30:AR BERKELEY TECHNOLOGY LAW JOURNAL

2015

Pages

385

to

1382

Berkeley Technology Law Journal Volume 30, Number AR Production: Produced by members of the Berkeley Technology Law Journal. All

editing and layout 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 © 2015 Regents of the University of California.

All Rights Reserved.

Berkeley Technology Law Journal University of California School of Law 3 Boalt Hall Berkeley, California 94720-7200 btlj@law.berkeley.edu http://www.btlj.org



BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 30 **ANNUAL REVIEW 2015** TABLE OF CONTENTS **FOREWORD** PATENT LAW STRIKING A BALANCE: THE PURSUIT OF TRANSPARENT PATENT OWNERSHIP EXERCISING A DUTY OF CLARITY: NAUTILUS, INC. V. BIOSIG INSTRUMENTS, INC. Norris Boothe 445 REPORTS OF SECTION 337'S DEATH HAVE BEEN GREATLY EXAGGERATED: THE ITC'S IMPORTANCE IN AN EVOLVING PATENT ENFORCEMENT ENVIRONMENT Joshua D. Furman489 ARE PATENT OWNERS GIVEN A FAIR FIGHT? INVESTIGATING THE AIA TRIAL PRACTICES Ryan J. Gatzemeyer531 STEMMING THE TIDE: STEM CELL INNOVATION IN THE MYRIAD-MAYO-ROSLIN ERA Eneda Hoxha 567 FEE-SHIFTING AND OCTANE FITNESS: AN EMPIRICAL APPROACH TOWARD UNDERSTANDING "EXCEPTIONAL" Hannah Jiam......611 SHINING THE LIMELIGHT ON DIVIDED INFRINGEMENT: EMERGING TECHNOLOGIES AND THE LIABILITY LOOPHOLE THE DEFENSIVE PATENT PLAYBOOK

•	BURDEN OF PROOF IN <i>MEDTRONIC</i> : THE FEDERAL CIRCUIT'S IDIOSYNCRATIC PATENT JURISPRUDENCE VETOED, AGAIN
	Sorin G. Zaharia
•	PATENTABLE SUBJECT MATTER AFTER ALICE—DISTINGUISHING NARROW SOFTWARE PATENTS FROM OVERLY BROAD BUSINESS METHOD PATENTS Ognjen Zivojnovic
C	OPYRIGHT LAW
•	DIGITAL APPLES AND ORANGES: A COMPARATIVE ANALYSIS OF INTERMEDIARY COPYRIGHT LIABILITY IN THE UNITED STATES AND EUROPEAN UNION Ali Amirmahani
•	THE REVOLUTION WAS NOT TELEVISED: EXAMINING COPYRIGHT DOCTRINE AFTER AEREO Dallas T. Bullard
•	Marvel v. Kirby: A Clash of Comic Book Titans in the Work Made for Hire Arena Meredith Annan House
•	PETRELLA V. METRO-GOLDWYN-MAYER, INC.: IS EQUITY IN COPYRIGHT LAW DOWN FOR THE COUNT? Jordyn Ostroff
T	RADEMARK LAW
•	NEW TENTH CIRCUIT'S STANDARDS: COMPETITIVE KEYWORD ADVERTISING AND INITIAL INTEREST CONFUSION IN 1-800 CONTACTS V. LENS. COM John Benton Russell
•	THE LEXMARK TEST FOR FALSE ADVERTISING STANDING: WHEN TWO PRONGS DON'T MAKE A RIGHT Virginia E. Scholtes
	v uguna 1. susones
C	YBERLAW
•	REGULATING THE SHARING ECONOMY Vanessa Katz

•	THE BLOCK IS HOT: A SURVEY OF THE STATE OF BITCOIN REGULATION AND SUGGESTIONS FOR THE FUTURE
	Misha Tsukerman
PR	RIVACY LAW
•	THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES? Ravi Antani 1173
•	CONFLICT AND SOLUTION IN DELAWARE'S FIDUCIARY ACCESS TO DIGITAL ASSETS AND DIGITAL ACCOUNTS ACT Elizabeth Holland Capel
•	CONSTITUTIONAL DRAG RACE: ANONYMOUS ONLINE SPEECH AFTER DIGITAL MUSIC NEWS V. SUPERIOR COURT Thaddeus Houston
•	RILEY V. CALIFORNIA, CAN YOU HEAR THE EQUILIBRIUM NOW? Maya Ziv
SU	JRVEY OF ADDITIONAL IP AND TECHNOLOGY LAW DEVELOPMENTS1317

SUBSCRIBER INFORMATION

The Berkeley Technology Law Journal (ISSN1086-3818), a continuation of the High Technology Law Journal effective Volume 11, is edited by the students of the University of California, Berkeley, School of Law (Boalt Hall) and is published in print three times each year (March, September, December), with a fourth issue published online only (July), by the Regents of the University of California, Berkeley. Periodicals Postage Rate Paid at Berkeley, CA 94704-9998, and at additional mailing offices. POSTMASTER: Send address changes to Journal Publications, University of California, Berkeley Law—Library, LL123 Boalt Hall—South Addition, Berkeley, CA 94720-7210.

