

Striking Out at the TTAB – All Rise for Consumer Recognition

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What qualifies as the United States' current favorite sport may be a subject for heated debate, but "America's Pastime" and its biggest stars still have significant power over the public—and, apparently, the Trademark Trial and Appeal Board ("TTAB").

By 2017, New York Yankees right-fielder Aaron Judge had become a fan favorite, reaching such popularity that the team officially designated a section of its home stadium "The Judge's Chambers." Attendees wholeheartedly embraced the theme, with some showing up in judge's robes, white wigs, and holding large signs bearing phrases such as "ALL RISE" and "HERE COMES THE JUDGE." Not one to waste a good merchandising opportunity, Judge's union, the Major League Baseball Players Association ("MLBPA"), licensed the use of these phrases, with Judge's permission, to

various third parties in exchange for royalties.

Also in 2017, Long Island resident Michael P. Chisena filed applications to register the trademarks “ALL RISE,” “HERE COMES THE JUDGE,” and a design of a baseball diamond incorporating a gavel and scales of justice. Judge and the MLBPA filed oppositions of the applications before the TTAB. Purportedly unaware of throngs of screaming baseball fans wearing merchandise in reference to Judge just a few miles away, Chisena asserted that his applied-for marks did not refer to the right-fielder, and that the MLBPA simply uses “ALL RISE” and “HERE COMES THE JUDGE” as part of merely informational expressions to celebrate Aaron Judge’s baseball prowess. Traditionally, slogans or phrases that are common expressions or that simply convey information are not registerable as trademarks (e.g. “AMERICA’S FRESHEST ICE CREAM” for ice cream).

Just a few months ago, the TTAB addressed similar arguments in its review of Lizzo LLC’s attempt to register “100% THAT BITCH.” In a precedential decision, the TTAB considered the possibility that the phrase was a merely informational expression that conveyed female self-confidence and independence. The singer Lizzo even admitted that the phrase originally came from an Internet meme. However, because Lizzo had popularized the phrase, the public had come to predominantly associate it with the singer, rendering it a valid trademark that identified her. And so, the TTAB allowed the mark to register.

As with Lizzo, the TTAB sided with Judge and the MLBPA in a precedential decision, shutting down Chisena’s arguments and pointing out consumer recognition of “ALL RISE,” “HERE COMES THE JUDGE,” and the judicial baseball design logo as unmistakably referring to the Yankees player. Reliance on public perception therefore appears to be on the rise, spurring the TTAB to look outside of the application at issue and, at least in the case of celebrity singers and athletes, to rely on public perception as a measure of validity for trademarks.