

This Opinion is not a
Precedent of the TTAB

Mailed: August 5, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tres Vidas Organic, Inc.

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Serial No. 86609789

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Luke Brean of Breanlaw LLC,
for Tres Vidas Organic, Inc.

Steven W. Jackson, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Mermelstein, Ritchie, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Tres Vidas Organic, Inc. (“Applicant”) seeks registration on the Principal Register of the mark TRES VIDAS and design,¹ as shown below, for “tequila; tequila infused with vitamins,” in International Class 33:

¹ Application Serial No. 86609789 was filed on April 24, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use on June 1, 2014, and first use in commerce on June 2, 2014.



The mark contains a statement that “The English translation of TRES VIDAS in the mark is three lives.”

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to the identified goods, so resembles the previously registered mark, DOS VIDAS,² in standard character format, for “tequila,” as to be likely to cause confusion, mistake, or to deceive. The mark in the cited registration contains a translation statement that “The English translation of ‘DOS VIDAS’ in the mark is ‘TWO LIVES.’”

When the refusal was made final, Applicant appealed. For the reasons discussed below, we affirm the refusal to register.

I. Likelihood of Confusion

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

² Registration No. 4433798 issued November 12, 2013.

2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which arguments or evidence were presented. The other factors, we consider to be neutral.

Goods/Channels of Trade

We consider first the relatedness of the goods. Both the application and the cited registration identify “tequila.” The goods are therefore identical-in-part and legally identical.³ *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012).

Because the goods described in the application and in the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). In short, there is nothing to stop Applicant from offering its tequila via the same channels and to the same classes of purchasers as those of Registrant.

³ Arguably, Applicant’s “tequila infused with vitamins” is also subsumed within the broader identification of “tequila.” But at the very least it is overtly related.

Applicant does not dispute the identity of the goods and the channels of trade, and we find that these *du Pont* factors weigh heavily in favor of finding a likelihood of consumer confusion.

The Similarity/Dissimilarity of the Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Indeed, when, as here, the goods at issue are identical in part, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than if the goods were not identical. *In re Viterra Inc.*, 101 USPQ2d at 1912.

The mark in the cited registration is DOS VIDAS, whereas Applicant's mark is TRES VIDAS with a design of a tree. While we recognize that Applicant's mark includes a design element, we nonetheless note that, in the cases of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request products. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); TMEP § 1207.01(c)(ii) (April 2016).

With this in mind, we find that, on their face, the literal portions of the marks are similar in sight and sound in that they share the term "VIDAS." Applicant does not contest that its mark means "three lives" whereas the mark in the cited registration means "two lives." *See In re Spirits Int'l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009).

However, Applicant argues that the marks have other, more mystical meanings. In particular, Applicant argues that its TRES VIDAS mark would be understood as referring to the Mesoamerican religious and cultural concept of three worlds where the tree acts as a symbol of life.⁴ In this regard, Applicant submitted Wikipedia evidence with its February 5, 2016 Response to Office Action, including an entry for "Mesoamerican religion," stating: "The importance of time is seen in the cycles of life, death and regeneration, which are something worshipped in almost everything existing." The entry further refers to the concept of "axis mundi," for which Applicant

⁴ 4 TTABVUE 9.

submitted an additional Wikipedia entry stating: “The axis mundi (also cosmic axis, world axis, world pillar, center of the world, world tree) in certain beliefs and philosophies, is the world center, or the connection between Heaven and Earth.” Applicant thus argues that the commercial impression of its “TRES VIDAS” or “three lives” would be understood by consumers of its tequila as referring to the Mesoamerican concept of cycle of life, death, and regeneration, with the accompanying design of a tree.⁵

The problem with Applicant’s argument is that its mark is not “AXIS MUNDI” or “TREE OF LIFE,” but rather “TRES VIDAS,” (“three lives”) and design, and there is nothing in the evidence submitted by Applicant that suggests that consumers are even aware of Mesoamerican theology, or that they would associate the specific term “TRES VIDAS” (or “three lives”) with a specific cultural or religious concept, such as that noted by Applicant. Rather, we must assume that consumers would simply understand the mark as referring to “three lives,” and the tree as likely being a living tree associated with that commercial impression of lives or living.

As to the mark in the cited registration, Applicant argues that the term “DOS VIDAS” would be understood as meaning not simply “two lives” but more aptly a double life, such as one by day and one by night.⁶ There is no evidence that the term is understood in this manner, however. Rather, again, we must assume that consumers would understand the mark as referring to “two lives.” As such, the

⁵ Applicant also included several other Wikipedia entries with its Response to Office Action, including for “Mesoamerican world tree.”

⁶ 4 TTABVue 10.

commercial impressions of the marks are similar, and indeed, it is likely that consumers would expect that Applicant's TRES VIDAS and design tequila is merely another line of tequila put forth by the purveyor of DOS VIDAS tequila.

Accordingly, we find the marks to be similar in sight, sound, connotation, and commercial impression, and this *du Pont* factor also favors finding a likelihood of confusion.

II. Conclusion on Likelihood of Confusion

On balance, after considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the goods are legally identical and would travel through some of the same channels of trade to some of the same consumers, and that the marks, when viewed in their entireties, are also similar in sight, sound, connotation and commercial impression. Accordingly, we find a likelihood of confusion between the mark TRES VIDAS and design for which Applicant seeks registration, and the mark in the cited registration, DOS VIDAS.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.