

Hearing:

October 21, 1999

THIS DISPOSITION IS NOT CITABLE  
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Paper No. 52

HRW

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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The Church of God

v.

Church of God of Prophecy

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Opposition No. 94,180  
to application Serial No. 74/350,952  
filed on January 22, 1993

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James Francis Browne for The Church of God.

Mark S. Graham and Robert O. Fox of Luedeka, Neely & Graham  
for Church of God of Prophecy.

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Before Seeherman, Walters and Wendel, Administrative  
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

The Church of God of Prophecy has filed an application  
to register the design mark depicted below for "evangelistic  
and ministerial services, namely, religious services and  
ceremonies."<sup>1</sup>

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<sup>1</sup> Serial No. 74/350,952, filed January 22, 1993, claiming a date  
of first use and of first use in commerce of 1933. The drawing  
is lined for the colors red, blue and purple.

The Church of God filed an opposition to registration of the mark on the grounds of priority and likelihood of confusion, and false suggestion of a connection with opposer. Opposer alleges that opposer has been engaged for many years in conducting religious and ministerial services; that opposer was founded by A. J. Tomlinson in 1903; that in 1933 A. J. Tomlinson designed and presented a flag to opposer in its 28<sup>th</sup> annual assembly as a symbol of its religious and ministerial services; that the flag (or design thereof) which applicant seeks to register is identical to the flag previously used by opposer and is being used for identical services;<sup>2</sup> and that prospective worshippers and members of applicant's church are likely to erroneously believe that applicant's services are sponsored by opposer or that there is a religious connection between applicant and opposer.

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<sup>2</sup> Applicant states in its brief that the mark in question is generally used in the form of a flag, and hence the mark is often

Applicant, in its answer, denies the salient allegations of the notice of opposition. Applicant further alleges that persons who may be associated with opposer were, up until about November 1992, members of applicant; that applicant, not opposer, was founded by A. J. Tomlinson; that in 1993, A. J. Tomlinson presented the flag to applicant or a predecessor of applicant; that opposer did not exist in 1933; and that it is applicant, not opposer, which has made long continuous use of said flag or a similar variation thereof to identify applicant's services. As an affirmative defense, applicant alleges that opposer owns no rights in any mark the use of which is likely to cause confusion with the mark involved herein.<sup>3</sup>

#### The Record

The record consists of the file of the involved application; opposer's trial testimony deposition, with accompanying exhibits, of Robert J. Pruitt, General Overseer of opposer;<sup>4</sup> and applicant's trial testimony depositions,

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referred to by the parties as the "flag mark," although the design is also used on printed materials.

<sup>3</sup> Applicant also set forth the affirmative defenses of laches, acquiescence, estoppel and license, but has failed to pursue the same. Accordingly, no consideration has been given to these defenses.

<sup>4</sup> Applicant's renewed objections to certain portions of this deposition as being irrelevant or otherwise improper are considered moot in view of our limitation of our decision to purely secular issues.

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with accompanying exhibits, of Billy D. Murray, General Overseer of applicant, John Pace, director of the publication communications ministry for applicant, Buford Johnson, retired minister affiliated with applicant, Wade Phillips, manager of Fields of the Wood, a Bible theme park owned and maintained by applicant, Lewis Sullivan, a former merchandise director for applicant's White Wing Publishing House, and Donna Brogdon, the present vice-president of finance for applicant's White Wing Publishing House. Applicant also submitted the testimonial depositions upon written questions, with accompanying exhibits, of ten pastors or state overseers of applicant and its notice of reliance upon printed publications consisting of assembly minutes and official publications of applicant (Exhibits 86-149), books and pamphlets (Exhibits 150-319) and the discovery depositions taken of Robert J. Pruitt in both Opposition No. 98,057<sup>5</sup> and the present opposition. Opposer, in its rebuttal period, submitted a notice of reliance upon Exhibits 143-315 previously submitted under applicant's notice of reliance and the discovery deposition of Billy D. Murray.<sup>6</sup>

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<sup>5</sup> In Opposition No. 98,057 the organization known as Church of God, an entity different from opposer and applicant herein, is opposing opposer's application S.N. 74/428,670 to register the mark THE CHURCH OF GOD.

<sup>6</sup> Applicant's objections to opposer's reliance upon evidence introduced by applicant's notice of reliance is not well taken. Evidence which is properly made of record may be relied upon by

Both parties filed briefs and both participated in an oral hearing.

As background for this case, we look to the undisputed facts in an admittedly simplified history of the churches involved. In 1903 A. J. Tomlinson founded the church organization known as the Church of God. In 1923 there was a schism as a result of which A. J. Tomlinson broke off from the original group, but both groups continued to call themselves Church of God. In 1953, as a result of continuing litigation between these two groups over the name,<sup>7</sup> the Tomlinson group was required to adopt the name Church of God of Prophecy and has since used that name in all secular matters. The Tomlinson group is applicant in this proceeding.

