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TRADE SECRETS***An Update on Pending Federal Trade Secret Legislation***

By Heath J. Szymczak and Bradley A. Hoppe†*



In today’s business world, protecting trade secrets is of vital importance. A trade secret is anything which gives a company a competitive

advantage and is kept confidential, including a design, formula, manufacturing process, financial data, or customer information. Unlike other forms of intellectual property (such as trademarks, copyrights, and patents), trade secrets are not currently protected by federal statute. Prosecution of civil trade secrets claims derives solely from state statutes and common law. Companies are vulnerable to trade secret theft from both internal (disgruntled or defecting employees) and external threats. Two bills are currently pending in Congress which, if passed, would create the first federal civil statutory claim for theft of trade secrets.

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Messrs. Hoppe and Szymczak helped develop the innovative Bond Trade Secret Protection Audit which systematically reviews a company’s agreements, policies and protocols, as well as their physical and electronic security measures.

What Protections do Trade Secrets Currently Have?

Over the last thirty years almost every state has enacted some form of what is known as the Uniform Trade Secret Act (“UTSA”). However, two states have rejected UTSA altogether: New York and Massachusetts. In the last couple of years, Massachusetts has come close to adopting UTSA, but the legislation failed due largely to the inclusion of a controversial ban on non-compete agreements. If Massachusetts ultimately adopts USTA, New York would be the only remaining holdout.

Despite its name, UTSA’s implementation from state to state has not been entirely “uniform,” including differing definitional terms affecting the scope of trade secret protection and available remedies such as punitive damages and attorney’s fees. In most states, a plaintiff asserting a theft of trade secrets claim may seek compensatory damages and injunctive relief to prevent irreparable injury through use or disclosure of the trade secret information.

What is the Status of the Pending Federal Trade Secret Legislation?

Due to this lack of uniformity and inadequate enforcement under federal criminal statutes, coupled with the increase in cyber theft from foreign countries, there has been a push in Congress to create a broader framework for federal civil protection of trade secrets, with more robust compensatory and provisional remedy measures than can be found under state law. For the past two years, Congress has sought to do this by amending the Economic Espionage Act of 1996, 18 USC §§ 1831 *et seq.*, a federal criminal statute.

The first attempt came in 2014 when a bipartisan bill (S. 2267) was introduced in the Senate by Senators Christopher Coons and Orrin Hatch, entitled “Defend Trade Secrets Act of 2014.” An identical textual bill (H.R. 5233) was also introduced in the House by Congressman George Holding, though under the name “Trade Secret Protection Act of 2014.” While

the Senate Bill stalled, the House Bill was unanimously passed by the House Judiciary Committee on September 17, 2014. After a rise in criticisms from academic circles, however, the bill was never brought to the House floor for a vote.



Last year identical textual bills were introduced simultaneously in July 2015. Both bills were titled “Defend Trade Secrets Act of 2015.” The House Bill (H.R. 3326) was introduced by Congressman Doug Collins. The Senate Bill (S. 1890) was introduced by Senator Orrin Hatch. Momentum for passage is growing as the number of bipartisan co-sponsors increased significantly in 2015. The House Bill currently has 107 cosponsors (77 republicans and 30 democrats); the Senate Bill currently has 23 cosponsors (13 republicans, 9 democrats, and 1 independent). At the same time, criticism from the academic community has also waned. In 2014, 31 law professors signed a joint opposition letter; in 2015, only two signed.

How is the New Legislation Different?

The proposed federal legislation would create the first private civil claim for theft of trade secrets, so long as the trade secret pertains to a product or service which impacts interstate or foreign commerce. The bills borrow heavily from federal trademark law, including aggressive *ex parte* seizure mechanisms such as those used to seize counterfeit goods. The 2015 versions initially made several modifications to the 2014 version presumably to make it more palatable to past critics:

- Increasing and refining the showing and specificity required to obtain a controversial *ex parte* seizure order;
 - Delineating how and when materials may be seized, and placing restrictions on how long the seizure can remain in place prior to an evidentiary hearing, rather than merely incorporating by reference sections of the Trademark Act of 1946, 15 USC § 1116;
 - Addressing concerns over the fluid nature of data by including provisions preventing the dissemination through network or internet connection, and by also providing for encryption of data pending adjudication; and
 - Including language which makes it clear that the bills do not codify the “inevitable disclosure doctrine” (which creates a presumption that an employee taking a position with a competitor would disclose the former employer’s trade secrets), as this was a major source of criticism in 2014.
- Reducing the Statute of Limitation from five years to three years;
 - Reducing the amount of punitive damages available to a prevailing plaintiff from treble to double;
 - Requiring proof of harm (e.g., use of the trade secret or disclosure to third parties) rather than the mere act of “misappropriation” alone;
 - Providing immunity to individuals who may disclose a trade secret in the course of reporting a violation of law (i.e. “whistleblower” immunity);
 - Allowing impacted third-parties to seek encryption of seized information; and
 - Clarifying even further that the bill prohibits the application of the “inevitable disclosure doctrine” to enjoin competition in a way that conflicts with prevailing state law.



This year, on January 28, 2016, the Senate Judiciary Committee voted in favor of passage of the Senate Bill (S. 1890), but only after a few significant amendments (Substitute Amendment EHF16041 and Leahy-Grassley Amendment ALB16037) to the initial 2015 version were recommended, including:

- Changing the name to “Defend Trade Secrets Act of 2016”;

These recent changes bring the Senate Bill much more closely into alignment with UTSA. There is no indication as to when it may be brought to the Senate Floor for a vote. The House Bill (H.R. 3326) has also been assigned to the House Judiciary Committees and may be voted out of committee at any time, with or without similar amendments. This reformulated legislation, coupled with the recent changes to the Federal Rules of Civil Procedure,^{*} may provide a framework for efficient prosecution of trade secret theft claims while providing restraint against unwarranted anticompetitive conduct. Federal courts may be better equipped, through use of magistrate judges, to closely monitor discovery and adjudicate proportionality. They may also be more inclined to level sanctions to prevent abuses.

^{*} Several recent amendments to the Federal Rules of Civil Procedure (particularly Rules 4, 16, 26 and 37) took effect on December 1, 2015. These amendments are designed to reduce the costs of litigation in federal courts, including making the scope of discovery proportional to what is at stake in a given case, truncating deadlines, and requiring earlier and more active judicial case management.

PATENT LITIGATION***A New Era: Changes to Pleadings Standard in Patent Cases Take Effect******By Sharon M. Porcellio* and Kate Reid†***

An end to “bare-bones” patent pleadings took effect on December 1, 2015, but not before patent plaintiffs rushed to file a record 851 patent cases in November 2015. The

driving force behind this rush to the courthouse was significant amendments to the Federal Rules of Civil Procedure (effective December 1, 2015) which promise to make patent pleading a more laborious proposition for patent plaintiffs.

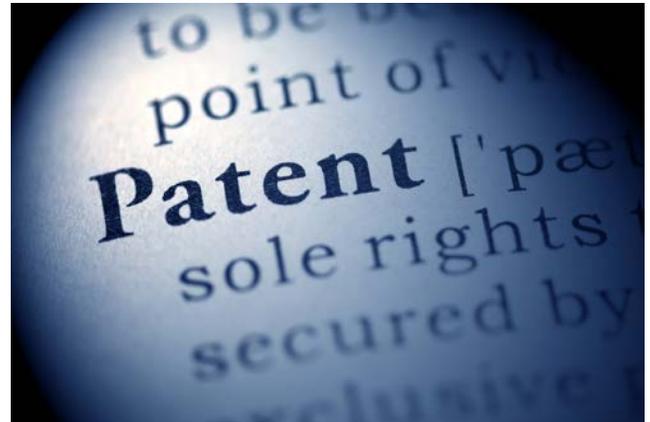
The Elimination of the Form Complaint

The December 1, 2015 amendments to the Federal Rules included the deletion of Rule 84, which previously provided, “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” H.R. Doc. No. 114-33, at 2 (2015). This development is significant for patent litigators because the

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“Appendix” referenced in Rule 84 included Form 18, an example complaint for patent infringement. Form 18 included merely an allegation that the defendant infringed the asserted patent by making, using, or selling “electric motors.” The form did not require the plaintiff to enumerate each specifically accused product, or to particularize which claims in the asserted patent were infringed.



