

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 4, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Engineering & Inspection Svcs., LLC*  
—

Serial No. 86644478  
—

Kenneth L. Tolar of Tolar Law Office  
for Engineering & Inspection Svcs., LLC

Erin M. Falk, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

—  
Before Cataldo, Adlin and Lynch,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Engineering & Inspection Services, LLC (“Applicant”) seeks registration of the  
mark shown below



Serial No. 86644478

for “engineering.”<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that Applicant’s mark so resembles the mark shown below



for, *inter alia*, “design for others in the field of engineering, engineering, industrial design; all the foregoing not relating to sports or a sports team, league, mascot or stadium,”<sup>2</sup> as to be likely to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are

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<sup>1</sup> Application Serial No. 86644478, filed May 28, 2015 under Section 1(a) of the Trademark Act. The application includes this description of the mark: “The mark consists of a rectangle superimposed on a gear with the letters ‘EIS’ depicted thereon.”

<sup>2</sup> Registration No. 4743813, issued May 26, 2015. The registration includes this description of the mark: “The mark consists of a stylized star design with the letters ‘E’, ‘I’ and ‘S’ under the longest leg of the star and the words ‘A MEMBER OF THE VINCIT GROUP’ under the star.” The cited registration also identifies services in Class 40.

the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

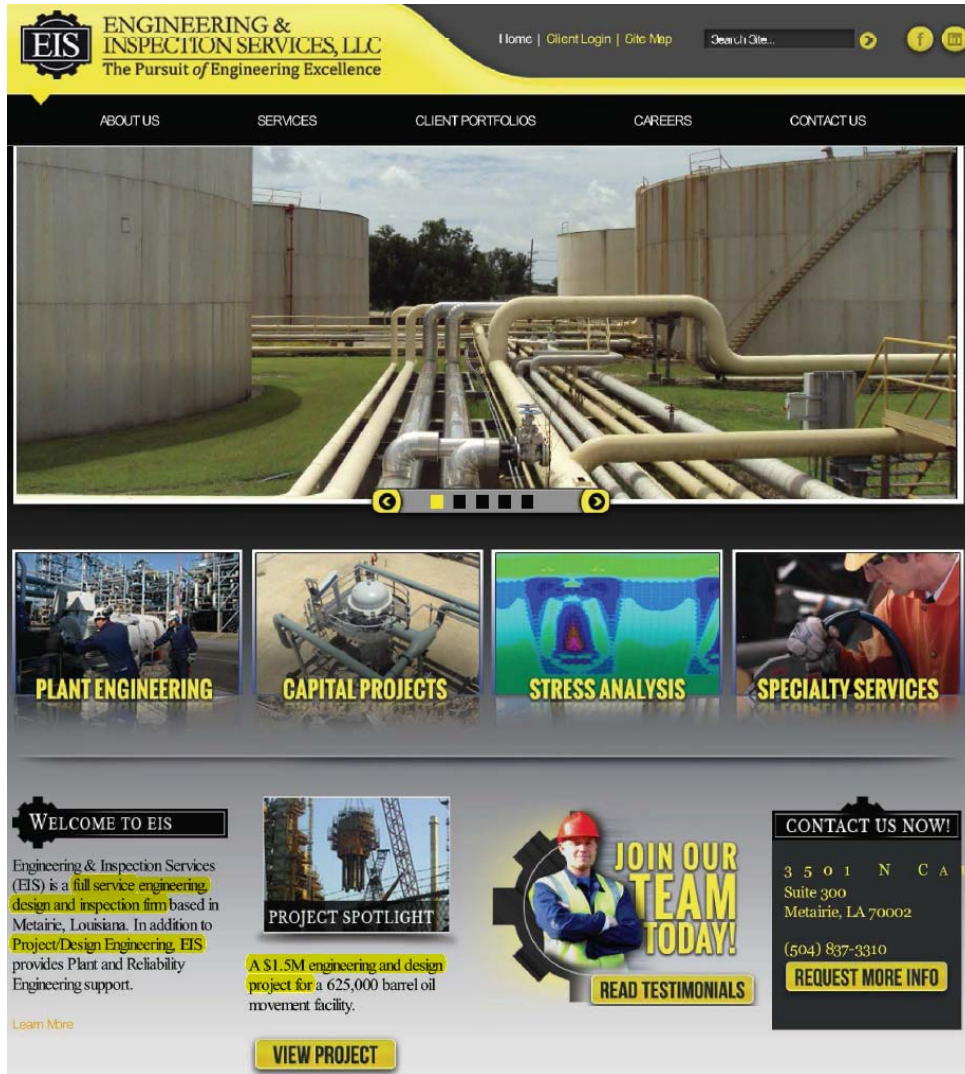
Turning first to the services and channels of trade, they are in-part legally identical, as Applicant and Registrant both offer “engineering” services. Indeed, given the placement of the first comma in Registrant’s identification of services, this is the only logical reading of Registrant’s identification. If we construed Registrant’s second reference to “engineering” as being modified by “design for others in the field of ...,” the second reference to “engineering” would be duplicative of the first and superfluous. Furthermore, while Registrant’s engineering services are by definition unrelated “to sports or a sports team, league, mascot or stadium,” Applicant’s broad identification of “engineering” encompasses all engineering services, including those which do not relate to sports. *See, e.g., Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015), *aff’d*, 652 Fed.Appx. 971 (Fed. Cir. 2016) (given broad identification of services, “we must presume that the services encompass all services of the type identified”).

