

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rainscapes Construction, Inc.

Serial No. 86906294

Stephen D. Adams of Luedeka Neely Group, P.C.
for Rainscapes Construction, Inc.

John D. Dalier, Trademark Examining Attorney, Law Office 106
(Mary I. Sparrow, Managing Attorney).

Before Bergsman, Wolfson and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Rainscapes Construction, Inc. (“Applicant”) seeks a Principal Register
registration for the mark shown below



for “installation and maintenance of residential and commercial irrigation systems;
and lighting installation services.”¹ The Examining Attorney found that both

¹ Application Serial No. 86906294, filed February 12, 2016 under Section 1(a) of the Trademark Act, alleging first use dates of June 28, 2010. The application includes this

IRRIGATION PROFESSIONALS and RAINSCAPES are merely descriptive of Applicant's services under Section 2(e)(1) of the Trademark Act, and therefore required disclaimers of both terms. Although Applicant agreed to disclaim IRRIGATION PROFESSIONALS, it declined to disclaim RAINSCAPES, and the Examining Attorney therefore refused registration. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

"Irrigate" is defined as "to supply land with water so that crops and plants will grow or grow better."² Office Action of June 3, 2016 at 2. "Irrigation" is defined as "the action of supplying or fact of being supplied with moisture" and "the action of supplying land with water by means of channels or streams; the distribution of water over the surface of the ground, in order to promote the growth and productiveness of plants."³ Office Action of June 14, 2016 at 2-3. Wikipedia defines "irrigation" as "the method in which water is supplied to plants at regular intervals for agriculture," and states that it is "used to assist in the ... maintenance of landscapes." Request for Reconsideration of September 7, 2016 at 16.

The issue here is whether RAINSCAPES is merely descriptive of Applicant's irrigation services. The evidence reveals that it is:

According to a North Carolina State University website, "[r]ainscapes are landscape enhancements that reduce stormwater runoff from properties ... Rainscapes simulate natural drainage to intercept, capture and absorb rain into

description of the mark: "The mark contains 'RAINSCAPES THE IRRIGATION PROFESSIONALS' and a design. The term RAINSCAPES is printed above the phrase THE IRRIGATION PROFESSIONALS to the right of a design representing falling raindrops."

² <http://dictionary.cambridge.org/us/dictionary/english/irrigate?q=irrigation>.

³ <http://www.oed.com/view/Entry/99840?redirectedFrom=irrigation#eid>.

the ground.” Furthermore, “[r]ainscaping helps to reduce ... water use during dry spells [and] water bills.” Denial of Request for Reconsideration, September 19, 2016 at 5 (<https://wrri.ncsu.edu/partnerships/cewm/bcwa/rainscaping/>).

According to Austin [Texas] Water Utility, “rainscapes help prevent runoff and can reduce or eliminate the need for additional water for irrigation, saving customers on their water and wastewater bills ... Installing a rainwater collection system, such as a tank or cistern, along with a rainscape, can help you make the most of this cheap, high-quality source of water ...” Office Action of June 14, 2016 at 7 (<http://austintexas.gov/departments/waterwise-rainscape-rebate>).

The University of Arizona Cooperative Extension, Cochise County website states: “RainScapes are the ultimate in water efficient landscaping. In a RainScape, all outdoor plant water needs are met by harvesting rainwater (and gray water if possible) while preserving tap water for indoor and drinking water needs.” One “principle” of RainScapes is “to ensure all the water needs for the landscape are met by the rain that falls on the property.” Ultimately, “[h]ow much water you need each month for irrigation depends on the number and type of plants in the landscape ... What falls on the ground can be directed to plants – contouring the soil can help direct and detain the water long enough to help give the plants a good drink ... RainScapes help reduce dependence on declining water supplies while giving you a beautiful landscape supplied by Mother Nature’s bounty.” *Id.* at 14-15 (<http://cals.arizona.edu/cochise/waterwise/rainscape.html>).

