

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 2, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Melt Your Heart, Inc.

Serial No. 75/245,378

Philip L. Conrad of Kudirka & Jobse, LLP for Melt Your
Heart, Inc.

James R. Menker, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Simms, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

On February 21, 1997, Melt Your Heart, Inc. filed an
application to register the mark MELT YOUR HEART on the
Principal Register for "decorative wooden outdoor
adornments for snow sculptures" in International Class 20.
The claimed date of first use is December 26, 1996; and the
relevant portion of applicant's specimen is reproduced
below.

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Registration has been finally refused pursuant to Sections 1, 2 and 45 of the **Trademark Act, 15 U.S.C. §§1051, 1052 and 1127**, on the ground that the drawing of the mark differs from the mark shown on the specimens, i.e., the mark in the drawing is a mutilation of the mark as actually used.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

Applicant argues that in determining whether the mark presented in the drawing is a mutilation of the mark as actually used on the specimens one looks to whether the mark in the drawing in fact identifies and distinguishes the involved product from those of others, and whether it creates a separate and distinct commercial impression. Applicant contends that there is no question in this case that the applied-for mark identifies and distinguishes applicant's goods; and that the applied-for mark creates a separate commercial impression without the additional words "THE" and "SNOWMAN." Specifically, applicant contends that the term "THE" is merely an incidental article which has no effect on the commercial impression created by the mark; that the term "SNOWMAN" appears on a separate line, and it serves to describe the product not the source of the

product; and that the phrase MELT YOUR HEART is a well-known colloquialism with no recognizable association with the term "snowman."

The Examining Attorney essentially contends that applicant's mark as presented in the drawing (MELT YOUR HEART) omits essential and integral matter from the mark as it appears on the specimens (THE MELT YOUR HEART SNOWMAN)¹; that applicant uses the words all in the same font type and size even though the word "SNOWMAN" appears on a second line; that the mark as used on the specimens is a unitary phrase of which MELT YOUR HEART is an inseparable element; and that while "melt your heart" is a figurative phrase relating to "a softening of feelings," the term "melt" also has a special meaning in relation to the term "snowman" thus implying that applicant's products (decorative wooden outdoor adornments for snow sculptures) "will make your heart melt as inevitably as a snowman will melt." (Brief, p. 5). The Examining Attorney also contends that applicant offered no evidence to show that purchasers separate the

¹ We note that the Examining Attorney stated in the final Office action that applicant could alleviate the problem of the discrepancy between the drawing and the specimens by either amending the drawing to read THE MELT YOUR HEART SNOWMAN and disclaiming the word "snowman," or submitting substitute specimens showing use of the mark MELT YOUR HEART along with an affidavit or declaration of use as of the filing date of the application. Applicant opted for neither of these alternatives.

words MELT YOUR HEART out of the phrase THE MELT YOUR HEART SNOWMAN.

As stated by the Court of Appeals for the Federal circuit in the case of The Institut National des Appellations D'Origine v. Vintners International Co. Inc., 958 F.2d 1574, 22 USPQ2d 1190, 1197 (Fed. Cir. 1992) (wherein the Court affirmed the Board's granting of summary judgment in applicant's favor, and held, inter alia, that applicant's use of the mark CHABLIS WITH A TWIST for citrus flavored wine was not a mutilation of the words CALIFORNIA CHABLIS WITH A TWIST as used by applicant):

'Mutilation' is a concept long recognized as a part of trademark registration case law. See In re Servel Inc., 181 F.2d 192,195, 85 USPQ 257, 259-260 (CCPA 1950). The issue must be decided on the facts of each case.

And later in The Institut National des Appellations v. Vintners case, the Court cited McCarthy's Trademarks and Unfair Competition treatise² saying that the question is "what exactly is the 'trademark'?" and quoted McCarthy's as follows:

It all boils down to a judgment as to whether that designation for which registration is sought comprises a

² The current citation in McCarthy's treatise on this subject is 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §19:59 (4th ed. 1999).

separate and distinct 'trademark' in and of itself.

In the circumstances of the case now before us, we agree with the Examining Attorney that the mark presented in the drawing, MELT YOUR HEART, is an inseparable and integral part of the mark as actually used, THE MELT YOUR HEART SNOWMAN. The words MELT YOUR HEART do not create a separate and distinct commercial impression when viewed as applicant uses THE MELT YOUR HEART SNOWMAN on its specimens.

The specimens submitted by applicant unquestionably show the applied-for mark with the additional words "THE" and "SNOWMAN," all in the same font type and size with no emphasis on any specific word or words. The word "THE" appears on the same line with the words "MELT YOUR HEART" and it is illogical to assume that the purchasing public would read and perceive this mark as "THE MELT YOUR HEART." Rather, consumers when encountering this mark for the involved goods, would in fact read it as "THE MELT YOUR HEART SNOWMAN." That is, the words "THE" and "SNOWMAN" are part and parcel of the mark as viewed by the consumer. It is true that the words MELT YOUR HEART are a colloquial phrase. Nonetheless, applicant's particular use of those words with the additional words "THE" and "SNOWMAN" creates

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a single commercial impression, especially in light of the logical mental connection between the words "MELT" and "SNOWMAN." See *In re Jane P. Semans*, 193 USPQ 727 (TTAB 1976) [wherein the Board affirmed the refusal to register the mark KRAZY for food seasonings and seasoned rice, when the specimens showed use of KRAZY MIXED-UP (all on one line in plain type) and/or JANE'S KRAZY MIXED-UP SALT (with the word JANE'S in plain lettering on the line above the words KRAZY MIXED-UP SALT in stylized lettering)]. See also, TMEP §807.14(b).

Decision: The refusal to register is affirmed.

R. L. Simms

B. A. Chapman

D. E. Bucher
Administrative Trademark Judges,
Trademark Trial and Appeal Board