

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000588
of 17 May 2024

Claimant: **2M Engineering Limited**
John F. Kennedylaan 3
5555 XC Valkenswaard
The Netherlands

Representative: **Louwers Advocaten B.V.**
Zwaanstraat 31K
5651 CA Eindhoven
The Netherlands

against

Defendant: **Momo Medical Holding B.V.**
Molengraaffsingel 12
2629 JD Delft
The Netherlands

Representative: **Ploum**
Blaak 28
3011 TA Rotterdam
The Netherlands

Contested trademark: **Benelux registration 1391996**
BedSense

I. FACTS AND PROCEEDINGS

A. Facts

1. On 15 June 2023 the claimant filed an application for a declaration of invalidity with the Benelux Office for Intellectual Property (hereinafter: "the Office") in accordance with Article 2.30bis (1)(a), invoking in its arguments the absolute grounds stated under Article 2.2bis (1)(b) and (c) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP"), namely that the contested trademark is devoid of any distinctive character and is descriptive.

2. The cancellation application is directed against Benelux trademark registration 1391996 of the wordmark BedSense, which was filed by the defendant on 13 March 2019 and was registered on 4 June 2019 for goods and services in classes 9, 10 and 44.

3. The cancellation application is directed against all goods and services of the contested trademark.

4. The language of the proceedings is English.

B. Course of the proceedings

5. The cancellation request is admissible and was notified by the Office to the parties on 6 July 2023. During the administrative phase of the proceedings both parties filed arguments. The course of the proceedings meets the requirements as stated in the BCIP and the Implementing Regulations (hereinafter: "IR"). The administrative phase was completed on 30 November 2023.

II. ARGUMENTS

A. Claimant's arguments

6. The claimant first indicates that the goods covered by the contested trademark in class 9 can be summarized as measuring apparatus and instruments, the goods in class 10 can be summarized as measuring apparatus and instruments for medical use, and the services in class 44 are medical services.

7. According to the claimant, the goods and services target the public at large and the professional public that is interested in (medical) instruments and services in the Benelux. He points out that this also appears from the website of the defendant, namely by stating that the offered goods and services are for nursing staff, clinical managers and other healthcare professionals. The claimant therefore concludes that the degree of attention of the public is likely to vary from average to high. In that context, he explains that the level of attention of the relevant public in relation to the goods in class 10 and services in class 44 will be above average insofar as they concern the health of humans and, as regards the goods in class 9, they are addressed to the public at large and the professional public whose attention may vary from average to above average.

8. The claimant claims that the contested sign is composed of English words which are almost identical to the Dutch equivalent words and are generally used and understood by the public at large and professionals, especially in data-driven innovation and IT. He also states that the word 'sensor' has been assimilated into Dutch language, is listed in the Van Dale dictionary and is defined as "instrument of orgaan dat veranderingen kan waarnemen" - in English "instrument or organ that can detect changes". Regarding the word 'bed', the claimants indicates that this word is exactly the same in Dutch language and underlines that Dutch is understood in the Netherlands and the Dutch speaking territory of Belgium. The claimant also points out that, as generally accepted by the Office, the public in the Benelux can be assumed to understand the meaning of English words.

9. The claimant explains that the two verbal components of the contested trademark are conjoined without a space and that this is common marketing practice in a commercial context. Relying on case law, the claimant indicates that the absence of a hyphen or a space between the two components comprising the contested sign does not amount to any creative aspect capable of distinguishing the goods from those of other undertakings. According to him, the omission of the space will not prevent the relevant public from understanding the descriptive semantic content conveyed by the trademark and the sign will therefore be perceived in the same way as if it were written in two words. The claimant considers that this is emphasized by the fact that the trademark "BedSense" is registered with a capital B and a capital S.

10. Relying on dictionary entries, the claimant states that the component BED in Dutch as well as English means 'a piece of furniture on or in which to lie and sleep' and the component SENSE is an English word which means 'to detect automatically, as by sensors' and/or 'to detect automatically especially in response to a physical stimulus (such as light or movement)'. In relation to machines, instruments or similar devices the word SENSE means 'to detect' or 'to measure'. The claimant also points out that the Board of Appeal (EUIPO) has assigned the same meaning to the word SENSE in cases involving the word SENSE and that the word SENSE is a commonly used word within the medical field and indicates that measurements are being taken. According to the claimant, the addition of the word BED just indicates where the measurements are being taken or to be taken, namely in or around a bed.