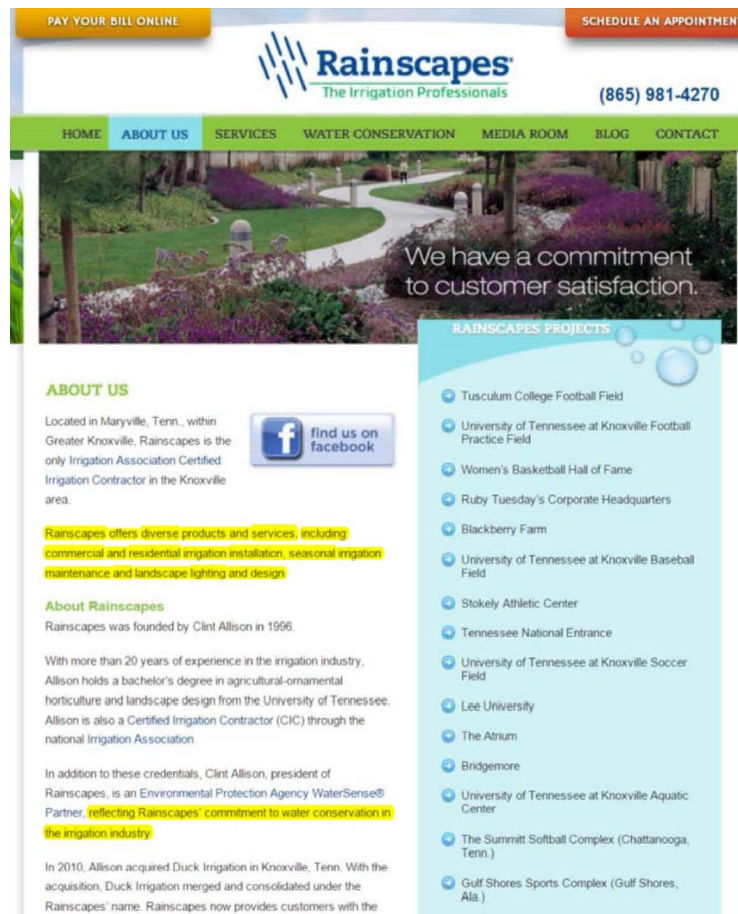
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Applicant’s specimen reveals not only that Applicant provides irrigation services, but also that it is committed to water conservation in performing those services and

⁴ While there is no dictionary definition of “rainscapes” of record, that is not dispositive, especially here, where the meaning of the term is apparent from the other evidence. *See In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1603 (TTAB 2014); *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1393 (TTAB 1999).

Serial No. 86906294

that its President holds credentials that reflect the company’s “commitment to water conservation in the irrigation industry”:



Specimen of February 2, 2016 at 1. Water conservation is a goal of both rainscapes and irrigation.

Furthermore, the “Rainscapes” page accessible on “rainscapingiowa.com” depicts a rainscape in a manner which makes clear that it supplies water to land and plants:



Office Action of June 14, 2016 at 11.

On this record we have no doubt that RAINSCAPES is merely descriptive of Applicant's irrigation services, because rainscapes:

“capture and absorb rain into the ground” (North Carolina State University website);

“can reduce or eliminate the need for additional water for irrigation” (Austin Water Utility website); and

meet “all outdoor plant water needs” by “harvesting rainwater” (University of Arizona Cooperative Extension website).

In other words, rainscapes supply land with water, which is one definition of “irrigation,” and can support plants’ need for water, which is another. Conversely, irrigation may be “used to assist in the ... maintenance of landscapes,” which is also something that rainscapes do, as they “are landscape enhancements” and “the ultimate in water efficient landscaping ... giving you a beautiful landscape.” *Compare* Request for Reconsideration of September 7, 2016 (Wikipedia entry for “irrigation”)

with Office Action of June 14, 2016 (North Carolina State University website and University of Arizona Cooperative Extension website).⁵

It is clear that RAINSCAPES immediately conveys knowledge of a quality, feature, function, characteristic or purpose of Applicant's irrigation services. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009)); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). In fact, someone who knows that Applicant provides "installation and maintenance of residential and commercial irrigation systems" will understand the term RAINSCAPES "to convey information about them," specifically, that Applicant uses "rainscapes" in at least some of its irrigation systems. *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).⁶ This perception will be fostered and reinforced by the remaining elements of Applicant's mark, specifically the "design representing falling raindrops" and the admittedly descriptive and disclaimed term IRRIGATION PROFESSIONALS.

⁵ Applicant's argument that the record reveals "only obscure, specialized usages of the term [rainscape] by a narrow group of universities and landscaping companies," which would not be familiar to relevant consumers is not well-taken. Applicant seeks registration for the installation and maintenance of "commercial irrigation systems," which encompasses large, sophisticated commercial entities at least some of which would be familiar with the uses and sources of record, or similar uses and sources. Moreover, some of the evidence of record is targeted to ordinary consumers and homeowners.

