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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ivani, LLC

Serial No. 88354318

Kirk A. Damman of Lewis Rice LLC
for Ivani, LLC.

Michael Ebaugh, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

Before Cataldo, Wolfson, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Ivani, LLC ("Applicant") seeks registration on the Principal Register of **NETWORK PRESENCE SENSING** (in standard characters) for "computer hardware and downloadable computer firmware to analyze data to detect human presence within an area," in International Class 9.[1]

[1] Application Serial No. 88354318 was filed on March 25, 2019, based on Applicant's allegation of its bona fide intention to use the applied-for mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs and other entries on appeal are to the Board's TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive of Applicant's identified goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

I. Analysis and Discussion

Applicant identifies its goods as "computer hardware and downloadable computer firmware to analyze data to detect human presence within an area." It explains that its product collects data in a given area (such as a hotel room, office, apartment, or residence) from the waves of energy emitted from existing IoT (Internet of Things) devices in the room—such as cell phones, tablets, wall sockets or light fixtures. When a human enters the area, disrupting the ordinary pathway of those signals, the product detects the human's presence. This detection enables the product's purchasers—those who own or manage the areas—to trigger adjustments in lights or temperature, or alert security, as appropriate.[2]

The issue is whether Applicant's proposed mark, NETWORK PRESENCE SENSING, merely describes its identified goods.

A. Applicant's Arguments

Applicant "does not dispute that a feature of its good involves detecting the presence of objects and people."[3] It contends, however, that the words "NETWORK"

[2] *See* Applicant's Dec. 6, 2019 Response to Office Action.

[3] June 6, 2020 Response to Office Action at TSDR 7.

and "SENSING" "can have numerous meanings, [so] it is impossible to state with any assurance what significance will be attached to Applicant's Mark when it is seen by the relevant customer…."[4] The relevant issue, Applicant states, is "whether or not, upon a consumer being presented with the mark, said consumer can essentially guess the related goods and services."[5]

"The word element 'NETWORK' is somewhat ambiguous in that it can be a very broad or a very narrow word, depending on the interpreter,"[6] Applicant argues, analogizing to *In re Hutchinson Technology, Inc*., 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988) ("TECHNOLOGY" is a very broad term which includes many categories of goods, and does not convey an immediate idea of the ingredients, qualities, or characteristics of the goods). Moreover, Applicant argues, there is no "NETWORK" such as components or circuitry, associated with its goods; rather, its goods collect data emitted by existing IoT devices that are already in the area, and are not part of Applicant's goods.[7] (Applicant states, however, that it is willing to disclaim "NETWORK" upon reversal of the Examining Attorney's refusal.)[8]

In addition, Applicant maintains, "SENSING" does not describe its product, as it does not have a sensor; rather, it detects disruptions in the flow of energy waves emitted by the preexisting IoT devices in the area.[9]

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[4] Applicant's brief, 6 TTABVUE 14-15.

[5] June 6, 2020 Response to Office Action at 5.

[6] *Id*. at 10.

[7] Applicant's Dec. 6, 2019 Response to Office Action at 9.

[8] Applicant's brief, 6 TTABVUE 16.

[9] Applicant's brief, 6 TTABVUE 11, 13.

Applicant concludes that its proposed mark, taken as a whole, is greater than its parts.[10] It is suggestive of Applicant's product, not descriptive.

B. Applicable Law

Section 2(e)(1) provides that a mark is unregistrable on the Principal Register if, "when used on or in connection with the goods of the applicant [it] is merely descriptive or deceptively misdescriptive of them ...." 15 U.S.C. § 1052(e)(1). A term is merely descriptive of goods or services within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Well Living Lab Inc.,* 122 USPQ2d 1777, 1779 (TTAB 2017). In particular, we note, a term is merely descriptive if it conveys information regarding a **function or purpose** of the goods. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012).

Contrary to Applicant's contention, "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *Earnhardt v. Earnhardt, Inc.,* 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017) (citing *DuoProSS*, 103

[10] Applicant's brief, 6 TTABVUE 16.

USPQ2d at 1757). "Whether a mark is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use." *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1102 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219).

Whether a term is merely descriptive is determined from the viewpoint of the relevant purchasing public—in this case, property owners or managers seeking to monitor the presence of people within the space. *See In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) *quoted in In re Omniome, Inc.*, 2020 USPQ2d 3222, *5 (TTAB 2019). Viewing the matter from this perspective, we consider the commercial impression that the term, taken as a whole, would have on its purchasing public:

> In considering the mark as a whole, the TTAB "may not 'dissect' the mark into isolated elements," without ever "consider[ing] . . . the entire mark," *DuoProSS*, 695 F.3d at 1252, 1253, but it "may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components," *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1174 (Fed. Cir. 2004) (citation omitted).

Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc., 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018).

Evidence of the purchasing public's understanding of the term may be obtained from any competent source, including websites, publications, and labels, packages, or in advertising material directed to the goods. *In re North Carolina Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017). This includes in particular the

applicant's website, on which it describes and promotes its goods. *In re Hikari Sales USA, Inc.,* 2019 USPQ2d 111514, *9 (TTAB 2019).

