

# 23:3 BERKELEY TECHNOLOGY LAW JOURNAL

Pages  
1009  
to  
1042

Summer  
2008

**Production:** Produced by members of the *Berkeley Technology Law Journal*. All editing and layout is done using Microsoft Word.

**Printer:** Joe Christensen, Inc., Lincoln, Nebraska.  
Printed in the U.S.A.  
The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Library Materials, ANSI Z39.48—1984.

**Copyright © 2008 Regents of the University of California.**  
All Rights Reserved.

*Berkeley Technology Law Journal*  
University of California, Berkeley  
Boalt Hall School of Law  
587 Simon Hall  
Berkeley, California 94720-7200  
(510) 643-6454 (Phone)  
(510) 643-6816 (Fax)  
[btlj@law.berkeley.edu](mailto:btlj@law.berkeley.edu)  
[www.btlj.org](http://www.btlj.org)

# BERKELEY TECHNOLOGY LAW JOURNAL

---

VOLUME 23

NUMBER 3

SUMMER 2008

## TABLE OF CONTENTS

### SYMPOSIUM: INTELLECTUAL PROPERTY AND ENTREPRENEURSHIP

#### ARTICLES

- THE ROLE OF PATENT LAW IN KNOWLEDGE CODIFICATION ..... 1009  
By Dan L. Burk
- THE NEED FOR SPEED (AND GRACE): ISSUES IN A FIRST-INVENTOR-TO-FILE WORLD .. 1035  
By Margo A. Bagley
- WHY DO START-UPS PATENT? ..... 1063  
By Stuart J.H. Graham and Ted Sichelman

#### COMMENT

- FIRST AMENDMENT RIGHTS TO PROTECTED EXPRESSION: WHAT ARE THE  
TRADITIONAL CONTOURS OF COPYRIGHT LAW? ..... 1099  
By William McGinty

## SUBSCRIBER INFORMATION

The *Berkeley Technology Law Journal* (ISSN 1086-3818), a continuation of the *High Technology Law Journal* effective Volume 11, is edited by the students of the University of California School of Law, Berkeley (Boalt Hall), and published four times each year (March, June, September, January) by the Regents of the University of California, Berkeley, Journal Publications, School of Law, 311 Boalt Hall, University of California, Berkeley, CA 94720-7200. Periodicals Postage Rate Paid at Berkeley, CA 94704-9998, and at additional mailing offices. POSTMASTER: Send address changes to Journal Publications, 311 Boalt Hall, School of Law, University of California, Berkeley, CA 94720-7200.

**Correspondence.** Address all correspondence regarding subscriptions, address changes, claims for non-receipt, single copies, advertising, and permission to reprint to Journal Publications, 311 Boalt Hall, School of Law, Berkeley, CA 94720-7200; (510) 643-6600; JournalPublications@law.berkeley.edu. Authors: see section entitled Information for Authors.

**Subscriptions.** Annual subscriptions are \$65.00 for individuals, and \$85.00 for organizations. Single issues are \$27.00. Please allow two months for receipt of the first issue. Payment may be made by check, international money order, or credit card (MasterCard/Visa). Domestic claims for non-receipt of issues should be made within 90 days of the month of publication; overseas claims should be made within 180 days. Thereafter, the regular back issue rate (\$27.00) will be charged for replacement. Overseas delivery is not guaranteed.

**Form.** The *Journal* conforms to THE CHICAGO MANUAL OF STYLE (15th ed. 2003) and to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). Please cite this issue of the *Berkeley Technology Law Journal* as 23 BERKELEY TECH. L.J. \_\_\_\_ (2007).

## BTLJ ONLINE

The full text and abstracts of many previously published *Berkeley Technology Law Journal* articles can be found at <http://www.btlj.org>. Our site also contains a cumulative index, general information about the *Journal*, selected materials related to technology law, and links to other related pages. Author, volume, and subject indexes may also be found in Volume 20, Number 4 (2005) of the *Journal*.

# INFORMATION FOR AUTHORS

The Editorial Board of the *Berkeley Technology Law Journal* invites the submission of unsolicited manuscripts. Submissions may include previously unpublished articles, essays, book reviews, case notes, or comments concerning any aspect of the relationship between technology and the law. If any portion of a manuscript has been previously published, the author should so indicate.