⁶ We acknowledge that the Wikipedia entry for "irrigation" states: "While floodwater harvesting belongs to the accepted irrigation methods, rainwater harvesting is usually not considered a form of irrigation." However, the qualifier "is usually not" (rather than, for example, "is never") indicates that in some cases rainwater harvesting *is* a form of irrigation. Moreover, other evidence of record makes clear that rainscapes can and do perform the same functions as other types of irrigation.

Applicant and the dissent essentially argue that “rainscapes” are used “in lieu of,” or are “the complete opposite of” irrigation systems. The evidence is to the contrary. According to the Austin Water Utility website, rainscapes “can reduce or eliminate the need for *additional* water for irrigation, saving customers on their water and wastewater bills,” while the University of Arizona Cooperative Extension website states that “[i]n a RainScape, *all outdoor plant water needs are met by harvesting rainwater* (and gray water if possible) *while preserving tap water* for indoor and drinking water needs” (emphasis added). In other words, “rainscapes” can be a substitute for, and perform the same functions as, other types of irrigation, as Applicant’s proposed mark itself will convey to consumers.

Finally, Applicant’s competitors which use rainscapes to irrigate, or use rainscapes in conjunction with irrigation products and services, should, like Applicant, have the opportunity to use the term “rainscapes” or variations thereof to describe their goods and services. *See, In re Boston Beer Co. L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff’d*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Abcor Development*, 200 USPQ at 217 (“The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.”).

Decision: The refusal to register in the absence of a disclaimer of RAINSCAPES is affirmed. This decision will be set aside if, within thirty days of the mailing date of this order, Applicant submits to the Board a proper disclaimer of RAINSCAPES. Trademark Rule 2.142(g). The disclaimer should be worded as follows: “No claim is made to the exclusive right to use RAINSCAPES or IRRIGATION PROFESSIONALS apart from the mark as shown.”

Bergsman, Administrative Trademark Judge, dissenting:

I respectfully dissent from the majority’s decision to requiring Applicant to disclaim the exclusive right to use the word “Rainscape” because the evidence does not show that “Rainscapes” is merely descriptive when used in connection with the “installation and maintenance of residential and commercial irrigation systems; and lighting installation services.”

A user may rainscape by installing raingardens, dispersing runoff from down spouts, installing rain barrels and cisterns, and practicing conservation, including planting trees.⁷ Thus, none of the websites discussing “Rainscapes” make reference to installing irrigation systems.

Irrigation and rainscaping are distinct but related processes. As noted by the majority, the term “Rainscape” refers to a landscaping technique intended to preserve and recycle rainwater. It is designed to be used in lieu of irrigation whereas irrigation

⁷ Water Resources Research Institute of the University of North Carolina System website (wrri.ncsu.edu) attached to the September 19, 2016 Office Action at 5.

is the application of water to landscape.⁸ According to *Wikipedia*, “[i]rrigation is often studied together with drainage, which is the natural or artificial removal of surface and sub-surface water from a given area.”⁹

When the term “Rainscape” is used in connection with the installation and maintenance of residential and commercial irrigation and lighting systems, it suggests to consumers and potential consumers that the services involve incorporating an irrigation system into one’s landscaping. “Rainscapes” does not immediately convey a quality, characteristic, feature, function, purpose or use of those services. Consumers and potential consumers must exercise logic and reasoning to create a nexus between the mark and the services. Thus, “Rainscape” is not merely descriptive when used in connection with the installation and maintenance of residential and commercial irrigation and lighting systems. When “Rainscape” is used as part of a composite mark in connection with the installation and maintenance of residential and commercial irrigation and lighting systems, it need not be disclaimed.

⁸ See Austin Water website (*austintexas.gov*) (“These rainscapes help prevent runoff and can reduce or eliminate the need for additional water for irrigation.”); Rainscaping Iowa website (*rainscapingiowa.org*) (“Rainscapes are designed to retain and infiltrate a known quantity of runoff generated from a targeted area, such as a rooftop, driveway, parking lot, street and turf.”) both attached to the September 19, 2016 Office Action at 2, 15. See also The University of Arizona Cooperative Extension Cochise County website (*cals.arizona.edu*) attached to the June 14, 2014 Office Action at 14 (“RainScapes balance the landscape water budget by using a combination of different kinds and amounts of plants, and rain catchment options including storage tanks (‘active systems’) and contouring the land (‘passive systems’) to beneficially direct rainwater.”).

⁹ September 7, 2016 Request for Reconsideration at 16.