C. Application to This Case

Applying these principles to the evidence in the present case, we agree with the Examining Attorney that NETWORK PRESENCE SENSING merely describes the function or purpose of Applicant's goods.[11] As Applicant's website explains:

NETWORK PRESENCE SENSING™

Network Presence Sensing™ is identifying the presence of people in a space using an already existing mesh network without additional hardware. In this case, N-Way switches and outlets create this mesh. This technology contributes to the world of actionable data collection and has additional implications outside of lighting control including advanced security, optimized HVAC control, and more. [12]

In other words, Applicant's product uses the network of wavelengths emitted by wireless devices in a room to sense human presence in that area. Its website continues:

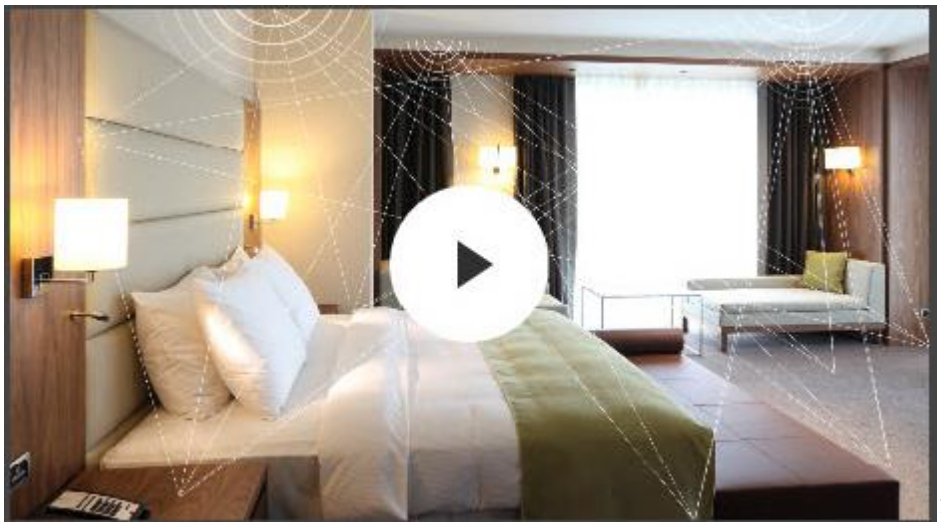
Network Presence Sensing™ uses an emergent system behavior of wireless communications to detect the presence of humans. When devices communicate with each other, their wireless transmissions interact with the environment as they propagate through space. The radios provide network diagnostic information to aid network formation and diagnose communications issues. Ivani's NPS™ technology analyzes this data to derive human presence in a detection area. [13]

It monitors a spider web-like network:

[11] June 6, 2019 Office Action at 2, Jan 6, 2020 Office Action at 4.

[12] Ivani.com, June 24, 2020 Office Action at 10.

[13] Ivani.com, June 24, 2020 Office Action at 5.

 [14]

As Applicant's own website indicates, its device taps into and uses this "NETWORK" of waves of energy. As the Examining Attorney correctly notes, quoting a technical dictionary:

> A network consists of multiple devices that communicate with one another. It can be as small as two computers or as large as billions of devices. While a traditional network is comprised of desktop computers, modern networks may include laptops, tablets, smartphones, televisions, gaming consoles, smart appliances, and other electronics.[15]

Using this existing network, Applicant's product detects the "PRESENCE" of humans in an area. Its website touts this purpose, and its identification of goods describes that function: "to detect human presence within an area." "To detect

[14] Ivani.com, Jan. 6, 2020 Office Action at 31.

[15] TechTerms.com, Jan. 6, 2020 Office Action at 11.

automatically" is the very definition of "SENSING."[16] Even if Applicant does not use traditional sensors, such as photoelectric cells, its product still detects, and therefore senses, human presence.

Thus, even if the constituent words of Applicant's proposed mark, NETWORK PRESENCE SENSING, might have broader applications, taken separately, their commercial impression, taken together, immediately describes the purpose or function of Applicant's product. *See DuoProSS,* 103 USPQ2d at 1757 ("The Board, however, ultimately must consider the mark as a whole and do so in the context of the goods or services at issue."). Unlike *Hutchinson Technology*, prospective purchasers of Applicant's goods would immediately understand the descriptive significance of the proposed mark in relation to those goods. *See In re Omniome,* 2020 USPQ2d 3222, at *10.

II. Conclusion

For the foregoing reasons, we find that Applicant's proposed mark, NETWORK PRESENCE SENSING, is merely descriptive of its goods under Section 2(e)(1).

Decision: The refusal to register Applicant's proposed mark, NETWORK PRESENCE SENSING, is affirmed.

[16] "Sensing" – "To detect automatically." The American Heritage Dictionary of the English Language, AHDictionary.com, June 6, 2019 Office Action at 2, 8.