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# **IP & TECHNOLOGY NEWSLETTER**



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*Edited by: Amanda Rosenfield Lippes and Erin S. Phillips*





## **COPYRIGHT**

### **To Interface Literally or Not to Interface Literally? That is the Question**

*By: George R. McGuire<sup>1</sup>*

On October 7, 2020, the Supreme Court heard arguments around a decades long copyright battle between Oracle and Google. Oracle has complained that Google's copying of the Application Programming Interfaces (APIs) to Java when developing its Android software platform for use by developers of apps to be run on the Android mobile operating system constituted mass copyright infringement. From a narrow perspective, the stakes could involve copyrightability of computer code that provides an interface to an application, while from a broader perspective, the case could result in a precedent that defines the scope of copyright law as it relates to computer code, and perhaps more broadly, to expressive works that are exclusively, utilitarian. Here is a sneak peak of the issues and arguments as we all await the Supreme Court's ultimate decision which is expected sometime in early to mid-2021.

#### **Questions Presented**

The case presents the Supreme Court with three basic questions:

1. Whether computer code that provides the interface to an underlying platform is proper subject matter for a copyright.
2. Whether it is fair use for another to use the literal code for the interface.
3. What standard of appellate review should be applied to a jury verdict of fair use.

This article focuses on the first two questions.

The first question stated another way is whether the expression of code that provides the interfaces

<sup>1</sup> George is the chair of Bond's IP & Technology Practice Group and concentrates his practice in all facets of intellectual property law. George is also an adjunct professor at Syracuse University College of Law.

necessary to use an underlying platform merges with the idea of providing the interface. This question revolves around a doctrine referred to as the merger doctrine. The merger doctrine applies when there are so few ways to express a particular idea or ideas, that the idea and the expression are said to merge. This is important because in copyright law, ideas are not protectable (the cliché is that "ideas are free for everyone to use"), while only the expression of the idea is protectable; this is referred to as the "idea-expression dichotomy." Thus, when the idea and expression merge, you are left with something unprotectable from a copyright standpoint.

In regard to the second question of fair use, it involves an exception to an act of infringement. Fair use is an equitable law that requires consideration of the facts as analyzed by balancing four basic factors:

1. The Purpose and Character of the Use;
2. The Nature of the Copyrighted Work;
3. The Amount or Substantiality of the Portion Used; and
4. The Effect of the Use on the Potential Market for or Value of the Work.

None of the four factors is dispositive and there is not a rigid formula that is applied. Rather, the facts must be carefully balanced in an ad hoc manner to reach a conclusion as to whether one's use of another's work is or is not fair.<sup>2</sup>

In its simplest statement of how the issues in this case are shaped, for the first question presented Google argues that for developers who write applications in the Java programming languages, because they are familiar with the various declarations used in Java it did not make sense to rename those declarations, but rather use the declarations that Java was written to have, and if

<sup>2</sup> In his study of fair use, David Nimmer concluded that the four statutory factors are so malleable that "[i]n the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale." David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).



of the parties. The justices and attorneys compared Java to a restaurant menu, a hit song, a football team, an accounting system, instructions for finding a blend of spices in a grocery store, a safecracking manual, and the QWERTY keyboard layout. Whichever metaphor the court thinks is most closely an accurate portrayal of JAVA's interface code will carry the day.

In a metaphor that favored Oracle, Justice Thomas openly opined in equating JAVA to a football team: "Someone could argue that if a team takes your best players, a football team, that the only way that those players could actually perform at a high level is if you give that team your playbook. I don't think anybody would say that is right." Google's attorney responded that the football analogy was missing the point — Oracle wasn't trying to keep "fans" for its sports team, just "prisoners" for its Java SE platform. "Why would Congress want a rule that says: 'okay, these developers are extremely familiar with these commands. They're used to write creative computer programs. Let's just make it as inefficient as possible for them?'" he said. "The only upshot of Oracle's rule that it wants you to adopt is to make computer programming incredibly inefficient so that we have fewer creative computer programs."