Where, as here, Applicant’s and Registrant’s services are in-part identical, we must presume that the channels of trade and classes of purchasers for those services are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes

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of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Even if our reading of Registrant's identification of services was found to be incorrect, the Examining Attorney has established that Applicant's engineering services are related to Registrant's services identified as "design for others in the field of engineering" and "industrial design." In fact, Applicant promotes itself as a "full service engineering, design and inspection firm," which provides "Project/Design Engineering" including a "\$1.5M engineering and design project ....":



Applicant's specimen. Other companies also offer engineering services on the one hand and design for others in the field of engineering, or industrial design, on the other:



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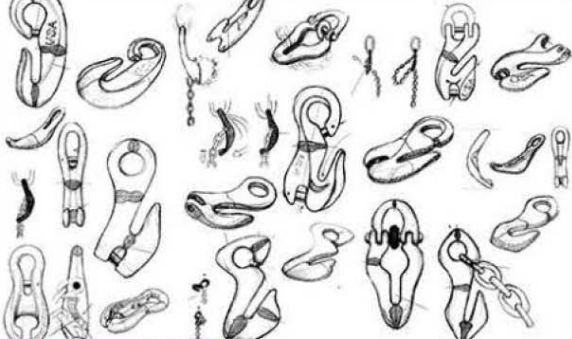
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Office Actions of September 15, 2015 and April 28, 2016.


In addition, the Examining Attorney introduced a number of third-party registrations suggesting that the same sources offer services identical to Applicant's and Registrant's under the same marks, including:

 (Reg. No. 4732450) is registered for “engineering” on the one hand and “industrial design” and “design for others in the field of energy engineering” on the other.

 (Reg. No. 4663054) is registered for “engineering services and industrial design services in the field of materials handling, namely, heavy process equipment.” “

WHITEBOARD in standard characters (Reg. No. 4687871) is registered for “new product design, development, and engineering services for others” on the one hand and “industrial design services” on the other.

FUZZY MATH in standard characters (Reg. No. 4807772) is registered for “interior and industrial design, engineering.”

 (Reg. No. 2665826) is registered for “design for others in the field of engineering,” “industrial design,” “technical consultation in the field of hydro-electric engineering” and “environmental design and engineering services.”

Office Actions of September 15, 2015 and April 28, 2016. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or

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services are of a type which may emanate from a single source.” *See, In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998); *see also In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

This evidence establishes that even if the services are not legally identical, they are at least closely related, and the Examining Attorney’s website evidence establishes that Applicant’s and Registrant’s services travel in the same channels of trade. These factors therefore weigh heavily in favor of a finding of likelihood of confusion, and, to the extent that Applicant’s and Registrant’s services are identical, this reduces the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

As for the marks, they are more similar than dissimilar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). This is because the literal and dominant portion of Applicant’s mark is identical to the dominant portion of Registrant’s mark. In fact, it is settled that where, as here, marks are comprised of both words and a design, the words are normally accorded greater weight, in part because consumers are likely to remember and use the word(s) to request the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito*

*Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”).

We find that this general principle is applicable here. In Applicant’s mark, EIS is the only literal element, and is highlighted as it appears inside a “rectangle superimposed on a gear,” which draws attention to the initials EIS that appear in the center of the mark, essentially “on top” of the mark’s gear design and the rectangle. Moreover, the gear design in Applicant’s mark is less distinctive than it might otherwise be, because gears suggest and therefore reinforce the identified engineering services. Similarly, the rectangle in which the initials appear is a “common design element,” and therefore not particularly distinctive *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1138 (TTAB 2015). Those interested in Applicant’s engineering services would rely on the initials EIS which more clearly identify a source of services than either the nondistinct rectangle or the gear design.

