

BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 17

NUMBER 2

SPRING 2002

TABLE OF CONTENTS

SYMPOSIUM PATENT SYSTEM REFORM

PATENT MISUSE THROUGH THE CAPTURE OF INDUSTRY STANDARDS.....	623
By Janice M. Mueller	
HARMONY AND DIVERSITY IN GLOBAL PATENT LAW	685
By John F. Duffy	
THE RESPONSIBILITY OF THE RULEMAKER: COMPARATIVE APPROACHES TO PATENT ADMINISTRATION REFORM	727
By John R. Thomas	
CARROTS AND STICKS TO CREATE A BETTER PATENT SYSTEM.....	763
By Jay P. Kesan	
STRICT LIABILITY AND ITS ALTERNATIVES IN PATENT LAW	799
By Roger D. Blair & Thomas F. Cotter	
JURY DEMANDS: WHO'S ASKING?.....	847
By Kimberly A. Moore	
SPECIALIZED TRIAL COURTS: CONCENTRATING EXPERTISE ON FACT.....	877
By Arti K. Rai	
PATENT ABOLITIONISM	899
By Mark D. Janis	

17:2 BERKELEY TECHNOLOGY LAW JOURNAL

Patent System Reform
Symposium

2002

Pages
623
to
952

Production: Produced by members of the *Berkeley Technology Law Journal* on PC computers. 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 © 2002 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

BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 17

NUMBER 2

SPRING 2002

TABLE OF CONTENTS

SYMPOSIUM PATENT SYSTEM REFORM

PATENT MISUSE THROUGH THE CAPTURE OF INDUSTRY STANDARDS.....	623
By Janice M. Mueller	
HARMONY AND DIVERSITY IN GLOBAL PATENT LAW	685
By John F. Duffy	
THE RESPONSIBILITY OF THE RULEMAKER: COMPARATIVE APPROACHES TO PATENT ADMINISTRATION REFORM	727
By John R. Thomas	
CARROTS AND STICKS TO CREATE A BETTER PATENT SYSTEM.....	763
By Jay P. Kesan	
STRICT LIABILITY AND ITS ALTERNATIVES IN PATENT LAW	799
By Roger D. Blair & Thomas F. Cotter	
JURY DEMANDS: WHO'S ASKING?.....	847
By Kimberly A. Moore	
SPECIALIZED TRIAL COURTS: CONCENTRATING EXPERTISE ON FACT.....	877
By Arti K. Rai	
PATENT ABOLITIONISM	899
By Mark D. Janis	

DONORS

The *Berkeley Technology Law Journal* acknowledges the following generous donors to Boalt Hall's Law and Technology Program:

Benefactors (\$25,000 and above)

BROBECK, PHLEGER
& HARRISON LLP
Palo Alto, CA

LATHAM & WATKINS
San Francisco, CA

COOLEY GODWARD LLP
San Francisco, CA

MCCUTCHEN, DOYLE, BROWN
& ENERSEN, LLP
Palo Alto, CA

FARELLA BRAUN + MARTEL LLP.
San Francisco, CA

MORRISON & FOERSTER LLP
San Francisco, CA

FENWICK & WEST L.L.P.
Palo Alto, CA

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
Palo Alto, CA

GRAY CARY WARE
& FREIDENRICH, LLP
Palo Alto, CA

WEIL, GOTSHAL & MANGES LLP
Redwood Shores, CA

HELLER EHRMAN WHITE
& MCAULIFFE LLP
San Francisco, CA

WILSON SONSINI GOODRICH
& ROSATI
Palo Alto, CA

Members (\$10,000 to \$24,999)