The Federal Circuit previously held that the barebones pleading standard set forth in Form 18 essentially trumped the plausibility pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and that a patent complaint that tracked Form 18 was therefore sufficient to survive a motion to dismiss and to force a patent defendant to bear the burden of onerous discovery. See *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013); *In re Bill of Lading* 681 F.3d 1323, 1334 (Fed. Cir. 2012).

As one court noted, the prior practice under the Form 18 era was for plaintiffs to file a Form 18 cookie-cutter complaint containing little or no factual content, and then, using claim charts, prior art charts, discovery, and motions, to “pare claims that ought not to have been brought or that [could not] withstand careful scrutiny.” *Macronix Int’l Co. v. Spansion Inc.*, No. 13-679, 2014 U.S. Dist. LEXIS 31465, *16-17 (E.D. Va. Mar. 10, 2014).

In light of the abrogation of both Rule 84 and Form 18, the relaxed pleading standard in *In re Bill of Lading* has been nullified. The December 1, 2015

amendments have brought patent pleadings in line with all other federal cases. In order to survive a Rule 12(b)(6) motion to dismiss, two district courts have already recognized that patent plaintiffs now need to satisfy the pleading standard that applies to every other federal complaint: the plausibility standard set forth in *Twombly* and *Iqbal*:

- *Rembrandt Patent Innovations LLC v. Apple, Inc.*, No. C 14-05094, 2015 U.S. Dist. LEXIS 167148, *12 (N.D. Cal. Dec. 13, 2015) (recognizing that *Twombly*'s plausibility standard now governs a challenge to the sufficiency of a patent complaint due to the abrogation of Rule 84 and Form 18)
- *Mayne Pharma Int'l Pty Ltd. v. Merck & Co., Inc.*, No. 15-438-LPS-CJB, 2015 U.S. Dist. LEXIS 162912, n.1 (D. Del. Dec. 3, 2015) (explaining that "[u]nder the new rules, allegations of direct infringement will be subject to the pleading standards established by *Twombly* and *Iqbal*, requiring plaintiffs to demonstrate a 'plausible claim for relief.'")

What is Required to Plead a Case of Patent Infringement under the Federal Rules?

The precise parameters of a "plausible" patent infringement complaint await definition by the courts. The minimal pleading requirements of *Twombly* / *Iqbal* require that a plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." 550 U.S. at 555.

Case law from the Form 18 era suggests that the nature of the patent claim alleged to be infringed may dictate the nature of the facts that must be pled to plausibly plead an infringement claim. For instance, to plausibly allege infringement of a method claim, a plaintiff may now need to plead sufficient facts to support the plausible conclusion that each and every step of the claimed method is

practiced by the accused product. *Ziptronix, Inc. v. Omnivision Techs., Inc.*, No. 10-5525, 2011 U.S. Dist. LEXIS 129275, *10-11 (N.D. Cal. Nov. 7, 2011) ("[a] distinction exists between a patent infringement claim with regard to a product, device, or apparatus, all of which are tangible items, and a claim to a process, which consists of a series of acts or steps.")

Likewise, because a system claim can be directly infringed only by making, using, selling, offering to sell, or importing, a plaintiff may now need to plead facts sufficient to support a plausible conclusion that the defendant makes, uses, sells, or offers to sell or imports a device having all of the elements recited in the claim, arranged in the claimed manner, in order to plausibly plead infringement of a system claim.



Strategic Considerations Going Forward

Given the new "plausibility" standard for patent cases, plaintiffs may want to consider identifying what claims in the asserted patent are alleged to be infringed and how those claims are infringed. Also, patent defendants may want consider taking advantage of opportunities for pre-answer motion practice to "winnow out weak (or even baseless) claims and will protect defendants from the need to prepare defenses for the many claims that inevitably fall by the way side." *Macronix*, 2014 U.S. Dist. LEXIS 31465 at *16-17. One thing is certain – the Federal Rules amendments have ushered in a new era for pleadings in patent infringement cases.

