FOREWORD

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The Annual Review is a yearly publication of the *Berkeley Technology Law Journal* that provides a summary of many of the year's major developments at the intersection of law and technology. Our aim is to provide a valuable resource for judges, policymakers, practitioners, students, and scholars. Each Note provides a primer on a particular area of law, a development in that area of law, and commentary on that development.

The twelve Notes in this issue continue a tradition of covering a wide range of topics. The Notes address developments in patent, copyright, trade secrets, and privacy, as well as technology-focused regulations and legislature.

I. PATENT LAW

Our first Note[1] in this Section examines the inconsistent manner in which district courts across the country treat Patent Trial and Appeal Board (PTAB) claim construction decisions during patent litigation. For greater consistency, this Note proposes a framework for district court analysis of PTAB findings of fact and ultimate claim constructions based on principles of administrative law and standards of appellate review, taking into account the different claim construction standards used in each forum.

The second Note[2] examines recent Federal Circuit cases concerning the patent subject matter eligibility of software. The Note asserts that the Federal Circuit is applying the "technological arts" test within the *Alice* two-step framework.

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1. Niky R. Bagley, Note, *Treatment of PTAB Claim Construction Decisions: Aspiring to Consistency and Predictability*, 32 BERKELEY TECH. L.J. 315 (2017).

2. Joseph Allen Craig, Note, *Deconstructing Wonderland: Making Sense of Software Patents in a Post-*Alice *World*, 32 BERKELEY TECH. L.J. 359 (2017).

The third Note[3] examines patentable subject matter doctrine as applied to biotechnology method claims. Focusing on undue preemption as the policy driver behind subject matter ineligibility, this Note argues that post-*Alice* Federal Circuit decisions reflect a return to the machine-or-transformation test. Such an approach indicates future decisions will diverge from preemption policy, especially in the field of medical diagnostics. Thus, this Note suggests that rather than reverting to a de facto machine-or-transformation test, courts should consider preemption directly as part of the *Alice* step two analysis.

The fourth Note[4] examines the aftermath of the Supreme Court's *Halo Electronics, Inc. v. Pulse Electronics, Inc.*[5] decision, providing a summary of the current state of enhanced damages awards in patent infringement. It also argues for a shift in enhanced damages from a punitive framework towards a utilitarian framework to preserve the balance between patent protection and incentivizing innovation.

II. COPYRIGHT LAW

The Note[6] in this Section evaluates the Ninth Circuit's decision in *DC Comics v. Towle*,[7] where the court employed a new test for its unorthodox copyright doctrine to determine that the Batmobile was a copyrightable fictional character. Analyzing the convoluted history of the doctrine, the Note articulates a set of rationales entitled "stewardship" that justify the court's departure from traditional tenets. The Note, however, finds the framework is problematic when applied to contemporary characters.

III. TRADE SECRET LAW

The Note[8] in this Section analyzes the Defend Trade Secrets Act of 2016, which created a civil cause of action for trade secret misappropriation under federal law. The Note explores the consequences of concurrent

3. Joyce C. Li, Note, *Preemption, Diagnostics, and the Machine-or-Transformation Test: Federal Circuit Refinement of Biotech Method Eligibility*, 32 BERKELEY TECH. L.J. 379 (2017).

4. G.W. Moler, Note, *Balancing Interests Post-Halo: A Proposal for Constitutionally Bounded Enhanced Damages in Patent Infringement*, 32 BERKELEY TECH. L.J. 413 (2017).

5. 136 S. Ct. 1923 (2016).

6. Michael Deamer, Note, DC Comics v. Towle: *Protecting Fictional Characters through Stewardship*, 32 BERKELEY TECH. L.J. 437 (2017).

7. 802 F.3d 1012 (9th Cir. 2015).

8. Brittany S. Bruns, Note, *Criticism of the Defend Trade Secrets Act of 2016: Failure to Preempt*, 32 BERKELEY TECH. L.J. 469 (2017).

federal and state trade secret laws that result from the Defend Trade Secret Act's lack of preemption, and concludes that the Defend Trade Secrets Act should be amended to preempt state and common law trade secret claims.

