

NOT FOR PROFIT CORPORATIONS:  
CORPORATIONS:  
SECRETARY OF STATE:  
NAMES:  
DISCRETION:

It is the opinion of this office that in a case wherein the Secretary of State determines that the requested name of a Not For Profit Corporation is one so similar to a name previously on file in his office so as to mislead or deceive the general public or persons dealing with the corporation, he may refuse to file such name.

February 28, 1963

Opinion No. 22

Honorable Warren E. Hearnes  
Secretary of State  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Hearnes:

This will acknowledge receipt of your recent letter requesting an opinion of this office. Your request reads as follows:

"This department has recently been requested to determine whether or not one, or any of the following names, are available for use as the name of a Not For Profit Corporation under Chapter 355. The names presented are as follows:

1. St. Ferdinand Township Democratic Club.
2. St. Ferdinand Township Independent Democratic Club;
3. Independent Democratic Club of St. Ferdinand Township.

"We currently have on file with this office, and in good standing, a corporation formed under Chapter 355, under the name St. Ferdinand Township Regular Democratic Club.

"Section 355.035, paragraph (2) states that a corporate name-

'shall not be the same as the name of any corporation, whether for Profit or Not For Profit, existing under any law of the state---.'

Honorable Warren E. Hearnnes

"The problem involved, as this department sees it is, whether or not the name of a corporation presently on file with this office precludes use of the names, or one of them, presented to this office, which in turn hinges upon the interpretation of the word 'same' in 355.035.

"We would appreciate your opinion in this matter so that the problem might be resolved in this case, and future cases to come before this office."

In reply to your question we agree with your observation that the solution to the question presented depends upon the meaning of the word "same" as used in Section 355.035, RSMo 1959.

The pertinent part of Section 355.035, RSMo 1959, reads as follows:

"The corporate name \* \* \*

"(2) Shall not be the same as the name of any corporation, whether for profit or not for profit, existing under any law of this state, or any foreign corporation, whether for profit or not for profit, authorized to transact its business or conduct its affairs in this state, and \* \* \*"

It will be noted that the above statute uses the term "shall not be the same as the name of any corporation . . ." while our General and Business Corporations Act, Chapter 351, RSMo 1959, in Section 351.110 regulating names of corporations uses entirely different language as follows:

"The corporate name \* \* \*

"(3) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter."

Honorable Warren E. Hearnes

As may be seen there is a great difference between the two statutes, the older Section 351.110, RSMo 1959, using the term "or deceptively similar to" while our newer Section 355.035, RSMo 1959, uses the language "shall not be the same as . . ." There are many cases construing the meaning of the older Section 351.110, RSMo 1959, among them the following: Empire Trust Co. v. Empire Finance Co., 41 S.W.2d 847. These cases all turn upon the "or deceptively similar" portion of 351.110, RSMo 1959. It may be pointed out that there are no cases construing the meaning of Paragraph 2 of Section 355.035, RSMo 1959.

While it may have been better had our legislature in enacting Section 355.035, RSMo 1959, used the same terminology as Section 351.110, RSMo 1959, it chose, either by design or otherwise, to use different language and by so doing has given general Not For Profit corporations greater leeway in choosing a name.

While, as stated supra, there are no cases construing Paragraph 2, Section 355.035, RSMo 1959, it is substantially the same statute as previously enacted by the State of Illinois in 1943, which statute was taken substantially from an earlier Illinois statute. There are only two cases noted in connection with this Illinois statute which must be given consideration in this matter. They are: People ex rel. Felter v. Rose, (1907) 225 Ill. 496, 80 NE 293, 294; and International Committee of the Young Women's Christian Association v. Young Women's Christian Association of Chicago, (1902) 194 Ill. 194, 62 NE 551. It should be noted that in neither of the above cases did the court rule directly upon the statute involved, but it is believed that they apply to the question under consideration.

The Young Women's Christian Association case, supra, involved an injunction filed by the Young Women's Christian Association of Chicago [the older association] against the International Committee of the Young Women's Christian Association. The court, ruling for the Young Women's Christian Association of Chicago, stated that the defendant would be enjoined from using the name International Committee of the Young Women's Christian Association because of its similarity to the plaintiff's name. That it would confuse the general public and cause them to direct donations to it which were meant for the plaintiff organization. That it was a name

Honorable Warren E. Hearnes

calculated to deceive and mislead. Therefore, they would not be allowed to profit from it.

The Rose case, supra, was a mandamus action brought against the Secretary of State of Illinois in an attempt to force him to file a corporate name which he had refused to file because of its similarity to a name of a corporation already authorized to do business in Illinois. The Supreme Court of Illinois, ruling for the Secretary of State, stated they would not compel him to perform what might well be a vain act. That the names in question were so similar that in a proper case they [the court] might be compelled to enjoin the use of the requested name. The essence of the opinion is stated as follows, l.c. 294:

"If this mandamus is awarded this court might be put in the absurd position of being required to sustain an injunction against the use of the name which it has compelled the Secretary of State, by mandamus, to authorize. The Secretary of State will not be required, by mandamus issuing out of this court, to issue a certificate of incorporation when it is plainly apparent that the effect will be to mislead the public dealing with such corporation." (Emphasis supplied)

So, while the court did not construe the statute specifically, they intimate from the above language that the Secretary of State may have some portion or measure of discretion in the filing of names of Not For Profit Corporations.

Thus, in the question before us, it does not seem conceivable that our legislature [even in the face of the difference in language of Sections 351.110 and 355.035, RSMo 1959] would have intended to permit the organization of a Not For Profit Corporation with a name deceptively similar to that of another existing corporation or one that could be so calculated to deceive and mislead the general public or persons dealing with the corporation.

Honorable Warren E. Hearnes

CONCLUSION

It is the opinion of this office that in a case wherein the Secretary of State determines that the requested name of a Not For Profit Corporation is one so similar to a name previously on file in his office so as to mislead or deceive the general public or persons dealing with the corporation, he may refuse to file such name.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Northcutt.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

RRN:im:lt