The one metaphor that seemed to get the most play was a comparison to a keyboard layout which favored Google's position. "You didn't have to have a QWERTY keyboard on typewriters at the beginning," just like Google could have built code that didn't reference Java, said Justice Stephen Breyer while questioning Oracle's attorney. "But my God, if you let somebody have a copyright on that now, they would control all typewriters, which really has nothing to do with copyright."

## Conclusion

Overall, the questions of the justices lead one to think Google may prevail on fair use, but that interface code may actually be found to have copyright protection. While it seems questionable that the justices grasped the true distinction between APIs and actual code of an app, the software industry as a whole must now wait with great anticipation of the case's outcome and the future of programming.



## TRADE DRESS Practical Considerations for Federally Registering a 3D Product Configuration

By: Fred J.M. Price<sup>3</sup>

Trade dress is a powerful intellectual property (IP) tool that can be used to protect the distinctive non-functional "look and feel" of a product's design, shape, and/or 3D configuration.<sup>4</sup> Product manufacturers and designers can look to trade dress as a potential supplemental type of IP protection (in addition to patent or copyright protection), or as an alternative type of IP protection (where, for example, a statutory bar prevents an entity from protecting aspects of the subject product through the patent system) for their products.

<sup>3</sup> Fred is a member of Bond's IP & Technology Practice Group. His practice focuses on prosecuting patents and trademarks at the U.S. Patent and Trademark Office and registering copyrights with the U.S. Copyright Office. Fred also represents clients in patent, trademark and copyright litigation matters in federal district court and before the U.S. International Trade Commission (ITC). Fred also represents clients in Uniform Domain-Name Dispute Resolution Policy (UDRP) proceedings and in trademark opposition and cancellation proceedings.

<sup>4</sup> The U.S. Supreme Court recognized the definition of trade dress as including the "total image and overall appearance" of a product "and may include features such as size, shape, color or color combinations, texture, graphics." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992).

Trade dress is a subcategory of trademark law<sup>5</sup>, and thus is registrable at the U.S. Patent and Trademark Office (USPTO). Examples of 3D configuration trade dress registrations include:

- U.S. Reg. No. 5067689; trade dress description - design of a sole edge including longitudinal ribbing, and a dark color band over a light color; example product follows:



- U.S. Reg. No. 6026577; trade dress description - three-dimensional configuration of a figure-eight-shaped razor handle; example product follows:



- U.S. Reg. No. 6149775; trade dress description - three-dimensional configuration of the paneling of a bomba barrel drum shell; example product follows:



<sup>5</sup> “Trade dress constitutes a ‘symbol’ or ‘device’ within the meaning of §2 of the Trademark Act” (providing that “[t]he term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof – (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”). TMEP § 1202.

A U.S. trade dress registration provides a registrant with the right to prevent others from using in the U.S. and/or importing into the U.S.<sup>6</sup> a confusingly similar trade dress design in conjunction with the same or similar goods, and should prevent federal registration by others of the same. This right is potentially unlimited in time as long as the design meets certain requirements including consistent and continuous use, and periodic USPTO renewal fees are paid.

Requirements of trade dress registration include (1) non-functionality and (2) distinctiveness of the particular product configuration/design sought to be registered.

### Non-Functionality

If the trade dress sought to be registered is “essential to the use or purpose of the article or if it affects the cost or quality of the article,” the trade dress is deemed functional and not registrable.<sup>7</sup> Functionality is determined based on consideration of one or more of the following factors:

1. the existence of a utility patent that discloses the utilitarian advantages of the design sought to be registered;
2. advertising by the applicant that touts the utilitarian advantages of the design;
3. facts pertaining to the availability of alternative designs; and
4. facts pertaining to whether the design results from a comparatively simple or inexpensive method of manufacture.

Supporting evidence is key in a functionality determination. If the examining attorney believes that the applied for trade dress may be functional, he/she will perform a search and may even request information from the applicant to support such a finding. Very strong and often determinative evidence of functionality includes when the product

<sup>6</sup> Principal Register registrations only.

