

12/28/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 9
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **The Kay Medical Group For Cardiac,
Vascular & Pulmonary Surgery**

Serial No. 75/726,335

Thomas I. Rozsa of **Rozsa & Chen LLP** for **The Kay Medical Group For Cardiac, Vascular & Pulmonary Surgery**.

Maria-Victoria Suarez, Trademark Examining Attorney, Law Office 102 (**Thomas V. Shaw**, Managing Attorney).

Before **Hohein**, **Hairston** and **Holtzman**, Administrative Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

The Kay Medical Group For Cardiac, Vascular & Pulmonary Surgery seeks registration of the matter shown below,

for "health care services, namely, diagnosis and treatment of diseases of the heart and vascular system and the

pulmonary system, cardiovascular and thoracic surgery, and pulmonary surgery."¹

The Trademark Examining Attorney has finally refused registration on the ground that the drawing filed with the application is not a substantially exact representation of applicant's mark as used in connection with applicant's services, as illustrated by the specimens of record. A copy of the top portion of applicant's web page, which was submitted as a specimen, is reproduced below.

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

The Examining Attorney has set forth what appear to be alternative arguments in support of the refusal to

¹ Serial No. 75/726,335, filed June 10, 1999, based on use of the mark in commerce, alleging first use and first use in commerce on

register. First, the Examining Attorney argues that the specimens display two distinct marks, one being the fanciful heart design and the other being the wording "THE ART AND SCIENCE OF HEART CARE." Thus, according to the Examining Attorney, applicant seeks to register two marks in a single application. Second, the Examining Attorney argues that the mark in the drawing, which consists of the fanciful heart design and the wording "THE ART AND SCIENCE OF HEART CARE," is an incomplete representation, i.e., a mutilation, of the mark as used on the specimens.

According to the Examining Attorney, the applied-for mark differs from the display of the mark on the specimens which consists of the fanciful heart design, the wording "THE ART AND SCIENCE OF HEART CARE" and the wording "THE KAY MEDICAL GROUP FOR CARDIAC, VASCULAR & PULMONARY SURGERY."

Applicant, in urging reversal of the refusal to register, argues that the fanciful heart design is sufficiently close to the wording "THE ART AND SCIENCE OF HEART CARE" so as to constitute "one overall commercial impression." (Brief, p. 7). In particular, applicant maintains that these elements appear at the top of its web page in a horizontal line with each other. Further,

May 21, 1999. The words "HEART CARE" have been disclaimed apart from the mark as shown.

applicant maintains that it "is not required to include its business name [THE KAY MEDICAL GROUP FOR CARDIAC, VASCULAR & PULMONARY SURGERY] as part of the overall service mark sought to be registered in the application." (Brief, page 7).

Trademark Rule 2.51(a)(1) provides, in part, that "the drawing of the trademark shall be a substantially exact representation of the mark as used on or in connection with the goods[.]" As noted by the Board in *In re Audi NSU Auto Union AG*, 197 USPQ 649, 651 (TTAB 1977), "[t]he words 'the trademark' imply that there shall be one trademark shown in the drawing."

In this case, it is our view that as used on the specimens of record, the fanciful heart design and the wording "THE ART AND SCIENCE OF HEART CARE" do not create a single or unitary commercial impression and therefore do not constitute a single trademark. On the specimens, the fanciful heart design appears in the top left portion of applicant's home page and the wording "THE ART AND SCIENCE OF HEART CARE" appears in the top center thereof, directly above the wording "THE KAY MEDICAL GROUP FOR CARDIAC, VASCULAR & PULMONARY SURGERY." Contrary to applicant's argument, we do not believe the fanciful heart design and the wording "THE ART AND SCIENCE OF HEART CARE", as used on

the specimens of record, are in sufficient proximity to form a single mark. When "THE ART AND SCIENCE OF HEART CARE" is observed by the average customer on applicant's home page, it is seen as part of the overall expression "THE ART AND SCIENCE OF HEART CARE THE KAY MEDICAL GROUP FOR CARDIAC, VASCULAR & PULMONARY SURGERY." This case is akin to *In re Audi NSU Auto Union AG, supra*, where the applicant sought to be register AUDI FOX and design for automobiles. In that case, there was space between AUDI and FOX and design on the lid of the car's trunk, and the Board found that the matter sought to be registered did not create one commercial impression.

Having found that the fanciful heart design and the wording "THE ART AND SCIENCE OF HEART CARE" do not create a single or unitary commercial impression, it is not necessary to determine whether each of these elements is a separate mark or whether the wording "THE KAY MEDICAL GROUP FOR CARDIAC, VASCULAR & PULMONARY SURGERY" forms part of the matter sought to be registered. Thus, we have not considered the arguments of the Examining Attorney and applicant with respect to these questions in reaching our decision herein.

Decision: The refusal to register is affirmed.