IV. PRIVACY LAW

The first Note[9] in this Section examines the Supreme Court's decision in *Spokeo, Inc. v. Robins*,[10] which treated privacy-related injury as an "intangible harm," requiring further analysis to determine whether there is standing to sue in federal court. This Note argues that courts should apply a three-step test, developed from post-*Spokeo* decisions, to determine whether an intangible harm is concrete.

The second Note[11] examines the debate over exceptional access to encrypted data in light of the battle between Apple and the FBI. The Note proposes a framework of disruptiveness to inform future encryption policy decisions.

V. REGULATION AND LEGISLATURE

The first Note[12] in this Section analyzes the federal labeling law requiring food manufacturers to disclose if their products are made through bioengineering, either through an in-text or electronic disclosure. The law creates uniformity through preemption, but by allowing electronic disclosure, is also likely to deter consumers from learning if foods contain GMOs. The Note argues, however, that this has the positive effect of protecting consumers from the misconception that GMO foods are unsafe.

The second Note[13] examines the applicability of the Federal Communication Commission's net neutrality rules, specifically the general conduct rule, to the practice of zero rating data. This Note asserts that there is not enough evidence of consumer harm to justify banning the practice, and recommends that the general conduct rule only be applied to cases of zero rating where the government has conducted a thorough analysis of the market, and actual or potential, harm.

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9. Vanessa K. Ing, Note, Spokeo, Inc. v. Robins: *Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L.J. 503 (2017).

10. 134 S. Ct. 1540 (2016).

11. Dustin Taylor Vandenberg, Note, *Encryption Served Three Ways: Disruptiveness as the Key to Exceptional Access*, 32 BERKELEY TECH. L.J. 531 (2017).

12. Jordan James Fraboni, Note, *A Federal GMO Labeling Law: How it Creates Uniformity and Protects Consumers*, 32 BERKELEY TECH. L.J. 563 (2017).

13. Jessica A. Hollis, Note, *Testing the Bounds of Net Neutrality with Zero-Rating Practices*, 32 BERKELEY TECH. L.J. 591 (2017).

The third Note[14] evaluates the recent Federal Aviation Administration Final Rule regarding the operation and certification of small, unmanned aircraft systems from the perspective of a proponent of commercial drone operation, such as Amazon's proposed Prime Air. The Note argues, in light of the development of manned aircraft regulation, that the FAA's drone rules are really a prohibition, rather than useful regulation, of commercial drone use. To remedy this, the Note proposes that the FAA ease the prohibitions and enact rigorous safety standards for commercial drones to accomplish useful integration of drones into the national airspace.

The fourth Note[15] argues that the decision in *ClearCorrect Operating, LLC v. ITC*[16] will have a major impact on the ITC's influence on digital trade. The Note discusses that impact and provides suggestions for how the ITC can adapt to the new standard.

VI. RIGHT OF PUBLICITY

The final Note[17] traces the development of the right of publicity, and describes the policy rationales that uphold said right, demonstrating that celebrities and non-celebrities alike should be able to control the uses of their identities. This Note proceeds to critique the Ninth Circuit's reasoning in *Sarver v. Chartier*[18], a right of publicity case brought by a non-celebrity, and argues that such line of reasoning may jeopardize the future of non-celebrities' right of publicity, at a time when their identities are more vulnerable to exploitation than ever before.

14. Robert Glenn Olsen, Note, *Paperweights: FAA Regulation and the Banishment of Commercial Drones*, 32 BERKELEY TECH. L.J. 621 (2017).

15. Barclay Oudersluys, Note, *Following* ClearCorrect*: A Guidelines for Regulating Digital Trade*, 32 BERKELEY TECH. L.J. 653 (2017).

16. 810 F.3d 1283 (Fed. Cir. 2015).

17. Noa Dreymann, Note, *John Doe's Right of Publicity*, 32 Berkeley Tech. L.J. 673 (2017).

18. Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016).