

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
August 24, 2007
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

David K. White and Elizabeth L. White

v.

The partnership of Edward McNamara and Wayne Meyers

Opposition No. 91154635
against Serial No. 76288617

Julie Ann Gregory, James R. Higgins, Jr. and Dana L.
Collins of Middleton Reutlinger for David K. White and
Elizabeth L. White.

Edward McNamara, *Pro Se*, for the partnership of Edward
McNamara and Wayne Meyers.

Before Quinn, Bucher and Mermelstein, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The partnership of Edward McNamara and Wayne Meyers
seeks registration on the Principal Register of the
following mark:



for services recited in the application, as amended, as follows:

“educational and entertainment services rendered in a theme park, featuring various Bible stories” in International Class 41.¹

David K. White and Elizabeth L. White have opposed registration, asserting that applicant’s mark, when used in connection with applicant’s services, so resembles a mark previously used by opposers, as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Specifically, opposers allege, *inter alia*, that they have adopted and used in interstate commerce the service mark **BIBLELAND** in connection with outdoor recreational and educational facilities in the nature of playgrounds that incorporate religious themes since at least as early as August 4, 1991, during which time this mark has developed substantial good will and recognition among the consuming public. Notice of Opposition at ¶ 3.

¹ Application Serial No. 76288617 was filed on July 23, 2001, based upon applicant’s allegation of a *bona fide* intention to use the mark in commerce. Applicant has disclaimed the exclusive right to use the word “Bible” apart from the mark as shown. The application contains the statement that “The mark consists of Noah’s arc with family and animals.”

The Record

By operation of the rules, the record includes the pleadings and the file of the opposed application. In support of their case, opposers made of record the testimony deposition of opposer, David K. White, dated April 25, 2005, with attached exhibits; the testimony deposition of opposer, Elizabeth L. White, dated May 5, 2005; under a Notice of Reliance, two newspaper articles from August 1991; and finally, opposers provided for the record, copies of two pending applications, the first owned by opposers, and a second owned by an individual named Wayne Clayton Meyers, evidently Mr. McNamara's partner:

BIBLELAND

for "recreational centers featuring educational attractions with religious themes" in Int. Cl. 41;²



for "Biblical theme and amusement parks with additional guest and visitor facilities domestic and international sites, (the scope and size of the parks range up to 1000 acres or more) recreational, educational and training facilities incorporating actual Holy Scriptures and authentic characters from the Bible to include broadcast (television, radio, and worldwide webb [sic] printing, film and television production" in International Class 41.³

² Application Serial No. 78165485 was filed by David White and Beth White, U.S. citizens and residents of New Albany, Indiana, on September 18, 2002, claiming first use anywhere and first use in commerce at least as early as August 4, 1991. This application has been suspended pending disposition of the subject application.

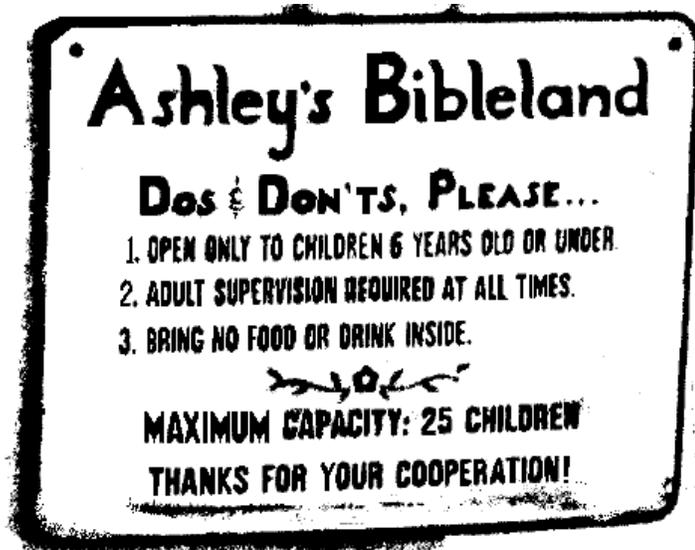
³ Application Serial No. 76472715 was filed by Wayne Clayton Myers, a U.S. citizen and resident of Branson, Missouri, on December 6, 2002, claiming a *bona fide* intention to use the mark in commerce.