**Format.** Authors may submit manuscripts in electronic or hardcopy form, though electronic submissions are strongly encouraged. Electronic submissions should be sent as attachments in Microsoft Word format to [btlj-submissions@law.berkeley.edu](mailto:btlj-submissions@law.berkeley.edu). Authors should submit double-spaced, single-sided manuscripts with generous margins. Authors should retain an exact copy of any material submitted.

**Citations.** All citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). In addition, the author should include his or her credentials, including full name, degrees earned, academic or professional affiliations, and citations to all previously published legal articles.

**Copyrighted Material.** If a manuscript contains any copyrighted table, chart, graph, illustration, photograph, or more than eight lines of text, the author must obtain written permission from the copyright holder for use of the material.

**Mailing Address.** BTLJ only accepts electronic submissions sent as Microsoft Word attachments to [btlj-submissions@law.berkeley.edu](mailto:btlj-submissions@law.berkeley.edu).

# DONORS

The *Berkeley Technology Law Journal* and the Berkeley Center for Law & Technology acknowledge the following generous donors to Boalt Hall's Law and Technology Program:

## Benefactors

COOLEY GODWARD KRONISH LLP	PERKINS COIE LLP AND AFFILIATES
COVINGTON & BURLING LLP	SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES
FENWICK & WEST LLP	WEIL, GOTSHAL & MANGES LLP
KIRKLAND & ELLIS LLP	WHITE & CASE LLP
LATHAM & WATKINS LLP	WILSON, SONSINI, GOODRICH & ROSATI
MORRISON & FOERSTER LLP	WINSTON & STRAWN LLP
ORRICK, HERRINGTON & SUTCLIFFE LLP	

## **Members**

ALSTON + BIRD LLP	HICKMAN, PALERMO, TRUONG & BECKER, LLP
BAKER BOTTS LLP	JONES DAY LLP
BINGHAM McCUTCHEN LLP	KEKER & VAN NEST LLP
DLA PIPER RUDNICK GRAY CARY	KNOBBE MARTENS OLSON & BEAR LLP
DAY CASEBEER MADRID & BATCHELDER LLP	MAYER BROWN LLP
DECHERT LLP	McDERMOTT WILL & EMERY
DREIER STEIN KAHAN BROWNE WOODS GEORGE LLP	MORGAN, LEWIS & BOCKIUS LLP
FINNEGAN HENDERSON FARABOW GARRETT & DUNNER LLP	ROPES & GRAY LLP
FISH & RICHARDSON P.C.	SONNENSCHN NATH & ROSENTHAL LLP
GOODWIN PROCTER LLP	TOWNSEND AND TOWNSEND AND CREW LLP
GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN, LLP	WILMER CUTLER PICKERING HALE AND DORR LLP
HELLER EHRMAN LLP	

## **Patrons**

BAKER & MCKENZIE LLP	O'MELVENY & MYERS LLP
GREENBERG TRAUERIG, LLP	VAN PELT, YI & JAMES LLP

The *Berkeley Technology Law Journal* is a nonprofit organization and welcomes donations. Donors are recognized appropriately for their contributions. For more information, contact the *Berkeley Center for Law and Technology*, Boalt Hall School of Law, 355 Boalt Hall, University of California, Berkeley, California 94720. Telephone: 510-642-8073. E-mail: [bclt@law.berkeley.edu](mailto:bclt@law.berkeley.edu).

# ADVISORY BOARD

ROBERT BARR  
*Executive Director of the Berkeley Center  
for Law & Technology*  
Boalt Hall School of Law  
Berkeley, California

ROBERT C. BERRING, JR.  
*Walter Perry Johnson Professor of Law*  
Boalt Hall School of Law  
Berkeley, California

JESSE H. CHOPER  
*Earl Warren Professor of Public Law*  
Boalt Hall School of Law  
Berkeley, California

PETER S. MENELL  
*Professor of Law and  
Director of the Berkeley Center for  
Law & Technology*  
Boalt Hall School of Law  
Berkeley, California

ROBERT P. MERGES  
*Wilson Sonsini Goodrich & Rosati  
Professor of Law and Director of the  
Berkeley Center for Law & Technology*  
Boalt Hall School of Law  
Berkeley, California