COPYRIGHT***The Diary of Anne Frank:
Lessons in International
Copyright Law******By Dr. Blaine T. Bettinger****

The Diary of Anne Frank is one of the most widely read books in history, having sold more than 30 million copies in 67 languages worldwide since its first publication in 1947. The copyright is held by the Anne Frank Foundation, a Swiss organization established by Anne's father, Otto.

For the past 69 years, Anne Frank has been listed by the Foundation as the sole author of *The Diary*. However, in the fall of 2015 the Anne Frank Foundation announced that Otto Frank was officially a co-author of the book. The Foundation asserted that while Otto Frank did not write any of *The Diary*, he earned co-authorship status due to his initial efforts in editing, merging, and trimming entries from Anne's diary and notebooks to produce the published version of the book in 1947. Indeed, Otto Frank wrote in his prologue to the first edition of *The Diary* that the words were Anne's alone.

Many have suggested that the Foundation's decision to add Otto Frank as co-author is simply a move to extend the copyright protection for the work. Under European copyright law, a work enters the public domain 70 years after death of the author. Since Anne Frank died at age 15 at the Bergen-Belsen concentration camp in 1945, *The Diary* would have entered the public domain on January 1, 2016. With Otto Frank listed as co-author, the first edition of

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The Diary would be protected until January 1, 2051, 70 years after Otto Frank's death in 1980.

To further solidify its copyright claim, the Foundation also argues that there are two versions of *The Diary* that remain under copyright regardless of the status of the original 1947 version. A version called *The Diary of Anne Frank: The Critical Edition*, authored by the Dutch State Institute for War Documentation (NIOD), was published in Europe and around the world in 1986. This new version contained the full text of Anne's diaries for the first time, and included a detailed physical analysis of Anne's penmanship, diaries, and notebooks. Another version described as the "definitive edition" by the Foundation, was published in 1991 with revised text and 25 percent more material from the original diaries. The author of that edition, Mirjam Pressler, transferred her rights to the Foundation. Since Pressler is still living at 75 years old, there will be copyright protection for this edition for a minimum of 70+ years.



A recent ruling in the District Court of Amsterdam may shed some light on the outcome of the copyright dispute. The Anne Frank House Museum in Amsterdam, which is not affiliated with the Foundation, had been working since 2011 on an intricate and detailed online version of *The Diary* with contextual information about the diaries, the Franks, and more. To perform the research to create this online version, and for other research purposes,

the Museum had electronic copies of the diaries made and extracted the text for textual research, including analysis of Anne's development as a writer. The Foundation learned of the reproductions and filed suit against the Museum and the Dutch Royal Academy of Science for copyright infringement. On December 23, 2015, the District Court of Amsterdam ruled that the use of the reproductions for research was not copyright infringement under Dutch law. Also, the Court ruled that Anne's original writings were protected by copyright until January 1, 2037, 50 years after the publication of the NIOD version in 1986, due to a Dutch law that works published posthumously before 1995 retain copyright for 50 years. It is unclear how this ruling affects the first edition of *The Diary*, which contains less than all of Anne's original work.



Despite the Foundation's proclamations and the outcome of the Dutch court case, the original Dutch version of *The Diary* was published online in France by two separate individuals on January 1, 2016. These individuals, one of which is French parliament member Isabelle Attard, assert that the Anne Frank Foundation is focused only on retaining copyright for financial gain, and that despite the Foundation's efforts the original Dutch version of *The Diary* is in fact firmly within the public domain. Given the enormous financial incentive to the Foundation to retain copyright—it has reported as much as \$1.5 million in yearly donations to charities—the authorship issue is likely to be litigated.

In the U.S., however, the outcome of the authorship issue will have no effect on the copyright term of

The Diary. The book first published in the U.S. in 1952, and works first published during that period are protected for 95 years from first publication as long as the copyright was renewed after 28 years. As a result the book will automatically enter the public domain in the United States in 2047.

What Are the Implications of this Dispute?

The dispute over *The Diary's* copyright term illustrates several important aspects of copyright law. While patent term may differ by just a few years from one country to the next, copyright protection can vary by several decades depending on country. For example, although *The Diary* was published in the U.S. just five years after the first edition was published in Europe, the copyright term would have been 30 years longer in the U.S. prior to the addition of Otto Frank as author.

