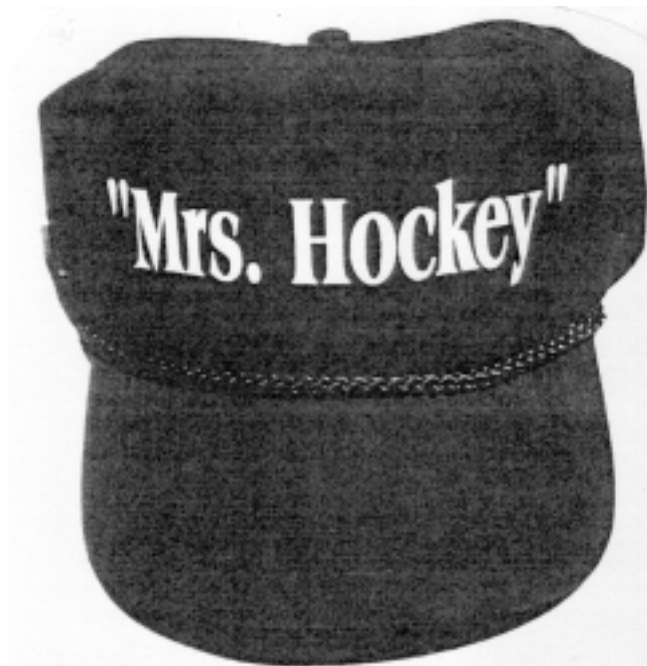
¹ Application Serial No. 75/431,077 was filed on February 9,
1998, based upon applicant's allegation of use in commerce since
at least as early as November 26, 1997. The application papers
stated that "[t]he term MRS. HOCKEY identifies a living person,
Colleen J. Howe, whose consent is of record." Applicant has
voluntarily disclaimed the word "HOCKEY" apart from the mark as
shown. Applicant also claimed ownership of Reg. No. 1,890,150,
issued on April 18, 1995 for the term MR. HOCKEY, registered in
connection with charitable fundraising services.

The Trademark Examining Attorney refused registration pursuant to Sections 1, 2 and 45 of the Trademark Act of 1946 (as amended), 15 U.S.C. Sections 1051, 1052 and 1127, because the proposed mark is ornamental as used on the goods. (Examining Attorney's brief page 1).

When the refusal was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. On February 11, 2003, an oral hearing on this matter was held before the Board.

We affirm the refusal to register.

The specimens of record in this use-based application are photographs of a purple cap having the designation "Mrs. Hockey" in contrasting white letters emblazoned across the front of the cap, as shown below:



In short, the Trademark Examining Attorney asserts that this term, positioned as it is on this cap, is seen as a message about the wearer. At oral argument, the Trademark Examining Attorney analogized the applied-for matter to similar designations one might find on T-Shirts or on the front of caps, such as "Soccer Mom," "Volleyball Dad" or "Golf Widow." In each instance, there appears to be a message about the attachment (or detachment) of the wearer to a particular sport or activity. Finally, she notes correctly that there is no evidence in the record that prospective purchasers view the designation MRS. HOCKEY as a source indicator for applicant's listed items of clothing.

By contrast, applicant argues that the designation MRS. HOCKEY is not ornamental because it lacks any design features; that as a ratio of the overall height of the raised, front portion of the cap, this wording is not emblazoned in a prominent fashion; and, most importantly, that "MRS. HOCKEY is the alter ego of a famous and celebrated person..."

First, we begin our analysis by clarifying for applicant that "ornamentation" is a term of art in federal trademark law that is in no way limited to ornate styles of

lettering. Rather, the Office's determination of ornamentation has to do with the manner in which the alleged source-indicating matter is combined with the trade dress of the goods or displayed on the goods and any inherent or acquired significance the matter has.

In fact, an early Board case on ornamentation introduced a hypothetical example of ornamental matter - the enigmatic saying "Swallow Your Leader." Such a message-laden expression (e.g., shown in all upper-case letters on a hypothetical trademark application drawing page and/or emblazoned across the front of an item of clothing in all plain, block letters) is merely ornamental. Such a slogan or expression, taken by itself, would not be considered as an indication of the source of the clothing on which it appears. See In re Olin Corp., 181 USPQ 182 (TTAB 1973).

