

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

Mailed:  
June 25, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Fraser Stryker Meusey Olson Boyer & Bloch, P.C.  
v.  
Fellers, Snider, Blankenship, Bailey & Tippens, P.C.

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Opposition No. 91166088  
to application Serial No. 78446589  
filed on July 6, 2004

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Daniel J. Guinan for Fraser Stryker Meusey Olson Boyer &  
Bloch, P.C.

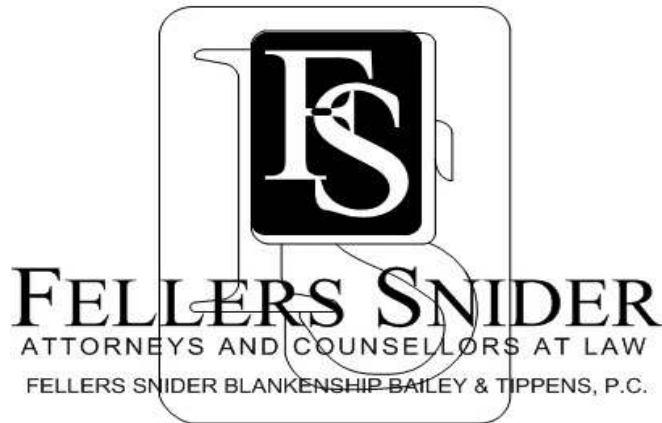
Daniel P. Dooley for Fellers, Snider, Blankenship, Bailey &  
Tippens, P.C.

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Before Drost, Mermelstein, and Bergsman, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Fellers, Snider, Blankenship, Bailey & Tippens, P.C.  
filed application Serial No. 78446589 on July 6, 2004, based  
on use in commerce, seeking to register the FS and design  
mark shown below for legal services. Applicant claimed a  
date of first use anywhere and first use in commerce at  
least as early as January 23, 2004.



Fraser Stryker Meusey Olson Boyer & Bloch, P.C. opposed registration under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). Opposer asserted ownership of its own FS and design mark as shown below for use in connection with "legal services" since at least as early as March 1, 1990. Accordingly, opposer alleged that applicant's mark so resembles opposer's mark as to be likely to cause confusion.



Applicant denied the salient allegations in the notice of opposition.

The only evidence introduced by either party is the affidavit of Stephen M. Bruckner, one of opposer's shareholders. Mr. Bruckner testified that opposer has been

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using the FS service mark displayed above in connection with legal services since at least as early as March 1, 1990. Opposer has used the mark "by depicting it in magazine and newspaper advertisements, on its internet website, in signage, on legal memoranda and other documents prepared for clients, on continuing legal education and seminar materials, and on stationery and letterhead." Opposer has rendered its legal services in Colorado, Iowa, and Nebraska. (Bruckner Affidavit, ¶¶3 and 5-7).

Both parties filed briefs.

Standing

Opposer, by virtue of its use of its FS and design service mark in connection with legal services, has established a real interest in this proceeding and, therefore, its standing to challenge the registration of application Serial No. 78446589 for applicant's FS and design service mark. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

Opposer's evidence demonstrates that it used its FS and design mark in connection with legal services since at least as early as March 1, 1990. Because applicant has not taken any testimony or introduced any evidence regarding its first

use of the mark sought to be registered, the earliest date upon which applicant may rely is the filing date of its application (*i.e.*, July 6, 2004). *Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974) (applicant took no testimony and thus is restricted to its filing date for first use); *Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715, 1716 (TTAB 1991); *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 448 (TTAB 1980). In view thereof, opposer has proven that it has priority of use.

Likelihood of confusion

Our determination of likelihood of confusion under Section 2(d) of the Lanham Act is based on an analysis of all the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

Both parties use their respective marks in connection with legal services. The question of likelihood of confusion, insofar as the services of the parties are concerned, must be determined on the basis of the services described in the application *sub judice* vis-à-vis the services in connection with which with opposer has shown prior use of its pleaded service mark. Because the

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description of services in applicant's application contains no restrictions as to channels of trade or classes of purchasers, it must be presumed, in determining likelihood of confusion, that applicant's legal services encompass all types of activities falling within the ambit of legal services, that applicant's legal services move through all channels of trade normally employed for legal services, and that applicant's legal services reach all potential purchasers or users of legal services, including ordinary citizens who need assistance with, *inter alia*, probate, criminal matters, personal injury, workman's compensation issues, traffic tickets, etc. *Morton-Norwich Products, Inc. v. N. Siperstein, Inc.*, 222 USPQ 735, 736 (TTAB 1984); *Set Products, Inc. v. Construction Products, Inc.*, 208 USPQ 842, 848 (TTAB 1980); *Hecon Corp. v. Magnetic Video Corp.*, 199 USPQ 502, 507 (TTAB 1978). Accordingly, the similarity or dissimilarity of the services, trade channels, and classes of consumers are factors that favor a finding of likelihood of confusion.

We are not persuaded by applicant's argument that "the practice of law in the United States is jurisdictional by nature and governed by jurisdictional licensing requirements" thereby precluding competition in the legal market and, therefore, likelihood of confusion.