Correspondence. Address all correspondence regarding subscriptions, address changes, claims for non-receipt, single copies, advertising, and permission to reprint to Journal Publications, University of California, Berkeley Law—Library, LL123 Boalt Hall—South Addition, Berkeley, CA 94705-7210; (510) 643-6600; JournalPublications@law.berkeley.edu. *Authors*: see section titled Information for Authors.

Subscriptions. Annual subscriptions are \$65.00 for individuals and \$85.00 for organizations. Single issues are \$30.00. 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 (\$30.00) will be charged for replacement. Overseas delivery is not guaranteed.

Form. The text and citations in the *Journal* conform generally to the THE CHICAGO MANUAL OF STYLE (16th ed. 2010) and to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Please cite this issue of the *Berkeley Technology Law Journal* as 30 BERKELEY TECH. L.J. ____ (2015).

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*, the *Bolt*, a collection of short comments and updates about new developments in law and technology written by BTLJ members, and *BTLJ Commentaries*, an exclusively online publication for pieces that are especially timesensitive and shorter than typical law review articles.

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. Submissions are accepted in electronic format through the Express O online submission system. Authors should include a curriculum vitae and resume when submitting articles, including his or her full name, credentials, degrees earned, academic or professional affiliations, and citations to all previously published legal articles. The Express O submission website can be found at http://law.bepress.com/expresso.

Citations. All citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

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.

DONORS

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

Partners

COOLEY LLP

FENWICK & WEST LLP

COVINGTON & BURLING LLP

ORRICK, HERRINGTON & SUTCLIFFE LLP

Benefactors

FISH & RICHARDSON P.C.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP &

KASOWITZ BENSON TORRES & FRIEDMAN LLP

AFFILIATES

KIRKLAND & ELLIS LLP

Weil, Gotshal & Manges

LLP

LATHAM & WATKINS LLP

WHITE & CASE LLP

MCDERMOTT WILL & EMERY

WILMER CUTLER PICKERING HALE AND DORR LLP

MORRISON & FOERSTER LLP

Wilson Sonsini Goodrich & Rosati

WINSTON & STRAWN LLP

Members

ALSTON & BIRD LLP

KEKER & VAN NEST LLP

BAKER BOTTS LLP

KILPATRICK TOWNSEND & STOCKTON LLP

BAKER & MCKENZIE LLP

KNOBBE MARTENS OLSON & BEAR LLP

BINGHAM MCCUTCHEN LLP

DURIE TANGRI LLP

MUNGER, TOLLES & OLSON LLP

GILLIN JACOBSON ELLIS LARSEN & LUCEY

O'MELVENY & MYERS LLP

GTC LAW GROUP LLP &

PAUL HASTINGS LLP

AFFILIATES

ROPES & GRAY LLP

GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN, LLP

SIDLEY AUSTIN LLP

HAYNES AND BOONE, LLP

SIMPSON THACHER & BARTLETT LLP

HICKMAN PALERMO TRUONG BECKER BINGHAM WONG, LLP TURNER BOYD LLP

HOGAN LOVELLS LLP

VAN PELT, YI & JAMES LLP

IRELL & MANELLA LLP

WEAVER AUSTIN VILLENEUVE & SAMPSON, LLP

BERKELEY TECHNOLOGY LAW JOURNAL ANNUAL REVIEW 2015

Senior Faculty Adviser
PETER S. MENELL

Faculty Advisers
CHRIS HOOFNAGLE
PETER S. MENELL

Senior Annual Review Editors
MISA EIRITZ
ALLISON A. SCHMITT

PETER S. MENEL	ALLISON A. SCHMITT					
Production Editors ROXANA GUIDERO JENNA STOKES	Editor-in-Chief JOSEPH D. MORNIN	Annual Review Editors ALLISON CHO LISA PATEL				
Advisers						
DALLAS T. BULLARD	Mark Gray	ALLISON A. SCHMITT				
Misa Eiritz	JEFFREY HIRSCHEY	JENNA STOKES				
S. ZUBIN GAUTAM	Kassandra Maldonado	Jonathan Tamimi				
	JOSEPH D. MORNIN					
Authors						
ALI AMIRMAHANI	Ryan J. Gatzemeyer	JAMES M. RICE				
NATHAN P. ANDERSON	Meredith Annan House	JOHN BENTON RUSSELL				
Ravi Antani	THADDEUS HOUSTON	VIRGINIA E. SCHOLTES				
Norris Boothe	Eneda Hoxha	Misha Tsukerman				
Dallas T. Bullard	Hannah Jiam	SORIN G. ZAHARIA				
ELIZABETH HOLLAND CAPEL	VANESSA KATZ	Maya Ziv				
Joshua D. Furman	Jingyuan Luo	Ognjen Zivojnovic				
	JORDYN OSTROFF					
Contributors						
Norris Boothe	Hannah Jiam	PEGGY NI				
MOLLY CALDWELL	SARAH KWON	JX Quek				
STEPHANIE CHENG	CYNTHIA LEE	SWAROOP POUDEL				
JANICE DOW	STELLA LEE	Talia Schwartz				
Mark Gray	Benjamin Li	SAM SWARTZ				
JENNIFER HICKS	ZACHARY NGUYEN	SORIN ZAHARIA				