The Trademark Examining Attorney herein points to Board language from In re Astro-Gods, Inc., 223 USPQ 621 (TTAB 1984), a seminal case in this area of the law:

We agree with the Examining Attorney that where, as here, an alleged mark serves as part of the aesthetic ornamentation of goods, the size, location, dominance, and significance of the alleged mark as applied to the goods are all factors which figure prominently in the determination of whether it also serves as an indication of origin.

Astro-Gods, *supra* at 623 (emphasis supplied).

In Astro-Gods, as here, the designation sought to be registered was not a recognized trademark of applicant at the time when applicant first used it ornamentally.² Nor does the ornamental matter on the instant cap *inherently* tell members of the purchasing public the secondary source of the cap as would, for example, the name "George Washington University," for as discussed in Olin, consumers across the country understand that the name of a well-known university printed on a T-shirt or cap indicates sponsorship or authorization by the named institution.

Moreover, in Astro-Gods, as here, there was no indication in the record of acquired distinctiveness - i.e., that the matter had been promoted in connection with applicant's items of apparel in such a manner and to such

² By contrast: (1) the design element in Olin Corp., *supra*, functioned as an indication of "secondary source" because this matter had previously been registered by applicant for skis; (2) the names "MORK & MINDY" were registrable for collateral products such as decals given the popularity at the time of applicant's television series of that name [See In re Paramount Pictures Corporation, 213 USPQ 1111 (TTAB 1982)]; and (3) a stylized and unique checkered flag design, already recognized as a source indicator for applicant's auto racing services, was also registrable as an indicator of secondary source for collateral goods like clothing and patches [See In re Watkins Glen International, Inc., 227 USPQ 727 (TTAB 1985)].

an extent as to create purchaser recognition of it as a trademark.³

As pointed out by the Trademark Examining Attorney, applicant has offered no evidence as to secondary source or as to acquired distinctiveness. We certainly cannot reach a contrary result herein based solely upon applicant's counsel's unsupported argumentation as to the fame of the designation MRS. HOCKEY as applied to applicant's president, Colleen J. Howe.⁴

Nor can we find a basis for registrability of otherwise merely ornamental matter with applicant's claim of ownership of the MR. HOCKEY⁵ registration for charitable

³ See In re David Crystal, Inc. (Izod Ltd., assignee, substituted), 132 USPQ 1 (CCPA 1961)[inadequate proof of acquired distinctiveness of red and blue band design appearing on men's socks].

⁴ At oral argument, applicant's counsel analogized this usage to having ARNOLD PALMER, "THE KING," TIGER WOODS or THE ROLLING STONES (or even their "Tongue Logo") emblazoned across a cap or T-Shirt. However, while these analogies could well suggest a successful approach to overcoming a merely ornamental refusal in any of these hypothetical cases, this would in each case be a fact-based determination requiring evidence of a type not present in the current record.

⁵ Applicant's counsel argues without any evidentiary basis that Gordie Howe ("Mr. Hockey") is recognized as the greatest all-around hockey player in history and one of the world's finest athletes ever. Evidently, Gordie Howe played against other NHL players over a period of six decades. When he retired from the sport, he allegedly held more records than any team athlete in history. We have no reason to doubt Mr. Howe's extraordinary talent, fame and allure, or that he continues to serve as a role model, an unblemished sportsman, a hero to many and an ambassador to generations of hockey fans and players alike. However, even if all of this had been proven on this record (which it was not), none of this is relevant to the question at hand.

fundraising services. Even if it were clear that caps and T-shirts are collateral goods for charitable fundraising services, MR. HOCKEY is clearly a different designation than is MRS. HOCKEY. Hence, inasmuch as this alleged trademark is for a different term, applicant could rely on neither the logic nor the evidence of secondary source or of any acquired distinctiveness of MR. HOCKEY to overcome the ornamentation refusal for MRS. HOCKEY.

Decision: The refusal to register is affirmed.