(Applicant's Brief, pp. 5-7). Because applicant is seeking

a geographically unrestricted registration, we are required to evaluate the *du Pont* likelihood of confusion factors in terms of nationwide markets. This requirement is not eliminated by the fact that lawyers are licensed by state bar associations. *In re Integrity Mutual Insurance Co., Inc.*, 216 USPQ 895, 896 (TTAB 1982); *Giant Food Inc. v. Nations Foodservice, Inc.*, 214 USPQ 641, 644 (TTAB 1982), *rev'd on other grounds*, 710 F.2d 1565 (Fed. Cir. 1983); *Armco, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 77 (TTAB 1981).<sup>1</sup>

Since we find that opposer and applicant render the same type of legal services to the same ultimate clients through the same channels of trade, opposer and applicant must be considered direct competitors. Because applicant seeks an unrestricted registration, the fact that the parties may not currently be in actual competition at this time is not relevant to our analysis. At the very least, such a registration would confer upon its owner the exclusive right to use its mark in the jurisdictions in which opposer now practices. Accordingly, likelihood of confusion turns on a comparison of the marks in their entirety as to appearance, sound, meaning, and commercial

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<sup>1</sup> In our practice at the Trademark Trial and Appeal Board in the U.S. Patent and Trademark Office, we see many law firms with offices in multiple states. Many of these firms have national and/or international law practices.

impression. *In re E. I. du Pont de Nemours & Co., supra.*

The marks are reproduced below.



In analyzing the similarity or dissimilarity of the marks, 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 overall commercial impression so that confusion as to the source of the goods 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 1835, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). In making this determination, we must consider the recollection of the average purchaser who normally retains only a general, rather than a specific, impression of the marks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.*, 753 F.2d 1056, 24 USPQ2d 749, 751 (Fed. Cir. 1983). Both marks

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prominently display the letters FS in a similar font, within a shaded, rectangular background.

Arbitrary letter combinations such as FS generally have been found to be similar because it is difficult for consumers to distinguish between similar letter combinations. *Crystal Corp. v. Manhattan Chemical Mfg. Co.*, 75 F.2d 506, 25 USPQ 5, 6 (CCPA 1935) ("We think that it is well known that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures, syllables, words, or phrases. The difficulty of remembering such lettered marks makes confusion between such marks, when similar, more likely"). *See also, Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) ("Because it is hard to distinguish between these letters, the mark TMM is confusing with TMS"); *Edison Brothers Stores v. Brutting E.B. Sports-International*, 230 USPQ 530, 533 (TTAB 1986) (EB and EBS for shoes is likely to cause confusion because "confusion is more likely between arbitrarily arranged letters than between other types of marks"). "Initials, by their very nature, are abbreviations, a shortened version designed to be comprehended at a glance. If the number of letters is the same, and there is a significant overlap in the letters used, that is generally sufficient to sustain a claim of similarity." *Continental Connector Corp. v. Continental*



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*Specialties*, 492 F.Supp. 1088, 207 USPQ 60, 66 (D. Conn. 1979).

The significance of the FS logo in applicant's mark is further reinforced by its location at the top center of applicant's mark. See *Palm Bay Imports Inc. v. Vueve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Vueve" is the most prominent part of the mark VUEVE CLICQUOT because "vueve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word); *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered").

In comparing the two marks, we note that the applicant's mark contains virtually opposer's entire mark (*i.e.*, the entirety of the literal portion and a very similar geometric shape). Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ

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155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

Applicant contends that the marks are visually different and that the addition of the "Fellers Snider" name further distinguishes the marks by specifically identifying the source of applicant's services.

In fact, the Applicant has incorporated into its mark the actual identity of the source of the services, as well as the services being offered. Anyone able to read the English language quickly realizes the source of the service is Fellers, Snider, Blankenship, Bailey & Tippens, P.C., of this there can be no doubt. In contrast, Opposer's mark conveys no proprietary or contact information and would only be recognizable by those previously familiar with Opposer's mark.

(Applicant's Brief, p. 4). The problem with applicant's argument is that the issue in a likelihood of confusion case is not whether people will confuse the marks but whether the marks will confuse people. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CPA 1973).

In a side-by-side comparison, applicant is correct, clients and potential clients should readily be able to distinguish the marks. However, the addition of the name

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"Fellers Snider" to a very similar FS logo used by opposer will not necessarily preclude likelihood of confusion. *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) ("When one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude likelihood of confusion"); *Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (when one incorporates the arbitrary mark of another into a composite mark, the inclusion of a significant, nonsuggestive element in the composite mark does not preclude the marks from being similar). While the use of the names "Fellers Snider" may reduce the visual similarities of the marks in a side-by-side comparison, applicant's names may increase the likelihood of confusion when opposer's mark is encountered separately because clients or potential clients familiar with applicant's legal services may mistakenly associate opposer's FS logo with applicant or assume that the legal services have a common source. Even those clients or prospective clients who notice and remember the differences in the marks, or who are knowledgeable about the source of applicant's services, are likely to believe, in view of the overall similarities of the FS logos, that the legal services so identified are somehow related.

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Finally, we note "[w]hen marks would appear on virtually identical goods or services, the degree of similarity [or the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In view of the foregoing, we find that the similarities of the parties' marks outweigh the differences, and therefore the similarity of the marks is a factor that favors finding that there is a likelihood of confusion.

In this case, because of the similarity of the marks and identity of the services, we find that there is a likelihood of confusion.

Decision: The opposition is sustained and registration to applicant is refused.