<sup>7</sup> The main policy behind the functionality doctrine is to maintain proper separation between trademark law and patent law, which provides the opportunity for a limited-duration monopoly covering utilitarian product features.

configuration/design sought to be protected by a federal trade dress registration is part of a utility patent application that describes or illustrates the utilitarian nature and/or functional advantages of the configuration (the configuration does not need to be claimed for a functional determination to be made). Another strong piece of evidence weighing in favor of a functionality determination includes the existence of applicant advertising promoting the utilitarian nature and/or functional advantages of the configuration, i.e., the particular product configuration allows for better performance of the product. Applicant should determine whether evidence of either of these functionality supporting factors exist prior to seeking federal trade dress protection, and if either does, a business decision may need to be made against filing.



If such evidence supporting a functionality decision does not exist, or there are reasonable arguments against the weight of such evidence (e.g., the product configuration is illustrated in a patent application, but is an incidental, arbitrary or non-essential feature), Applicant should identify and gather evidence weighing against a finding of functionality prior to filing a federal trade dress application. This evidence can include, for example, the existence of a design patent directed to the features sought to be protected by trade dress, as the subject matter of a design patent is directed to ornamental and non-functional product features. Evidence weighing against a finding of functionality can also include showing the existence of alternative designs that are functionally equivalent and not more difficult or costly to manufacture or install (as may be appropriate). For example, regarding U.S. Reg. No. 6026577 referenced above, consider the multitude of existing razor

handle shapes including cylindrical with a constant diameter, cylindrical with a diameter that narrows at the neck, and elongated with at least one planar surface.

### Distinctiveness

In order to procure a registration on the Principal Register, an applicant must also show that the product configuration/design sought to be protected by a federal trade dress registration has acquired distinctiveness (i.e., consumers think source of the product first rather than the product itself when they see the product configuration/design).<sup>8</sup> Acquired distinctiveness can be supported by evidence of one or more of the following factors:

1. advertising expenditures
2. sales success
3. length and exclusivity of use
4. unsolicited media coverage
5. consumer studies (linking the product configuration/design to the source)

Importantly, the evidence submitted must have a nexus to the particular product configuration/design sought to be protected by a federal trade dress registration.

An applicant may be able to meet the acquired distinctiveness requirement if the product configuration/design has been exclusively and continuously used by applicant for at least five years prior to the filing date of the application. A statement can be made by applicant regarding the same during the initial application process and be supported by a signed declaration. However, other supporting evidence is often required to meet

<sup>8</sup> “To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005). The acquired distinctiveness requirement furthers a main function of trademark law, which is to be used as a tool to fairly distinguish the goods of one manufacturer from another.

the burden of showing acquired distinctiveness. Applicant should be prepared to at least provide advertising and sales numbers, and advertising examples (print and online, if they exist, including website and social media) prominently highlighting, focusing and directing consumers (in words and/or appearance) to the unique product configuration/design. This evidence can be supported by an employee declaration with knowledge of the same. Declarations from multiple consumers of the product providing that when they see the particular product configuration/design they think applicant as the source can also be very helpful in showing acquired distinctiveness.

Failure to show acquired distinctiveness to a trademark examining attorney at the USPTO may not prevent federal registration of the subject trade dress. Registration, however, will need to be sought on the Supplemental Register. The Supplemental Register does not provide the full benefit of registration on the Principal Register including the presumption of validity, ownership and exclusive rights to use. However, benefits of registration on the Supplemental Register include the right to bring a trade dress infringement lawsuit in federal court; ideally prevents registration of confusingly similar trade dress; can act as a deterrent to competitors from using a confusingly similar trade dress, as the registration is part of a publicly searchable federal trademark database; and provides support for a claim of acquired distinctiveness and reapplication on the Principal Register after five years of registration on the Supplemental Register.



## TRADEMARK

### Book it as Protectable: The Supreme Court Holds **BOOKING.COM** is a Protectable and Registerable Trademark

By: *George McGuire and  
Lacey Miller<sup>9</sup>*

On May 4, 2020, the Supreme Court conducted its first ever oral argument over the phone. Then on June 30, 2020, in a nearly unanimous opinion, the Supreme

Court ruled that **BOOKING.COM** is not generic for online hotel reservation services and is protectable under the Lanham Act. The basic logic underlying the holding is that consumers do not view the term with its inclusion of .COM as a generic phrase for online hotel reservation services, but rather as an indicator of a sole source of such services. Important to the Court's holding is that only one company can own any particular domain name and thus as a matter of fact there can be only one company offering goods or services under the domain name **BOOKING.COM**.