As its case in chief, applicant submitted the testimony deposition of Edward McNamara, dated July 12, 2005, with attached exhibits.

Factual Findings

Opposer

Ashley White died unexpectedly in the fall of 1987 before she reached the age of four. Her parents, David and Elizabeth ("Beth") White, spent the next four years creating a memorial for Ashley at a personal cost of between \$50,000 and \$70,000. Ashley's Bibleland is co-located with Northside Christian Academy, on Grant Line Road in New Albany, Indiana, and was opened to the public on Sunday, August 4, 1991, before 600 - 900 persons.



⁴ This is a photocopy of a photograph depicting the sign at the entrance to the playground. David K. White depo. Ex. 4.

Wednesday, Aug. 7, 1991

THE TRIBUNE

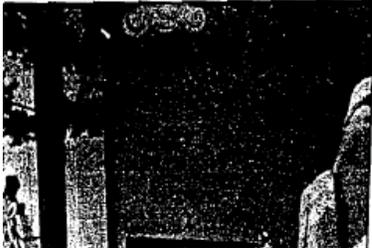
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Case White vs. McNamara et. al.
Deponent D. White
Reporter Joseph A. Javel IRI CRS File # 8207
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Bibleland is positive of negative situation

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This playground facility covers about four thousand square feet and includes play areas designed as Noah's Ark, Jonah and the Whale, the City of Jerusalem, Jesus' Sermon on the Mount, a fisherman's net, etc. A second, larger BIBLELAND playground facility was opened in the same Indiana town in 2004 at the Northside Christian Church, on Charlestown Road. This playground facility includes additional features such as Zacchaeus and the tree of knowledge, a cave where children can listen to Bible stories over headphones, and other Bible-related activities. The cost of the second BIBLELAND playground facility exceeded \$200,000. The Whites testified that both locations continue to draw users from Indiana, Kentucky and other neighboring states. Northside Christian, the Whites'

⁵ David K. White depo. Ex. 3.

home church, is a licensed user of the mark, but the Whites retain control over the quality and nature of the BIBLELAND playground facilities.

Applicant

Edward McNamara and his partner, Wayne Meyers, conceived of "Bible Land" as a way to teach Bible stories and educate the public generally about the Bible through the use of various Biblical themes. Their grand vision was to "start a theme park in California, just like Disneyland ..." (McNamara Depo. at 27). In August 1985, they obtained a state certificate that appears to be a temporary reservation of the corporate name "Bible Land" from the California Secretary of State.

Pointing to copies of entrance tickets, Mr. McNamara alleges the BIBLE LAND mark was used in connection with a petting zoo / puppet show between 1986 and 1989. In his testimony, McNamara explained that the purpose of charging admission for the petting zoo was "to keep the whole concept going, 'cause we were planning on trying to figure out what to do ... I mean, we're talking millions of dollars



... try[ing] to figure out how to get this whole – how do you, you know, develop a, you know, build a theme park.” (*Id.* at 30, 33).

As to the partnership’s usage of the mark BIBLE LAND between 1990 and the filing of the involved intent-to-use application in 2001, although McNamara testified to “a 28 - 30 page Business Plan,” “hats and shirts which had the name ‘Bible Land’ upon them,” claimed uses in Florida and Nevada, uses outside Disneyland, claimed aerial photography, and claimed banners at his daughters’ private birthday parties, none of this alleged material was ever produced during discovery, nor was any of it identified and introduced in Mr. McNamara’s testimonial deposition as exhibits.

Preliminary matters

Before analyzing the merits of this case, we turn to opposers’ objections to much of the evidence that applicant has proffered during the litigation of this opposition proceeding, as well as objections to applicant’s final brief.

Throughout his testimony, Mr. McNamara attempted to prove prior actual use by reference to activities by Wayne Meyers. Opposers repeatedly objected to references to purported actions of Mr. Meyers as inadmissible hearsay.