The same is true of Registrant’s mark. The initials EIS are, like the identical initials in Applicant’s mark, essentially highlighted by the accompanying design, because the initials effectively “pierce” the star design such that the design’s left side no longer looks like the side of a standard star, but instead is used to draw attention to the initials, through the lines of the star appearing above the initials. Furthermore,

the initials appear in solid letters, effectively “bolding” them in comparison to the star design, which is created with thin lines surrounding a white interior, making the design appear more as background than the bolded and more essential letters. As for the words at the bottom of Registrant’s mark – “A Member of The Vincit Group” – those words are much smaller than EIS, are not bolded and merely highlight that the source is EIS, which is in turn a Vincit Group member, drawing more attention to the initials than the star design. Furthermore, star designs are, like rectangles, fairly common elements of marks, and thus often less distinctive than accompanying words, as in this case. *See generally In re 1<sup>st</sup> USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1586-87 (TTAB 2007); *cf. Carl Karcher Enterprises Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125 (TTAB 1995) (despite finding a likelihood of confusion based in large part on the strength of opposer’s marks, stating, in dicta, “we recognize that a star design is a common shape, and that such designs, as well as the word ‘star’, are laudatory in nature”).

Furthermore, in Registrant’s mark, the initials EIS, identical to the literal element of Applicant’s mark, appear first, heightening the similarity between the marks and the likelihood of confusion. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *see also, Palm Bay Imports Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The marks also sound quite similar in that the first literal element of Registrant's mark is identical to the literal element of Applicant's mark, and the tagline "A Member of The Vincit Group" is neither distinctive nor distinguishing, as it merely modifies the initials EIS which are identical to the literal element of Applicant's mark. Similarly, the marks convey the same meaning, to the extent consumers perceive a meaning from the initials EIS.<sup>3</sup> Indeed, consumers familiar with Registrant's mark may, upon encountering Applicant's mark, believe that Applicant is the same EIS which is a member of the Vincit Group.<sup>4</sup> In short, because the marks

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<sup>3</sup> In response to the Examining Attorney's information request, Applicant stated that "EIS is an acronym for Engineering & Inspection Services," and that EIS "has no significance nor is it a term of art in the relevant trade or industry ...." Office Action response of March 15, 2016.

<sup>4</sup> Applicant's argument that "A Member of The Vincit Group" is a "house mark" which will avoid confusion is not well-taken. In fact, "the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical." *In re Mighty Leaf Tea*, 94 USPQ2d at 1260-61 (finding ML in standard characters confusingly similar to ML MARK LEES in stylized form). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (finding STONE LION CAPITAL confusingly similar to LION and LION CAPITAL); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN likely to be confused with TITAN); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1367 (TTAB 2007) (affirming refusal to register CLUB PALMS MVP based on prior registration of MVP, finding consumers "likely to believe that the CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services"); *In re Chica Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007) (affirming refusal to register CORAZON BY CHICA & Design based on a registration of CORAZON in stylized format, stating "to many consumers, applicant's mark for the identical word 'Corazon' followed by the phrase 'BY CHICA' will simply be viewed as the identification of the previously anonymous source of the goods sold under the mark CORAZON"); *In re Apparel Ventures, Inc.* 229 USPQ 225, 226 (TTAB 1986) ("Applicant has chosen as its mark the same word already registered by registrant and simply added 'by sassafras' to it. The words 'by sassafras' indicate to prospective purchasers that 'sassafras' is the name of the entity which is the source of the 'SPARKS' brand clothing. Prospective purchasers do not necessarily know or care which business calls itself 'sassafras,' but they would assume that when 'SPARKS' appears on two similar products they both come from the same source.").



in their entireties are similar, this factor also weighs in favor of finding a likelihood of confusion.

Finally, Applicant's argument that consumers of Applicant's and Registrant's services are sophisticated and will exercise heightened care is unsupported by any evidence. Even if we nevertheless assume that the nature of the identified services suggests sophisticated consumers, this factor is easily outweighed by the legally identical or at least closely related services, overlapping channels of trade and similar marks. *See, In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also, HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

*Decision:* The Section 2(d) refusal to register Applicant's mark is affirmed.