BOARD OF EDITORS 2014–2015

Executive Committee								
Editor-in-Chief								
JOSEPH D. MORNIN								
Senior Articles Editors	Senior Executive Editor							
DALLAS BULLARD	SIENA CARUSO							
Maissa Chouraki								
Mark Zambarda								
Senior Annual Review Editors	Senior Online Content							
MISA EIRITZ	Editor							
ALLISON A. SCHMITT	ALI MAHANI							
Editorial Roard								
Production Editors	Bluebook Editors							
ROXANA GUIDERO	DIANA OBRADOVICH							
JENNA STOKES	SYDNEY RYAN							
	DANIELA SPENCER							
Notes & Comments Editors	Symposium Editors							
Pratusha Erraballi	GINNY SCHOLTES							
THADDEUS HOUSTON	EMMIE TRAN							
Web & Technology Editors	External Relations Editor							
Leighanna Mixter	JOHN RUSSELL							
STEVE SWANSON								
Editor	Bolt Editor							
CRSON GOI	LDA CALONGE							
Articles F.ditors								
SIMONE FRIEDLANDER	JING LUO							
Josh Furman	JONATHAN MA							
MEREDITH HOUSE	MATT REAGAN							
NICK HURT	MISHA TSUKERMAN							
VANESSA KATZ	LILY WANG							
	Editor-in-Chief JOSEPH D. MORNIN Senior Articles Editors DALLAS BULLARD MAISSA CHOURAKI MARK ZAMBARDA Senior Annual Review Editors MISA EIRITZ ALLISON A. SCHMITT Editorial Board Production Editors ROXANA GUIDERO JENNA STOKES Notes & Comments Editors PRATUSHA ERRABALLI THADDEUS HOUSTON Web & Technology Editors LEIGHANNA MIXTER STEVE SWANSON E Editor ERSON GOI Articles Editors SIMONE FRIEDLANDER JOSH FURMAN MEREDITH HOUSE NICK HURT							

BTLJ Advisory Board

JIM DEMPSEY

Executive Director of the Berkeley Center for Law & Technology U.C. Berkeley School of Law Berkeley, California

ROBERT C. BERRING, JR.

Walter Perry Johnson Professor of Law
U.C. Berkeley School of Law
Berkeley, California

JESSE H. CHOPER

Earl Warren Professor of Public Law
U.C. Berkeley School of Law

Berkeley, California

PETER S. MENELL

Professor of Law and Faculty Director of the Berkeley Center for Law & Technology U.C. Berkeley School of Law Berkeley, California

ROBERT P. MERGES

Wilson Sonsini Goodrich & Rosati Professor of Law and Faculty Director of the Berkeley Center for Law & Technology U.C. Berkeley School of Law Berkeley, California

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

DEIRDRE K. MULLIGAN

Assistant Professor and Faculty Director of the Berkeley Center for Law and Technology U.C. Berkeley School of Information Berkeley, California

JAMES POOLEY

Deputy Director General of the World Intellectual Property Organization Washington, D.C.

> MATTHEW D. POWERS Tensegrity Law Group, LLP Redwood Shores, California

PAMELA SAMUELSON

Professor of Law & Information and Faculty Director of the Berkeley Center for Law & Technology U.C. Berkeley School of Law Berkeley, California

LIONEL S. SOBEL

Visiting Professor of Law
U.C.L.A. School of Law
Los Angeles, California

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

> MICHAEL STERN Cooley LLP Palo Alto, California

MICHAEL TRAYNOR Cobalt LLP Berkeley, California

THOMAS F. VILLENEUVE Gunderson Dettmer Stough Villeneuve Franklin & Hachigian LLP Redwood City, California

BERKELEY CENTER FOR LAW & TECHNOLOGY 2014-2015

Executive Director JIM DEMPSEY

Faculty Directors

KENNETH A. BAMBERGER ROBERT P. MERGES PETER S. MENELL

DEIRDRE MULLIGAN PAMELA SAMUELSON PAUL SCHWARTZ MOLLY S. VAN HOUWELING

Associate Director LOUISE LEE

CHRIS JAY HOOFNAGLE

Affiliated Faculty TALHA SYED

JENNIFER M. URBAN

In Memoriam **SUZANNE** SCOTCHMER 1950-2014