Fed. R. Evid. § 802; and *NutraSweet Company v. K&S Foods, Inc.*, 4 USPQ2d 1964, 1965 (TTAB 1987). We agree with opposers that significant portions of McNamara's testimony about actions purportedly taken by Meyers were based on conversations that Meyers reportedly had with McNamara, and we have excluded this from our consideration as constituting inadmissible hearsay. McNamara Depo. at 9-12, 21, 78 & 81.

Secondly, applicant repeatedly attempted to introduce testimony about its claimed prior uses by reference to documents or things that McNamara failed to produce or significant events he failed to disclose during discovery. Twice opposers sought to obtain additional discovery through motions to compel. Moreover, originals of copied documents and more complete documents referenced in McNamara's trial testimony deposition were promised by applicant but never delivered. This testimony concerned applicant's claimed use of the mark in Florida and Nevada, uses outside Disneyland, claimed aerial photographs and claimed banners at McNamara's daughters' private birthday parties, and a detailed business plan. Opposers maintained their objections throughout the deposition and reiterated their objections in their briefs. Again, we agree with opposers, and strike all references to such events.

ConAgra, Inc. v. Saavedra, 4 USPQ2d 1245, 1247 fn.6 (TTAB 1987) [party cannot rely on materials not produced in discovery where the materials were within the scope of the adverse party's requests]; see also Trademark Rule of Practice 2.120(g), 37 C.F.R. § 2.120(g); Fed. R. Civ. Proc. §§ 37(b)(2)(C) and (c)(1).

Among other questions about the trustworthiness of applicant's meager documentary evidence was opposers' concern about the probative value of mere photocopies of petting zoo / puppet show tickets that easily could have been manipulated digitally. [see the images *supra* at p. 6] While opposers did inquire about these particular originals, applicant never produced the originals. On this record, these concerns might be well founded. However, this is an objection that could be made to many pieces of documentary evidence in Board cases. Without more, we find that we cannot exclude this evidence simply because it *might* have been fabricated.

Opposers have pointed to other troubling contradictions surrounding McNamara's signing of his testimony declaration,⁶ discrepancies in mailing dates

⁶ While Mr. McNamara alleged under oath that he signed the transcript on January 6 or 7, 2006, one copy in the record shows his signature as having been affixed on July 12, 2005 and another as of September 28, 2005.

revealed by this record⁷ and significantly-different looking signatures of Mr. McNamara and Mr. R.D. Kelley, among others. While we share opposers' concerns about applicant's apparent disorganization and lack of respect for the opposition process McNamara demonstrated throughout the prosecution of this proceeding, and while we have grown weary of applicant's endless excuses for failing to play by the rules, we are not convinced that they are so egregious that we should sanction applicant by ruling summarily in opposers' favor. And while we are clearly struck by the very different looking signatures of the same affiant shown on submissions separated by time, we are not handwriting experts, and hence cannot conclude that certain signatures purporting to be those of Messrs. McNamara and Kelly, for example, were actually placed on these documents by the hands of others.

Finally, we turn to the several questions surrounding the timeliness of the filing of applicant's brief. In the Board order of February 11, 2005, opposers' trial brief was set by the rules to be due on October 25, 2005. Opposers actually filed their brief early, on October 20, 2005.

⁷ The documents allegedly served on opposers' counsel and mailed to the Board on January 6, 2006, according to the certificates of mailing, were evidently mailed at various points over the next week.

Applicant's brief was then due no later than November 24, 2005. Applicant asked for an initial extension for filing its brief until December 1, 2005, a second extension until December 21, a third extension until December 31, and a fourth extension until January 7, 2006.⁸ Opposers specifically objected to this fourth extension and asked for an order sustaining the opposition. Later, opposers filed a separate, outstanding motion to strike applicant's brief from the record as untimely filed and fraudulent.

Although the earlier requested deadlines for applicant's filing of its brief had all expired before the Board received the fourth extension request, it is clear from the flurry of activity undertaken by Mr. McNamara in late-December 2005 and early-January 2006 that he had not "lost interest" in defending this application. Hence, while we are not happy with applicant's overall conduct in defending this case, we grant applicant's request to reopen the period for filing its brief.