Additionally, the dispute demonstrates that authorship, like inventorship, cannot be achieved by agreement or proclamation. An individual cannot be added to a work as a co-author solely to extend the copyright term. The Anne Frank Foundation will undoubtedly face an uphill battle proving that Otto Frank is the co-author of a work that omitted his name for the past 68 years.

The case is also one of the best examples of the modern struggle between adequately protecting the rights of the author versus encouraging creativity and the public interest. The Anne Frank Foundation has an interest in extending the monopoly granted to Anne and collecting licensing fees, money that is distributed to charities around the world. In contrast, the Anne Frank Museum has plans for an elaborate and free online version of *The Diary* which could potentially introduce millions of people to the work in entirely new ways, but this version will remain hidden if the copyright term is extended.

There is no question that Anne's writings will continue to inspire readers for generations to come. What remains to be decided, however, is how long those readers must pay for that privilege.

TRADEMARKS***The Federal Circuit Finds Prohibition on “Disparaging” Trademarks Unconstitutional****By Jonathan Gray**

On July 8, 2015, a U.S. District Court judge made headlines when he affirmed the U.S. Patent and Trademark Office's (USPTO) cancellation of the Washington Redskins' team name for being disparaging to Native Americans. This decision only marked the most

recent salvo in the battle against the NFL team's name that has marched along since 1992, and has included two cases before the USPTO, at least two federal decisions court decisions, and a concerted lobbying effort for federal legislation. Indeed, with the Washington Redskins' considerable resources, the battle is showing no signs of slowing: the NFL team has appealed to the 4th Circuit.

But a recent decision may impact the pending 4th Circuit decision: the Federal Circuit struck down the section of the trademark law that forbids “disparaging” marks. Specifically, the court held that §2(a) of the Lanham Act violates the First Amendment's right of free speech. The section in question provides that trademarks may be refused registration if they “disparage... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute” (emphasis added). This section has provided the legal basis for the refusal of a myriad of marks that implicate various religions, cultures, and people.

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In re Tam and §2(a)

Simon Shaio Tam is the front man for the Asian-American dance-rock band The Slants. In 2011, Tam's application for registration of the mark THE SLANTS was refused under §2(a) for being disparaging “to persons of Asian descent.” Specifically, the USPTO explained that the term had “a long history of being used to deride and mock a physical feature” of people of Asian descent. After the refusal was affirmed by the Trademark Trial and Appeal Board (TTAB), Tam appealed to the Federal Circuit, arguing: (1) that the TTAB's decision was incorrect, and (2) that §2(a) was unconstitutional for violating the First Amendment.



On first pass, the Federal Circuit affirmed the TTAB's holding—ruling that THE SLANTS was properly refused under §2(a)—and dismissed any of the appellant's arguments that §2(a) violated the First Amendment. However, in view of the court's aging precedent, and the significance of the issue, the court subsequently ordered a rehearing *en banc*, and asked the parties to file briefs on whether the “the bar on registration of disparaging marks in 15 U.S.C. §1052(a) violate[s] the First Amendment.”

In a lengthy *en banc* decision, the Federal Circuit held §2(a) to be unconstitutional on its face. Writing for the majority, Circuit Judge Moore reasoned that §2(a) of the Lanham Act amounted to content-based regulation of speech and thus was unconstitutional unless the government could show that the “law is narrowly tailored to serve compelling state

interests.” The Federal Circuit explained that “when the government refuses to register a mark under §2(a), it does so because it disapproves of the message the speaker conveys by the mark.” Thus, because the government regulates the speech based on the conveyed message, the refusal of a registration amounts to discrimination based on viewpoint. With this in mind, the Federal Circuit concluded that the government had failed to proffer “a compelling state interest,” and therefore §2(a) failed constitutional muster.



In reaching its conclusion, the Federal Circuit brushed off the government’s arguments that withholding a trademark registration does not prohibit any form of free speech; rather, Tam would still be entirely free to use the mark. This argument, notably, tracks the reasoning that the Federal Circuit enunciated when it originally addressed this issue in 1981 in *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981), where the court stated: “it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed.” *McGinley*, 660 F.2d at 484. But marking a clean break with the prior decision, the Federal Circuit neatly disposed of this view, holding that the denial of a federal trademark registration, while not prohibiting speech, unconstitutionally burdens free speech as the “denial of [the benefits of registration] creates a serious disincentive to adopt a mark which the government may deem offensive or disparaging.”