ALSCHULER GROSSMAN STEIN & KAHAN LLP <i>Los Angeles, CA</i>	KIRKLAND & ELLIS <i>Los Angeles, CA</i>
COVINGTON & BURLING <i>San Francisco, CA</i>	KNOBBE MARTENS OLSON & BEAR LLP <i>Newport Beach, CA</i>
DAY CASEBEER MADRID & BATCHELDER LLP <i>Cupertino, CA</i>	MCDERMOTT, WILL & EMERY <i>Menlo Park, CA</i>
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P. <i>Palo Alto, CA</i>	O'MELVENY & MYERS LLP <i>San Francisco, CA</i>
FISH & RICHARDSON P.C. <i>Menlo Park, CA</i>	ORRICK, HERRINGTON & SUTCLIFFE LLP <i>San Francisco, CA</i>
GIBSON, DUNN & CRUTCHER LLP <i>Palo Alto, CA</i>	PILLSBURY WINTHROP LLP <i>San Francisco, CA</i>
HOWREY SIMON ARNOLD & WHITE, LLP <i>Menlo Park, CA</i>	SHEARMAN & STERLING <i>Menlo Park, CA</i>
KENYON & KENYON <i>San Jose, CA</i>	TOWNSEND AND TOWNSEND AND CREW LLP <i>San Francisco, CA</i>

Patrons (\$5,000 to \$9,999)

IRELL & MANELLA LLP
Los Angeles, CA

KEKER & VAN NEST LLP
San Francisco, CA

Comment Competition Prize Sponsor

COOLEY GODWARD LLP
San Francisco, CA

The *Berkeley Technology Law Journal* is a nonprofit organization and welcomes donations. Donors are recognized appropriately for their contributions. For more information, contact the Development Editor, *Berkeley Technology Law Journal*, Boalt Hall School of Law, 587 Simon Hall, University of California, Berkeley, California 94720, (510) 643-6454, or e-mail btlj@law.berkeley.edu.

ADVISORY BOARD

ROBERT C. BERRING, JR.

*Walter Perry Johnson Professor of Law &
Law Library Director*
Boalt Hall School of Law
Berkeley, California

ROGER BOROVOY

Fish & Richardson P.C.
Menlo Park, California

JESSE H. CHOPER

Earl Warren Professor of Public Law
Boalt Hall School of Law
Berkeley, California

BRIAN C. CUNNINGHAM

Cooley Godward LLP
Palo Alto, California

G. GERVAISE DAVIS III

Davis & Schroeder PC
Monterey, California

REGIS MCKENNA

Chairman and CEO
Regis McKenna, Inc.
Palo Alto, California

ROBERT P. MERGES

*Wilson Sonsini Goodrich & Rosati
Professor of Law & Technology*
Boalt Hall School of Law
Berkeley, California

DIANE WILKINS SAVAGE

Vividence Corp.
San Mateo, California

LARRY W. SONSINI

Wilson Sonsini Goodrich & Rosati
Palo Alto, California

MICHAEL TRAYNOR

Cooley Godward LLP
San Francisco, California

TOM VILLENEUVE

Gunderson, Dettmer, Stough,
Villeneuve, Franklin & Hachigian, LLP
Menlo Park, California

SUBSCRIBER INFORMATION

The *Berkeley Technology Law Journal* (ISSN 1086-3818), a continuation of the *High Technology Law Journal* effective Volume 11, is edited and published three times each year (Spring, Fall, and Annual Review of Law and Technology) by the students of Boalt Hall School of Law, University of California, Berkeley.

Correspondence. Address all correspondence regarding subscriptions, address changes, claims for nonreceipt, single copies, advertising, and permission to reprint to Journals Publications Coordinator, University of California, Berkeley, Boalt Hall School of Law, 588 Simon Hall, Berkeley, California 94720-7200. (510) 643-6600. Authors: See section entitled Information for Authors.

Subscriptions. Annual subscriptions are \$65.00. Institutional subscriptions are \$85.00. 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 nonreceipt 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 text and citations in the *Journal* conform generally to the UNITED STATES GOVERNMENT PRINTING OFFICE STYLE MANUAL (28th ed. 1984) and to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). Please cite this issue of the *Berkeley Technology Law Journal* as 17 BERKELEY TECH. L.J. ____ (2002).

Postmaster: Send address changes to the *Berkeley Technology Law Journal*, University of California, Berkeley, Boalt Hall School of Law, 587 Simon Hall, Berkeley, California 94720-7200.

BTLJ ONLINE

Abstracts of all *Berkeley Technology Law Journal* and *High Technology Law Journal* articles as well as the full text of most articles published in previous issues can be found at <http://www.law.berkeley.edu/journals/btlj>. Our site also contains subject, author and title indexes, general information about the *Journal*, selected materials related to technology law, and links to other related home pages. Subject and author and title indexes may also be found in Volume 10, Number 2 (1995) 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 should submit double-spaced, single-sided manuscripts with generous margins. We regret that submissions cannot be returned. Authors should retain an exact copy of any material submitted. 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@law.berkeley.edu.