REGIS MCKENNA  
*Chairman and CEO*  
Regis McKenna, Inc.  
Palo Alto, California

DEIRDRE K. MULLIGAN  
*Director of the Samuelson Law,  
Technology & Public Policy Clinic and  
Clinical Professor of Law*  
Boalt Hall School of Law  
Berkeley, California

JAMES POOLEY  
Morrison Foerster LLP  
Palo Alto, California

MATTHEW D. POWERS  
Weil, Gotshal & Manges LLP  
Redwood Shores, California

PAMELA SAMUELSON  
*Professor of Law & Information  
Management and Director of the Berkeley  
Center for Law & Technology*  
Boalt Hall School of Law  
Berkeley, California

LIONEL S. SOBEL  
*Professor of Law and Director of the  
International Entertainment & Media  
Law Summer Program in London,  
England*  
Southwestern University School of Law  
Los Angeles, California

LARRY W. SONSINI  
Wilson Sonsini Goodrich & Rosati  
Palo Alto, California

MICHAEL STERN  
Cooley Godward LLP  
Palo Alto, California

MICHAEL TRAYNOR  
Cooley Godward LLP  
San Francisco, California

THOMAS F. VILLENEUVE  
Gunderson, Dettmer, Stough, Villeneuve,  
Franklin & Hachigian LLP  
Menlo Park, California

# BOARD OF EDITORS

# 2008-2009

---

*Editor-in-Chief*

JUSTIN LEE

*Managing Editor*

CAMERON YAHR

*Senior Article Editors*

BRANDON BROWN  
ASHLEY DOTY

*Senior Executive Editor*

KIM NATIVIDAD

*Senior Annual Review Editors*

TAMAR GUBINS  
DANNY PRATI

*Executive Editors*

---

*Submissions Editors*

AARON EPSTEIN  
JADE HOFFMAN

*Production Editors*

ALICE AHN  
HILLIARY CREELY

*External Relations Editors*

REED MCBRIDE  
NATHAN SALHA

*Bluebook Editors*

ALYSSA KNUTSON  
JENNIFER SAIONZ

*Notes & Comments Editors*

TOLGA GULMEN  
JENNIFER RAAB

*Symposium Editors*

SUNIL BECTOR  
ANDREW DUFRESNE

*Member Relations Editor*

HERSH REDDY

*Annual Review Editors*

ADAM BLANKENHEIMER  
NATHAN KAMESAR

*Web Editor*

AARON BRAUER-RIEKE

*Assistant Managing Editor*

JENNIFER MIDDLETON

*Publishing Editor*

MARGARET ZIEGLER

*Article Editors*

---

ANGELIQUE ABED  
CESAR ALVAREZ  
VARTY DEFTERDERIAN  
JUSTIN HAAN

ELIZABETH IGLESIAS  
ANTHONY JACOBSON  
VIVIAN KIM  
PETER NAGLE  
MICHELE PATTON

MIKE SAWYER  
STEPHEN ULLMER  
JOEL WALLACE  
ROSAMOND XIANG

# BERKELEY CENTER FOR LAW & TECHNOLOGY

---

*Executive Director*

ROBERT BARR

*Faculty Directors*

AMY KAPCZYNSKI  
DEIRDRE MULLIGAN  
HOWARD SHELANSKI '92

PETER MENELL  
PAMELA SAMUELSON

ROBERT MERGES  
PAUL SCHWARTZ  
MOLLY VAN HOUWELING

*Assistant Director*

LOUISE LEE

*Assistant Director*

DAVID GRADY

*Affiliated Faculty and  
Scholars*

---

STEPHEN BARNETT  
ROBERT BERRING '74  
AARON EDLIN  
JOSEPH FARRELL  
RICHARD GILBERT  
BRONWYN HALL  
THOMAS JORDE

MICHAEL KATZ  
DAVID MOWERY  
ERIN MURPHY  
DAVID NIMMER  
DANIEL RUBINFELD  
ANNALEE SAXENIAN  
SUZANNE SCOTCHMER

CARL SHAPIRO  
MARJORIE SHULTZ  
LON SOBEL  
DAVID TEECE  
HAL R. VARIAN  
OLIVER WILLIAMSON  
BRIAN WRIGHT