#### History of the Case

The Patent and Trademark Office (Trademark Office) Examining Attorney refused registration of four different marks containing the term **BOOKING.COM** on the basis of the term being generic for online hotel reservation services. This determination was affirmed by the Trademark Trial and Appeal Board. The applicant then appealed to the U.S. District Court for the Eastern District of Virginia where it introduced surveys as evidence that consumers do not perceive **BOOKING.COM** to refer to an entire class of goods. Relying heavily on this evidence, the District Court concluded the term is descriptive, not generic, and has achieved secondary meaning such that it is protectable as a

<sup>9</sup> Lacey is an associate of Bond's IP & Technology Practice Group and focuses her practice on preparing and prosecuting patent, trademark, and copyright applications, and advising clients in intellectual property issues in litigation.



trademark under the Lanham Act. The Trademark Office appealed only the determination that the mark was not generic to the Court of Appeals for the Fourth Circuit. The Trademark Office did not appeal the determination that consumer-perception evidence gave the mark the requisite secondary meaning. The Fourth Circuit affirmed the District Court. Of note, the Fourth Circuit rejected the Trademark Office's seemingly bright-line rule that a rule that combining a generic term with .COM yields a generic composite. The appeal to the Supreme Court followed.



## Background

Generic terms are those terms that are commonly used to identify particular goods or services. These terms cannot be federally registered as a trademark or protected under the Lanham Act. Descriptive terms are those that describe a quality or characteristic of the goods or services but are not the generic term for the goods or services. Such terms can only be protected upon a showing that the term has gained secondary meaning in the perception of consumers as symbolizing a single source of origin of the goods or services.

With some rare exceptions, the Trademark Office has urged a rule of refusing registration to “generic.com” marks. A “generic.com” is a mark that combines a generic term for a class of goods or services with a generic internet suffix, such as “.com.” For example, a company that sells sneakers under the domain SNEAKER.COM

would, under the Trademark Office rule, be refused registration of the term SNEAKER.COM on the basis of it being generic.

In setting and adhering to this policy, the Trademark Office relied upon the pre-Lanham Act precedent set in a 1888 Supreme Court case, *Goodyear’s India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, that a generic corporate designation added to a generic term does not confer trademark eligibility. In *Goodyear*, the Court held that “Goodyear Rubber Company” was not “capable of exclusive appropriation.” Standing alone, the term “Goodyear Rubber” could not serve as a trademark because it referred, in those days, to “well-known classes of goods produced by the process known as Goodyear’s invention” (i.e., rubber). “[A]ddition of the word ‘Company’” supplied no protectable meaning, the Court concluded, because adding “Company” “only indicates that parties have formed an association or partnership to deal in such goods.” Permitting exclusive rights in “Goodyear Rubber Company” (or “Wine Company, Cotton Company, or Grain Company”), the Court explained, would tread on the right of all persons “to deal in such articles, and to publish the fact to the world.”

“Generic.com,” the Trademark Office maintained, is like “Generic Company” and is therefore ineligible for trademark protection, let alone federal registration. According to the Office, adding “.com” to a generic term—like adding “Company”—“conveys no additional meaning that would distinguish [one provider’s] services from those of other providers.” This is also the position of the lone dissenting judge in this case.

The reasoning was deemed faulty for two reasons. First, a “generic.com” term might also convey to consumers a source-identifying characteristic: an association with a particular website. As the Trademark Office (and the dissent) acknowledged, only one entity can occupy a particular Internet domain name at a time, so “[a] consumer who is familiar with that aspect of the domain-name system can infer that BOOKING.COM refers to some specific entity.”

Second, the Trademark Office understands *Goodyear* to hold that “Generic Company” terms “are ineligible for trademark protection as a matter of law” regardless of how “consumers would understand” the term. However, whether a term is generic depends on its meaning to consumers. That bedrock principle of the Lanham Act is incompatible with an unyielding legal rule that entirely disregards consumer perception. Instead, *Goodyear* reflects a more modest principle harmonious with Congress’ subsequent enactment: a compound of generic elements is generic if the meaning of the whole is no greater than the sum of its parts.