11. The claimant argues that the trademark "BedSense" is immediately descriptive because it directly relates to the characteristics of the goods and services it covers. The combination of the words BED and SENSE conveys a clear message to the relevant public that the apparatus, instruments, and medical services associated with the trademark are intended for use in or around a bed to detect or measure certain information. This understanding is automatic and does not require further thought from consumers. The claimant asserts that the sign "BedSense" leads consumers to perceive that the medical services offered involve sensing activities in or around a bed, while medical instruments and apparatus will be used in connection with these services. Additionally, the claimant argues that the sign conveys information about the thematic subject matter of the goods, particularly in class 9, indicating their relevance to sensing services near a bed. The components BED and SENSE individually indicate the intended purpose of the goods and services, namely their use in or around a bed and the detection or measurement of data or information. The claimant emphasizes that although the descriptiveness applies to class 9 goods, it is even stronger for class 10 goods and class 44 services, which are explicitly related to medical use, where patients often lie in beds for measurements. The claimant dismisses

the absence of the word combination "BedSense" in dictionaries, arguing that dictionaries do not encompass all possible word combinations. He asserts that the signs and indications composing the trademark need not be in use at the time of registration but may potentially be used for descriptive purposes. The claimant contends that "BedSense" directly informs the relevant public about the registered goods and services' purpose.

12. Furthermore, the claimant argues that the contested trademark lacks distinctive character as it consists of common English words that are readily recognizable and do not indicate a specific commercial origin. The claimant suggests that a significant portion of the relevant public will view "BedSense" merely as an informative message regarding the intended use of the goods and services rather than as a unique indicator of trade origin. He provides evidence from the defendant's website, illustrating the use of "BedSense" in connection with bed sensors, further highlighting the descriptive nature of the trademark. The claimant concludes that due to its clear descriptive meaning, "BedSense" lacks distinctive character and is ineligible for registration under Article 2.2bis (1)(c) BCIP.

13. Therefore, the claimant requests the Office to declare the contested trademark invalid for all goods and services the trademark is registered for and to order the defendant to bear the opponent's costs in this proceeding.

B. Defendant's arguments

14. The defendant acknowledges the average to high level of attention of the relevant public but disagrees with the claimant's interpretation of the contested trademark. He argues that 'sense' and 'sensor' have distinct meanings, with 'sense' implying a general feeling or understanding rather than a technical measurement. Therefore, he contends that the relevant public, with an average to high level of attention and understanding of English words, would recognize the difference between 'sense' and 'sensor' and would not perceive the trademark as a BED SENSOR as claimed by the claimant.

15. Furthermore, the defendant challenges the claimant's reliance on dictionary definitions to prove the descriptive character of the trademark. He argues that merely referencing English dictionaries is insufficient to establish the descriptive nature of a combined word. Instead, he explains that the perception of the relevant public should be considered, and it cannot be assumed that the combined word BEDSENSE would be understood in the same way as the individual words BED and SENSE based solely on foreign dictionary references. Regarding the meanings of BED and SENSE, the defendant disagrees with the claimant's definition of SENSE as "to detect" or "to measure", arguing that the context in which the word SENSE is used matters. The defendant highlights a previous decision by the EUIPO regarding the term SMARTSENSE, where SENSE was understood in the context of a smart device capable of taking measurements. However, he asserts that in the current case, where BED does not imply a programmed device, the interpretation of SENSE as "to detect" or "to measure" is not applicable. The defendant presents an alternative definition of SENSE as "a general feeling or understanding" or "an ability to understand, recognize, value, or react to something". He argues that this definition is more aligned with common usage and that the claimant's assertion that SENSE is commonly used in the medical field to indicate measurements being taken lacks concrete proof. Instead, the defendant suggests that SENSE in a medical context typically refers to nerve impulses relayed to the brain. Overall, the defendant contends that the claimant's interpretation of the trademark as a sensor that takes measurements

in or around a bed is incorrect. He states that the combined word BEDSENSE would be understood by the relevant public as a non-existing word, referring to a "bed feeling" rather than a device for taking measurements.

16. The defendant contends that for a trademark to be descriptive, there must be a direct and specific link between the meaning of the trademark and the goods and services in question. In that context, he argues that the mere incorporation of the words BED and SENSE does not inherently provide such a link. He disagrees with the claimant's interpretation of SENSE as implying measurement, citing a more common definition related to general feelings or understanding. The defendant challenges the claimant's assertion that SENSE is commonly used in the medical field to indicate measurement, suggesting that it more commonly refers to nerve impulses or general perception. He disputes the claimant's characterization of "sense services" and argues that the trademark does not describe the goods and services in Classes 9 and 10. The defendant also challenges the claimant's statement regarding the relationship between the trademark and medical services in Class 44, asserting that there is no direct link between the trademark and any medical purposes. He argues that the evidence provided by the claimant does not demonstrate any descriptive characteristics of the trademark and that the use of the trademark on the defendant's website does not suggest descriptiveness.