In 1990 a group within the Church of God of Prophecy became discontented with practices considered to be deviations from the established principles of theocratic government of the church and from the proper strict interpretation of certain of the 29 teachings of the church. In July 1993 this group separated from the Church of God of Prophecy, and set up its own church called The Church of

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either party. Although the assembly minutes which applicant has included in its notice of reliance do not qualify as either official records or printed publications under Rule 2.122(e), inasmuch as both parties have relied upon these minutes, they are considered of record as stipulated evidence.

<sup>7</sup> Church of God v. Tomlinson Church of God, 247 S.W. 2d 63 (Tenn. Sup. Ct. 1952) and subsequent decree issued by Chancery Court of Bradley County at Cleveland, Tennessee on March 6, 1953.

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God.<sup>8</sup> This group, the opposer herein, considers itself to be the continuation of the Church of God of Prophecy before it deviated from "the doctrine and governs" in 1990, or to be the true continuation of the organization founded by A. J. Tomlinson in 1903.

The record shows that in 1933 at the General Assembly of the church which later became the Church of God of Prophecy, the general overseer, A. J. Tomlinson introduced the flag, the design being identical with that involved here, which was unanimously accepted. Applicant's witness Buford Johnson attested to being present at this assembly. The flag (or flag design) is displayed inside and outside applicant's churches, on decals in members' homes, on lapel pins, in parades, to drape caskets, at the Fields of the Wood theme park, in front of international offices, on stationery, on the masthead of its White Wing Messenger publication and in various other ways. The booklet entitled "The All Nations Flag," issued by applicant in 1969, describes the history of the flag and the proper means of display of the flag for various occasions. Ten pastors or state overseers of applicant have given testimony as to their personal knowledge of use of the flag by applicant in churches or otherwise for periods ranging from twenty-four

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<sup>8</sup> This group is distinct from the group that continued to use the name Church of God under the 1953 Tennessee Chancery Court decree.

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to fifty years and use of the flag booklet since 1969. Applicant sells flag items at the bookstore run by its White Wing Publishing House, by mail order and at the giftshop at the Fields of the Woods park.

The Opposition

Opposer's position is basically that, as the alleged true continuation of the church founded by A. J. Tomlinson in 1903, opposer is the rightful owner of the church flag, the design of which applicant is seeking to register in the involved application. Insofar as this proceeding is concerned, however, opposer maintains that the Board is barred by the First Amendment from deciding the issue of ownership, in view of the doctrinal issues involved. Opposer asserts that the flag is a symbol of religious doctrine and that if applicant were permitted to register this flag design and, as a consequence, to potentially preclude opposer from using the flag, the Board would be sanctioning and supporting applicant's religion over opposer's.

If the Board is not so constrained by the First Amendment, opposer argues that the application should be refused under the provision of Section 2(b) of the Trademark

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Act barring the registration of the flag of a "foreign nation."<sup>9</sup> Opposer contends that the flag involved here is the flag of a specific religious group, which like other religious groups, may well be described as a "nation." Accordingly, and since the flag is held out by applicant as the flag of "the Holy Nation," opposer argues that applicant's flag falls within the proscriptions for a flag of a "foreign nation."

Finally, in the event that the Board finds that it is permitted to determine the question of ownership, opposer argues that it, not applicant, is the rightful owner of the flag because of applicant's deviations from the original doctrines taught by the founder A. J. Tomlinson, which the flag symbolizes. Opposer describes at length its religious doctrinal differences with applicant, noting applicant's alleged deviations from the theocratic form of election in applicant's selection of general overseer in 1990; applicant's alleged "abandonment" of the church's "Teaching 26" with respect to the wearing of gold adornment; and

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<sup>9</sup> Section 2(b) reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

- (b) consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

applicant's alleged lack of enforcement of the church's "Teaching 29" with respect to divorce and remarriage.

Applicant maintains that it is not necessary for the Board to resolve any religious doctrinal issues in order to determine applicant's right to register its flag design mark. Applicant argues that from the evidence of record it is clear that applicant is the prior user and owner of the mark and that opposer cannot rely upon a "departure from doctrine" argument to claim rights in property such as trademarks of the original church. Applicant denies the need to consider matters of religious doctrine that would raise First Amendment constitutional issues. Applicant also denies the applicability of the Section 2(b) bar to applicant's flag design, arguing that applicant is clearly not a "nation" in the literal or legal sense.

At the very outset, we must look to the restraints placed on courts by the First Amendment in the settlement of disputes over church property. The Supreme Court set forth the guiding principles in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), stating that

...the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are

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neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.