While the Court rejects the rule proffered by the Trademark Office that “generic.com” terms are generic and not registerable, the Court does not embrace a rule automatically classifying such terms as not generic. Whether any given “generic.com” term is generic depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class. Consumer surveys, dictionaries, usage by the mark owner and competitors, and any other evidence showing consumer perception of the term at issue is useful evidence as to how consumers perceive the mark in question. Thus, while the Court’s holding is helpful to owners of domain names embodied as *GENERIC.COM*, it is not automatic that the term is protectable – the mark still needs to be proven to be perceived as a mark by a consumer.

The Trademark Office also stated a concern over anticompetitive use of a federally protected mark such as *BOOKING.COM*. The Court, however, dismissed this concern as being handled by various anticompetitive doctrines and being no different than what exists already with regard to descriptive marks. Not only does trademark infringement law require a showing that consumers are likely to become confused as to the source of origin, the doctrine of classic fair use permits uses of anyone who uses a descriptive term, “fairly and

in good faith” and “otherwise than as a mark,” merely to describe her own goods. The scope of protection for descriptive “generic.com” marks is limited, a fact that the Applicant recognized. Thus, the trademark laws are not of such monopolistic breadth to prevent uses of terms that either do not cause confusion or are used in a non-trademark sense to describe one’s goods and services. The Court went on to reason that the existence of competitive advantages does not disqualify a mark for federal registration.



## Conclusion

In sum, the *BOOKING.COM* decision has given hope to holders of domain names embodying the generic term of the goods or services offered on the website followed by a common internet-domain suffix, such as *.com*, when the term is used as a trademark and the evidence shows consumers perceive the term as a source identifier. So, while it is not the case that marks embodied in the form “generic.com” will automatically be protected and registerable, when the proper evidence is marshalled and presented, such terms should be not be refused on the basis of being generic or merely descriptive, and should be protectable and registerable, subject to the other requisite conditions being met.

### Concurrence (Justice Sotomayor):

Justice Sotomayor, a former IP litigator, agreed with the majority that there should not be a *per se* rule against the registration of “generic.com,” while also acknowledging the issues with consumer survey evidence that the dissent raised. She concluded by stating that even though not appealed by the Trademark Office, the determination by the District Court that consumer-perception evidence gave the mark the requisite secondary meaning may have been in error.

### Dissent (Justice Breyer):

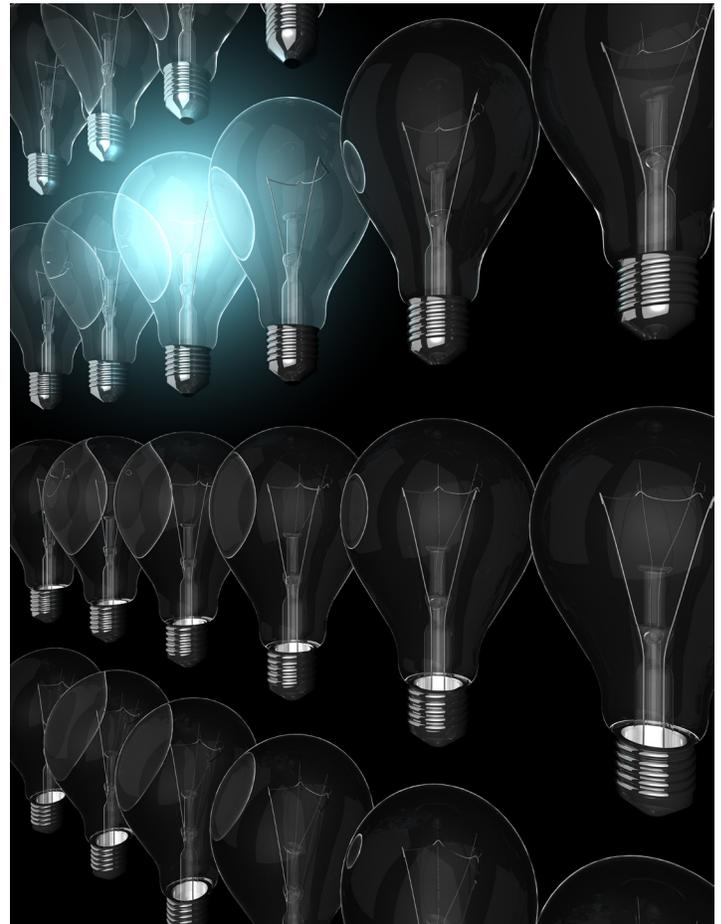
In a lone vote of dissent, Justice Breyer took the stance that BOOKING.COM is generic on its face, and thus should not be eligible for trademark protection, reasoning that the majority’s holding is inconsistent with trademark policy and principles.