17. The defendant disagrees with the claimant's argument that the trademark lacks distinctiveness due to its composition of common English words. He argues that the combination of these words leads to an unusual word, which could potentially have distinctive character. He also emphasizes that a lack of distinctiveness cannot be solely based on the lack of creativity or originality in a trademark, but rather on its ability to identify the origin of goods or services.

18. The defendant acknowledges that the Office is not bound by other trademark registrations. However, he argues that it is crucial to note numerous trademark registrations that include the word SENSE or combinations with it. These trademarks cover goods and services in IT and medical classes. The defendant provides extracts of these registrations and contends that these registrations, accepted by both the Office and the EUIPO, demonstrate that the trademark in question is similar to others already registered. This similarity suggests that the contested trademark is a legitimate combination without any inherent descriptive meaning for the registered goods and services.

19. Based on these arguments, the defendant concludes that the claimant has not demonstrated that the trademark "BedSense" is understood by the relevant public as descriptive of the goods and services it represents. He requests the Office to reject the cancellation and order the claimant to bear the costs of the proceeding.

III. GROUNDS FOR THE DECISION

A.1 Legal framework

20. Pursuant to Article 2.30bis (1)(a) BCIP, an application for invalidation of the registration of a trademark may be filed with the Office based on the absolute grounds for invalidity referred to in Article 2.2bis BCIP.

21. It is settled case law that in the context of an application for a declaration of invalidity based on Article 2.30bis (1)(a) BCIP, the relevant date for the purposes of examining the conformity of the trademark with Article 2.2bis BCIP is exclusively that of the filing of the application for registration.¹

22. In invalidity proceedings on absolute grounds, the contested trademark enjoys a presumption of validity, and it is up to the applicant to raise before the Office the concrete elements which call into question its validity.² The Office will therefore limit its examination to the grounds, arguments and evidence submitted by the parties (Article 2.30ter (1) BCIP and the principle of hearing both sides of the argument applies (Rule 1.37 and Rule 1.21 IR).

A.2 Regarding the ground set out in Article 2.2bis (1)(c) and (b)

23. According to Article 2.2bis (1)(c) BCIP, trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or performance of the service, or other characteristics of the goods or services shall not be registered or, if registered, shall be liable to be declared invalid.

24. According to settled case law of the Court of Justice of the European Union (hereinafter "CJEU"), the prohibition of registration of descriptive signs or indications pursues an aim which is in the public interest, namely that such signs and indications may be freely used by all. The provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trademarks.³

25. The CJEU clarified that it is not necessary that the signs and indications composing the trademark actually be in use at the time of the application for registration in a way that is descriptive of goods or services. It is sufficient that such signs and indications *may* be used for such purposes. A sign must therefore be refused registration if at least one of its possible meanings designates a characteristic of the goods or services concerned.⁴

26. The CJEU further pointed out that a trademark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics, unless there is a perceptible difference between the word and the mere sum of its parts⁵: that assumes that, because of the unusual nature of the combination in relation to the goods or services, the trademark creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts.⁶

¹ Court of Justice of the European Union (CJEU) 23 April 2010, C-332/09 P, ECLI:EU:C:2010:225, point 39 (Flugbörse).

² CJEU 13 September 2013, T-320/10, ECLI:EU:T:2013:424, points 27-29 (Castel).

³ CJEU 23 October 2003, C-191/01 P, ECLI:EU:C:2003:579, point 31 (Doublemint) and case law mentioned there.

⁴ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 97 (Postkantoor) and case law mentioned there.

⁵ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 100 (Postkantoor).

⁶ CJEU 12 February 2004, C-265/00, ECLI:EU:C:2004:87, point 41 (BIOMILD)

27. The trademarks referred to in Article 2.2bis (1)(b) BCIP are those that are regarded as incapable of performing the essential function of a trademark, namely that of identifying the commercial origin of the goods or services in question, thus enabling the consumer without any possibility of confusion, to distinguish the product or service from others which have another origin.⁷

28. The distinctive character of a sign must be assessed, first, by reference to the goods and services concerned and, second, in relation to the perception of the relevant public, which consists of average consumers of those goods and services in question who are reasonably well informed and reasonably observant and circumspect.⁸

29. Claimant basically argues that the contested trademark is descriptive because the trademark consists of the combination of the words BED and SENSE which will automatically be understood by the relevant public as conveying the message that the goods and services at issue are to be used or carried out in or around a bed to sense (detect or measure) certain information. The goods and services for which the contested trademark is registered are the following:

- Cl 9 Data processing equipment; Peripheral devices for data reproduction; Movement sensors; Pressure sensors; Software applications; computer application software; Data storage apparatus; data transmitting apparatus; Sensory Software; Scientific apparatus and instruments; Sensors.
- Cl 10 Sensor apparatus for medical use in diagnosis; Sensor apparatus for medical use in monitoring the vital signs of patients; Diagnostic, examination, and monitoring equipment; Patient monitoring instruments; Patient monitoring sensors and alarms; Apparatus for monitoring vital signs; Tools for medical diagnostics; Electromedical diagnostic instruments; Physiological monitoring apparatus for medical use; Medical analysis instruments; Instruments for use in medical analysis; Apparatus for use in medical analysis; Medical instruments for reproducing physiological data; Medical instruments for recording physiological data.
- Cl 44 Providing medical information; Medical analysis services; Monitoring of patients.