393 U.S. at 449.

The Ninth Circuit in the recent case of *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 51 USPQ2d 1146 (9<sup>th</sup> Cir. 1999) followed these principles in making a separation between those religious property disputes which might be resolved by applying neutral secular principles of property law and other claims which involved doctrinal issues. The neutral principles of trademark infringement were found to be equally applicable in disputes between religious organizations and such trademark issues could be determined without delving into any matters of religious doctrine. The Board, in its decision in *Stocker v. General Conference Corp. of Seventh-day Adventists*, 39 USPQ2d 1385 (TTAB 1996), gave recognition to the fact that religious institutions are entitled to the protection of the trademark laws, in the same manner as the commercial world. There, the Board resolved the claim of genericness relying solely upon secular principles of trademark law.

Here we are faced with the issue of the right to register the design for a flag as a service mark used in connection with evangelistic and ministerial services. This

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is a trademark issue which can be determined on secular principles of property law, namely, on the basis of priority of use of the design. Contrary to the arguments of opposer, there is no need for us to give any consideration to the meanings of the various symbols in the flag design or to which church is more closely following the doctrines and tenets said to be symbolized by the design. In determining trademark rights in the flag design, we are concerned only with an existing property right and need not consider any doctrinal disputes which may be going on between the two churches. These trademark rights stem from prior and continuous use of the flag design and not from the particular religious practices of the party using the design. The grant of a registration to applicant would simply be recognition of established property rights, and would not in any way be an endorsement or favoring of the particular religious services with which it is being used. See *In re Old Glory Condom Corp.*, 26 USPQ2d 1216 (TTAB 1993)[issuance of registration does not amount to government endorsement of the goods or services in connection with which the mark is used].

Accordingly, opposer's arguments that determination of applicant's right to registration is barred by the First Amendment is to no avail. We find no need to give any consideration whatsoever to doctrinal matters or to any of

opposer's arguments or evidence directed to applicant's purported deviations from the doctrine and principles of the Church of God as founded in 1903.

Opposer's second claimed bar to registration, this time under the provisions of Section 2(b) of the Trademark Act, is also without merit. Opposer's attempt to equate the design sought to be registered with "the flag ... of any foreign nation" is baseless. While applicant may refer to itself as "the Holy Nation" or to the flag as the "All Nations" flag, applicant is clearly not a "foreign" nation.<sup>10</sup> Applicant's use of the term "nation" in describing its religious body does not set this group off in a topographical sense, but rather only in a religious sense. Nor does applicant, by simply labeling its church a "nation," create a legally cognizable "nation." There is no bar under Section 2(b) of the Trademark Act to the registration of a design used in a flag for a religious group, and neither opposer nor applicant is a "foreign nation," as that phrase is intended to be understood in Section 2(b).

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<sup>10</sup> We take judicial notice of the following definition of "foreign":

l: situated outside a place or country, as  
a : situated outside one's own country (~ nations)  
( ~ cities). *Webster's Third International Dictionary*  
(1993).

Thus, we turn to applicant's right to register the flag design set forth in its application. Applicant has more than adequately established by the voluminous evidence of record that it adopted the flag design in 1933 and has continuously used this design in connection with the evangelistic and ministerial services of its churches since that time. Opposer does not contest that applicant has used the flag design for this period of time.

From deposition testimony of Robert J. Pruitt, we know that the first meetings of a group of disgruntled members of applicant's church, which called itself "The Concerned," began in 1992; and that this group broke away from applicant's church and founded a separate church, opposer herein, in Pruitt's home on July 24, 1993. (Applicant's Exhibit 320, p. 12). Pruitt further testified that up until 1990, when applicant's purported deviations began, applicant and opposer were "one and the same organization." (Applicant's Exhibit 321, p. 183). Thus, all use of the flag design up until this point was by a single organization, the Church of God of Prophecy, or prior to the 1953 decree, the Tomlinson Church of God. Opposer can claim no separate use of the design. The friction arose in 1990 over doctrinal issues, with opposer finally breaking off as a splinter group in 1993, claiming to be the spiritual continuation of the church founded in 1903. Thus, opposer,

as a distinct legal entity, could only have used the flag design in connection with its services since its formation in 1993.

Based solely on its claim of continuity of religious doctrine, opposer claims that its later use is a continuation of use of the flag design by the original church. Opposer makes no claim to any legal property rights in the flag design, but rather bases its claim of ownership on being the spiritual continuation of the church as it was founded in 1903. Pruitt acknowledged that applicant has never transferred any ownership rights in the mark to opposer. (Applicant's Exhibit 321, p.186).

We have previously held, however, that any consideration of the departure from doctrine arguments upon which opposer's claim is founded is both unnecessary and improper to our determination of the trademark rights involved here. Opposer has simply failed to establish ownership or priority in the involved mark based on use as a separate entity. Accordingly, opposer cannot prevail on the ground of priority and likelihood of confusion.<sup>11</sup>

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<sup>11</sup> Although opposer also made allegations of the false suggestion of an connection with opposer in the notice of opposition, opposer has neither made any arguments nor offered any specific evidence to support these allegations. Thus, we find that opposer has not established its claim under Section 2(a) of the Trademark Act.

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Decision: The opposition is dismissed.

E. J. Seeherman

C. E. Walters

H. R. Wendel  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board