The Federal Circuit also dispensed with the government’s other arguments. In particular, the government argued that a federal registration of a mark converts the underlying speech into a form of government speech—rather than private speech—which the government can control without implicating the First Amendment. The Federal Circuit found this argument to be meritless, stating that: “When the government registers a trademark, the only message it conveys is that a mark is registered.” Further, the Federal Circuit noted that the USPTO registers marks that the government cannot say it endorses, such as religious marks, drug-related marks, and crime-related marks. The Federal Circuit also analogized to copyright law, saying that “the public does not associate the copyrighted works of *Fifty Shades of Grey* with the government, neither does the public associate individual trademarks such as THE SLANTS with the government.”

While the Federal Circuit case is not directly binding on the 4th Circuit, it will likely be persuasive. If the 4th Circuit finds §2(a) constitutional, it will form a pronounced circuit-split over the sensitive First Amendment issue—a split that will likely find its way to the Supreme Court for resolution. Indeed, the Supreme Court has recently decided a similar case, finding that the state of Texas had the right the censor offensive specialty license plates, as the plates constituted government, not private, speech. The Supreme Court may see this trademark issue as an opportunity to refine the line between private and government speech. But in the meantime, while far from settled, *In re Tam* may pave the way for the registration of a host of marks that were previously refused, and may give the Washington Redskins hope in their upcoming appeal to the 4th Circuit.

Also, it is worthwhile noting that the Federal Circuit narrowed its decision to the disparagement provision in the Lanham Act. Future decisions will determine whether “offensive” or “scandalous” registrations are also unconstitutional, but it is difficult to see a real distinction between the law’s other prohibitions.

NEWS & HIGHLIGHTS***Bond's IP Group Bolstered By Key Additions from Jaeckle Fleischmann & Mugel***

Bond, Schoeneck & King, PLLC is pleased to announce its successful combination with Jaeckle Fleischmann & Mugel, LLP, resulting in a 270-lawyer firm and 52-lawyer office in Buffalo. This makes Bond one of the largest law firms in Buffalo and Upstate New York.

With this combination, Bond's IP Group is bolstered with the additions of:

- **Mitchell J. Banas, Jr. (Member)** – Mitch has extensive experience in complex commercial litigation of all varieties including IP and patent litigation, representing both plaintiffs and defendants. Mitch is admitted to practice before the U.S. Court of Appeals for the Federal and Second Circuit and the U.S. District Courts for the Western, Northern and Southern Districts. He received his B.A., cum laude, from the State University of New York at Fredonia, and his J.D., cum laude, from the State University of New York at Buffalo School of Law.
- **Patrick A. Quinlan (Senior Associate)** – Patrick concentrates his practice in IP law, including patents, trademarks, copyrights and trade secrets. He is a registered patent attorney and has extensive experience prosecuting both patents and trademarks at the United States Patent and Trademark Office. He has worked with established corporations as well as emerging start-ups in a wide spectrum of industries. He received his B.S., cum laude, in Computer Science, M.S. in Computer Science and Engineering, and his J.D. from the State University of New York at Buffalo.

"We are very excited to have Mitch and Patrick joining our IP team," said George McGuire, Chair of Bond's IP Group. "Not only are they top-notch lawyers, but they have a keen understanding of business and IP issues facing companies today."

"With the combination of the well-respected Jaeckle firm, we are now poised to deliver a platform of expanded and more in-depth services to our current and prospective clients," said Daniel Forsyth, co-managing member with Joseph Kubarek of the Bond Buffalo office.

"This combination could not come at a better time as we witness the continuing revitalization taking place in Buffalo and Western New York," Kubarek said. "We are proud to be a full service law firm with a commitment to providing a high level of service and delivering on a value promise, which is exactly what is needed in this economic environment."

About Bond's IP Group – Bond proudly represent IP clients nationwide including Fortune 100 companies, high-tech start-ups, service-oriented businesses, manufacturers, financial institutions, and major universities and research organizations.