30. Regarding the relevant public, the goods and services of the contested trademark are directed at both average consumers and a professional public. The Office assumes with the parties that the level of attention of the relevant public is average to high (see points 7 and 14 above).

31. The contested trademark is a word trademark, consisting of a compound word composed of two English words: BED and SENSE. The word BED⁹ is a noun to designate a piece of furniture that you lie on when you

⁷ CJEU 21 October 2004, C-64/02 P, ECLI:EU:C:2004:645 (DAS PRINZIP DER BEQUEMLICHKEIT); CJEU 15 September 2005, C-37/03 P, ECLI:EU:C:2005:547 (BioID) and CJEU 8 May 2008, C-304/06 P, ECLI:EU:C:2008:261 (EUROHYPO).

⁸ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 34 (Postkantoor) and case law mentioned there.

⁹ Definition taken from the online dictionary Collins, see

<https://www.collinsdictionary.com/dictionary/english/bed><https://www.collinsdictionary.com/dictionary/english/bed>.

sleep. The word SENSE¹⁰ is either a noun to designate the physical abilities of sight, smell, hearing, touch, and taste or a verb, namely a synonym for 'perceive, feel'. These words are basic English words and according to the Office these words will be understood by the relevant public.

32. When assessing the trademark "BedSense" in relation to the goods and services in question, it is crucial to differentiate between descriptive and evocative trademarks. First of all, the Office establishes that the meaning of SENSE, in combination with BED, could refer to the sensation of a bed or the inherent function or role that a bed serves in facilitating rest and relaxation, implying a general feeling or understanding rather than a technical measurement.

33. Contrary to the claimant's assertions, the Office considers that the public will not perceive SENSE as synonymous with SENSOR. The indication "BedSense" involves a more nuanced thought process to come to the conclusion that the bed serves as a conduit for checking/improving healthcare by enabling more efficient and effective monitoring of patient. Therefore, when considering the trademark "BedSense" in relation to goods and services aimed at monitoring patient/people health, the meaning of "BedSense" is, at most, suggestive rather than descriptive.

34. Consequently, the Office concludes that the claimant did not sufficiently substantiate that the wordmark "BedSense" solely consists of elements which may serve to designate the characteristics of the relevant goods and services. In this respect the Office recalls that in invalidity proceedings it is up to the claimant to call the validity of the contested trademark into question and to sufficiently substantiate this claim.¹¹

35. It must be concluded that even if the meaning of each word taken separately can be descriptive, the combination is not descriptive in relation to the relevant goods and services in the sense of Article 2.2bis (1)(c) BCIP.

36. It is in the light of the aforementioned considerations that it must be ascertained whether the sign at issue lacks distinctive character, as claimed by the claimant.

37. As mentioned above, the contested registration is not descriptive but at most evocative. The applicant's arguments concerning the lack of distinctive character of the contested trademark are the same as those put forward in relation to the contested trademark's descriptive character. There is no new evidence to show that the contested trademark would be incapable of identifying the goods and services in question as originating from a specific undertaking and therefore of distinguishing these goods and services from those of other undertakings. As explained above, it cannot be concluded that the contested trademark is descriptive of the goods and services in question. Consequently, no lack of distinctive character in the sense of Article 2.2bis 1(b) BCIP of the contested mark can be asserted on the basis of its alleged descriptiveness in respect of those goods and services.

¹⁰ Definition taken from the online dictionary Collins, see <https://www.collinsdictionary.com/dictionary/english/sense>.

¹¹ General Court 19 October 2022, T-486, ECLI:EU:T:2022:642, point 76 (Suisse).

B. Conclusion

38. Based on the foregoing the claim for cancellation of the contested trademark shall be rejected.

IV. DECISION

39. The cancellation application with number 3000588 is not justified.

40. Benelux registration 1391996 will be upheld for all the goods and services for which it is registered.

41. The claimant shall pay the defendant 1,420 euros in accordance with Article 2.30ter (5) BCIP in conjunction with rule 1.44 (2) IR, as the cancellation application is rejected in its entirety. This decision constitutes an enforceable order pursuant to Article 2.30ter (5) BCIP.

The Hague, 17 May 2024



Flavie Rougier
(*rapporteur*)

Marjolein Bronneman

Camille Janssen

Administrative officer: Rémy Kohlsaet