

6/14/02

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Paper No. 15  
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re American Pie LLC

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Serial No. 75/519,001

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Myron Amer, P.C. for applicant.

Susan Leslie DuBois, Trademark Examining Attorney, Law  
Office 111 (Craig Taylor, Managing Attorney).

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Before Seeherman, Hohein and Hairston, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by American Pie LLC to  
register the mark AMERICAN PIE for "pie shells."<sup>1</sup>

Registration has been finally refused under Section  
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the  
ground that applicant's mark, when applied to its goods, so

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<sup>1</sup> Serial No. 75/519,001, filed on July 15, 1998, which is based  
on a bona fide intention to use the mark in commerce. The word  
"PIE" has been disclaimed apart from the mark as shown.

resembles the mark RBI AMERICAN PIE, as shown below,



which is registered for "pies,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but no oral hearing was requested. We affirm the refusal to register.

Our determination under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between

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<sup>2</sup> Registration No. 2,012,994, issued November 5, 1996.

the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to consideration of the respective goods, it is the Examining Attorney's position that pies and pie shells are closely related goods. As noted by the Examining Attorney, pie shells are used to prepare pies. Also, pies and pie shells are sold in the same channels of trade, namely grocery stores, food markets and the like, to the same class of purchasers, namely ordinary consumers.

Further, in support of her position that pies and pie shells are closely related goods, the Examining Attorney made of record several use-based third-party registrations which indicate that entities have registered a single mark for pies, on the one hand, and pie shells, on the other hand. These third-party registrations are probative to the extent that they suggest that the involved goods are of type, which may emanate from a single source under the same mark.

Under the circumstances, we find that pies and pie shells are sufficiently related that, if sold under the same or substantially similar marks, confusion as to source or sponsorship is likely to occur. We should point out that applicant has not argued to the contrary. Rather, applicant's arguments focus on the respective marks.

Turning therefore to consideration of the marks, applicant argues that given the presence of the letters "RBI" and the design in the cited mark, the respective marks are sufficiently distinguishable to avoid confusion. Further, applicant argues that marks consisting of the term AMERICAN PIE are weak marks and, therefore, entitled to a limited scope of protection. In support of its argument, applicant relies on two third-party applications and one third-party registration for marks, which include the term AMERICAN PIE.

In this case, we agree with the Examining Attorney that the respective marks are highly similar in overall commercial impression due to the shared term AMERICAN PIE.

While the marks must be considered in their entirety, it is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight. In the case of marks, which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Applying such principles to the cited mark, it is clear that the term AMERICAN PIE is the dominant literal

and source-identifying element in this mark. We believe it is fair to assume that the design element, which includes a baseball pitcher and pie on a diamond background, and the letters "RBI", which in the context of the design element would appear to stand for "Runs Batted In" in the game of baseball, are intended to convey the idea that baseball is as American as apple pie. Thus, the design element and letters "RBI" suggest the association of pie with America, and serve to reinforce the mark AMERICAN PIE.

There is no question that the letters "RBI" and the design element in the cited mark are noticeable, and if we were making a side-by-side comparison of the marks, the differences in the marks would be obvious. This, however, is not the proper test. Rather, it is the overall commercial impression of the marks which will be recalled over a period of time by the average consumer that must be taken into account in determining likelihood of confusion.

In view of the foregoing, and while differences admittedly exist between the respective marks, when considered in their entireties, and according appropriate weight to the dominant portions thereof, applicant's mark AMERICAN PIE is substantially similar in commercial impression to the cited mark RBI AMERICAN PIE and design.

As to applicant's argument that the cited mark is weak and therefore entitled to a limited scope of protection, we should point out that third-party registrations, in and of themselves, are entitled to little weight in evaluating whether there is a likelihood of confusion. See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983). This is because third-party registrations are not evidence of what happens in the marketplace.<sup>3</sup>

In sum, we find that in view of the substantial similarity in the overall commercial impression of applicant's mark and the cited mark, their contemporaneous use on the closely related goods involved in this case is

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<sup>3</sup> In this case, applicant has submitted only one third-party registration, namely, Registration No. 2,384,578 for the mark AMERICAN PIE COUNCIL for "trade association services, namely, promoting the interests of pie makers and pie-related companies." We cannot find that the cited registration for the mark RBI AMERICAN PIE and design is weak based on this single registration. As to the two third-party applications submitted by applicant, we should point out that third-party applications are evidence only of the fact that such applications were filed; unlike registrations, they are not evidence of the weakness of marks. Moreover, we note that the two applications have been abandoned.

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likely to cause confusion as to the source or sponsorship of such goods.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.