Nonetheless, even with our accepting the fourth extension request, the brief was still filed in an untimely

⁸ It is not clear from the record that any of these requests were timely received by the Office as applicant was using the Board's old Arlington mailing address - at that point more than a year out of date. Incorrectly addressed mail is not entitled to the benefit of the date of deposit under Trademark Rule 2.197 (certificate of mailing) or the Express Mail provisions of Trademark Rule 2.198.

manner. The certificate of mailing rule explicitly requires that the materials be deposited with the U.S. Postal Service. Hence, applicant's use of FedEx shipping services does not entitle it to the benefit of timely mailing under the provisions of the certificate of mailing procedures. Similarly, a submission sent to an incorrect address, as is the case with applicant's brief, is not entitled to the benefit of the certificate of mailing procedures. See 37 C.F.R. § 2.197(a)(1)(i)(A).

We hasten to add, however, that even if considered, applicant's brief would not compel a different decision on the merits in this case.

ANALYSIS

Standing

Opposers' standing is a threshold inquiry made by the Board in every *inter partes* case. In *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1029 (Fed. Cir. 1999), the Federal Circuit enunciated a liberal threshold for determining standing, i.e., the opposers must have: (1) a legitimate personal interest in the opposition, and (2) a reasonable basis for the belief of damage. See also *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); and

Lipton Industries, Inc. v. Ralston Purina Company, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). David K. White and Elizabeth L. White allege in their Notice of Opposition that they will be damaged if the partnership of Edward McNamara and Wayne Meyers were to be granted a registration for applicant's mark, and have submitted evidence of opposers' preexisting, common law rights to use of this term. Additionally, there is evidence that opposers' pending trademark application for the mark **BIBLELAND** has been suspended pending the outcome of this proceeding. Together, these facts show that opposers have a "real interest" in this proceeding. See 15 U.S.C. §1064; and TBMP § 303.03 (2d ed. rev. 2004).

Priority

With regard to the issue of priority in relation to the parties' respective marks, we have sufficient evidence of record to conclude that opposers have used their service mark in interstate commerce since at least as early as August 4, 1991. The critical question then, for our determination herein, is whether applicant has demonstrated continuous use in commerce dating to some point prior to August 1991.

According to the evidence of record in this proceeding, the mark applicant was using in the 1986 to

1989 timeframe consisted of the words BIBLE LAND only, without the Noah's ark design shown in its intent-to-use application.⁹ This alleged prior use was solely in the context of a petting zoo and/or puppet show. Moreover, according to McNamara's own testimony, the form of entertainment was remarkable for its amateurishness. Even giving applicant the benefit of the doubt, there were at most a dozen or so of these extremely small events over a three- to four-year period. This "meager trickle" of activity constitutes *de minimus* usage, particularly in light of the inactivity over the following decades. There is precious little evidence in the record to support the finding of any meaningful activities by applicant under this mark since 1990. Even Mr. McNamara characterizes the present state of the business as "this theme park idea" [McNamara Depo. at 41] - clearly more conceptualization and hope than concrete implementation of a business plan. It

⁹ As pointed out by opposers, even if this use in 1986 to 1989 should be found to be *bona fide* use of a mark in the ordinary course of trade, due to the difference in the marks and the differences with the claimed services of the intent-to-use application, it would not be possible for applicant to "tack" onto this earlier claimed usage. See *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866, 1868-69 (Fed. Cir. 1991) ["tacking" should be permitted only in "rare instances," and then only when the previously used mark was "the legal equivalent of the mark in question or indistinguishable therefrom"]; see also *American Paging Inc. v. American Mobilphone Inc.*, 13 USPQ2d 2036, 2038 (TTAB 1989), aff'd in unpublished opinion at 923 F.2d 869, 17 USPQ2d 1726 (Fed. Cir. 1990).

is clear that applicant has yet to use the applied-for mark in connection with theme park services. In light of this finding, the earliest date applicant can rely upon is the filing date of its intent-to-use application, or July 23, 2001. Accordingly, opposers have demonstrated their priority.

Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. Specifically, the focus of our determination is on the issue of whether applicant's mark, when used in connection with educational and entertainment services rendered in a theme park, featuring various Bible stories, so resembles opposers' mark as to be likely to cause confusion, to cause mistake or to deceive as to source or sponsorship.

Our determination must be based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See 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. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the

cumulative effect of differences in the essential characteristics of the services and differences in the marks." 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).

The marks

Applicant has applied for the term BIBLE LAND in a special form drawing containing a hand-drawn but unmistakable sketch of Noah's ark.



As seen on the signage posted at the playground, opposers have used the designation "Ashley's Bibleland."

In support of its stated position that there is no likelihood of confusion herein, applicant repeatedly points out that opposers' mark is "Ashley's Bibleland," not BIBLELAND alone. However, we find that these marks are quite similar. The possessive form of "Ashley's" tells the potential playground visitor that the recreational area is a "Bibleland" having a connection to someone named Ashley. Hence, in this context, the suggestive term "Bibleland" retains its primary function as a source identifier. In spite of the visual and aural dissimilarities created by opposers' placing the word "Ashley's" before the term

"Bibleland," we find that the respective marks are similar as to connotation and commercial impression. This is consistent with the front-page, newspaper headline in *The Tribune* (New Albany, IN), *supra* at p. 5, "**Bibleland** is positive of negative situation" (*emphasis* supplied), reporting on the grand opening of Ashley's Bibleland. Moreover, while applicant's mark does contain an additional design feature, given the ready perceptions of members of the public at large that the Noah's ark pictorial represents a well-known Bible story, this merely reinforces the meaning and commercial impression of the term BIBLELAND. Accordingly, this critical factor also favors the position of opposers.

Similarity of Trade Channels

The depositions of Mr. McNamara and of the Whites show that both parties' services would be aimed at families and the children of those families. Hence, this *du Pont* factor also favors the position of opposers.

Conditions Under Which the Services Are Purchased

We agree with opposers that potential consumers of these respective services would be ordinary members of the general public. The admission fee to applicant's small events in 1986 to 1989 ranged from free to minimal. While

there may be logistical challenges to gaining access, those visiting "Ashley's Bibleland" are evidently not charged a fee for entry. Hence, we find that these classes of ordinary consumers would not likely discriminate among the several **BIBLELAND** / **BIBLE LAND** providers.

The services

The parties concur that the Board must compare the recitation of services found in applicant's application with the services on which opposers have shown common law usage of their mark.

Applicant has applied for "educational and entertainment services rendered in a theme park, featuring various Bible stories." Opposers have shown usage of their service mark in connection with outdoor recreational and educational facilities in the nature of playgrounds that incorporate religious themes.

The term "theme park" suggests a collection of mechanical amusement rides in a setting that is more elaborate than a simple playground and usually will have been designed for the purpose of entertaining a fairly large group of people, including small children, teenagers and adults. A playground, like many city parks, generally has no amusement rides, is smaller in size, generally does not provide onsite supervision and caters mostly to small

children. However, it is clear that both parties' services would involve recreational or entertainment facilities having as a primary focus Christian religious education.

Hence, upon weighing all of the *du Pont* factors herein, and especially in light of the strong similarity of the involved marks, we find that these respective services are sufficiently related - particularly given the common focus on Christian education in a recreational setting - to support a finding of likelihood of confusion.

Conclusion: Likelihood of Confusion

In conclusion, we find that both parties' services are aimed at families and the children of those families, and hence will share the same channels of trade; that potential consumers of these respective services would be members of the general public who would approach these free or inexpensive services without a high degree of care or discrimination; that these respective marks are confusingly similar as to connotation and commercial impression, and finally, that these respective services - inasmuch as both are focused on Christian education in a recreational setting - are therefore somewhat related.

Decision: The opposition is sustained under Section 2(d) of the Lanham Act, and registration to applicant is hereby denied.