Justice Breyer was not persuaded that the exclusivity of a domain name or an association with a particular user can render a generic term non-generic. He disagreed that this case should be distinguished from *Goodyear*, concluding that adding “.com” is the same as adding a corporate designation to a generic term, as both result in no more meaning than its constituent parts.

Further, he is of the opinion that survey evidence “has limited probative value in this context.” A generic term can achieve an association with a single source from money invested into securing this association or a period of exclusivity in the marketplace. He raised specific concerns with the survey conducted in this case. The results showed that a majority of participants believed BOOKING.COM was a brand name, while at the same time believing WASHINGMACHINE.COM was generic. As WASHINGMACHINE.COM is not related to any

company and it is not inherently more generic than BOOKING.COM, the results are likely due to the participants having heard of BOOKING.COM through advertising or otherwise.

Finally, Justice Breyer addressed his concern that granting federal registration to “generic.com” marks “threatens serious anticompetitive consequences.” “Generic.com” marks are easier to remember, easier to find, immediately convey the nature of the business, and can create an authoritative and trustworthy impression. Beyond the advantages already granted to the respondent by the exclusivity of the domain, federal registration of such marks would further grant the right to threaten trademark lawsuits against competitors using similar domains.



## NEWS & HIGHLIGHTS

### Honors:



Bond, Schoeneck & King is pleased to announce that member Jessica Copeland has been named to the 2020 Buffalo Business First 40 Under 40 class. Jessica is the co-chair of the firm's cybersecurity and data privacy practice. Jessica was also recently honored on Buffalo Business First's 2020 Legal Elite of Western New York list.

Bond, Schoeneck & King is also pleased to announce that seven of the lawyers in its intellectual property practice have been recognized by leading legal publications. Two are recognized by *Best Lawyers in America*®, two as *Super Lawyers*® and four as *Super Lawyers Rising Stars*®.

Bond attorneys receiving recognition in their respective cities and fields are as follows:

### Buffalo:



Jeremy P. Oczeck: *Best Lawyers in America*; *Super Lawyers*, Intellectual Property Litigation



Amanda Rosenfield Lippes: *Super Lawyers Rising Star*, Intellectual Property



Cory J. Zorsch: *Super Lawyers Rising Star*, Intellectual Property

### Syracuse:



Blaine T. Bettinger: *Super Lawyers Rising Star*, Intellectual Property



George R. McGuire: *Best Lawyers in America*; *Super Lawyers*, Intellectual Property



Erin S. Phillips: *Super Lawyers Rising Star*, Intellectual Property



Fred J.M. Price: *Super Lawyers*, Intellectual Property

*Best Lawyers* compiles its lists of outstanding attorneys through peer-review surveys in which thousands of leading lawyers confidentially evaluate their peers for their abilities, professionalism and integrity.

*Super Lawyers* magazine lists New York's top lawyers who have been chosen by their peers and through the independent research of Law & Politics magazine. Law & Politics, which performs the polling, research and selection of attorneys to be included in *Super Lawyers* magazine, identifies lawyers who have attained a high degree of peer recognition and professional achievement.

### Past Events:

Bond, Schoeneck & King was a sponsor of the 2020 IP Strategy Summit: Boston (October 15, 2020). Jeremy Oczeck, Co-Deputy Chair of Bond's Intellectual Property & Technology practice, was a panelist speaking on the topic of "Minimizing the Risk of Costly Patent Litigation."

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