Citations. All citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). 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. A photocopy of such written permission should accompany the submission. The Regents of the University of California hold the copyright for material published in the *Journal*, unless otherwise noted.

Mailing Address. Please submit all hardcopy manuscripts to:

Submissions Editor
Berkeley Technology Law Journal
University of California, Berkeley
Boalt Hall School of Law
587 Simon Hall
Berkeley, California 94720
(510) 643-6454 (Phone)

BOARD OF EDITORS

2001-2002

Editor-in-Chief
SONAL N. MEHTA

Managing Editor
SARAH RATCLIFFE

Senior Articles Editors
MARK GEIER
NICK OETTINGER

Senior Executive Editor
CHRISTOPHER J. SCHAFER

Annual Review Editor
HELEN A. CHRISTAKOS

Symposium Editor
NICOLE OZER

Production Editor
DEANNA KWONG

Article Editors

MICHELLE ARMOND
ALICE CHEN
SONGMEE CHOI
JOSEPHINE CHOY

MADDY DEMSKY
KRISTIE HIRSCHENBERGER
PATRICK KELLEY
RAMONA MATEIU

AMIR NAINI
GIL PELES
KRISTI THOMPSON
RAFFI ZEROUNIAN

Executive Editors

J. MANENA BISHOP
RYAN CASAMIQUELA
JOLINA CUARESMA
JOHN JANHUNEN
DAN LEDFORD

ELI LOOTS
DANIELLE PASQUALONE
LAURA QUILTER
DANIEL RASHTIAN
KIRSTEN ROE

TZADDI SMITH
HOLDEN TRIPLET
CHRISTA WORLEY
X. JOANNA WU
LISA ZEPEDA

Annual Review Advisors

MICHAEL FRANZINGER
FRANKLIN GOLDBERG
SABRA-ANNE KELIN

JOSH MAY
BRIAN McDONALD

ANTONIA SEQUEIRA
JONATHAN STERN
JOHN WHITE

MEMBERSHIP

2001-2002

Associate Editors

KEVIN BABIKIAN	DAVID HYMAS	DEAN C. ROWAN
ANIK BANERJEE	MICHELLE KLEY	DENNIS SMITH
WILL DeVRIES	ZHENG LIU	MICHAEL SMITH
PAUL EHRLICH	DAN MARGOLIS	MATTHEW C. STAPLES
KAREN FESSLER	NICK MARTINI	WINSLOW TAUB
DORIT GLOCKNER	JOSHUA MCGUIRE	KERRY TAYLOR
REBECCA HARDIMAN	JEFF MITCHELL	MICHELLE WATTS
CHRIS HAZUKA	RYAN OWENS	JOSEPH WIEDMAN
MELANIE N. HENRY	C. RACHAL PUGH	JIAN XIAO
KELLY HERSHEY	NANCY RAYBURN	TARRA ZYNDA

Members

CARYN ADAMS	AMY HU	ANDREW SHEN
JAYNE AHN	VICKY KANE	MIKE SHIELDS
JUDY AN	GREG KAHN	STEPHEN TODD
ERIC BROXMEYER	MICHELLE KLEY	KASRA TORABI
AARON BURSTEIN	JASON KRAJECER	CHRISTINA TSOU
JENNIFER CONNERS	RUTH KWON	JENNIE WANG
JOBE DANGANAN	LE LAM	AMALIE WEBER
CAMERON DOOLITTLE	REBECCA LUBENS	TIFFANY WEEKS
ASHITA DOSHI	DIANA LUO	MARTHA WINNACKER
KYLE DUKE	MICHELLE MARZAHN	DOROTHY WISNIOWSKI
BENJAMIN DURANSKE*	CARL MERINO	JOANNE WONG
C. ALAN FU	PAUL REYNAGA	LIMIN ZHENG
CHANDRA GARRY	SAM ROGOWAY	JENNIFER ZHOU
CHIA HENG HO	JULIA ROSENTHAL	JEFF ZINSMEISTER
	BHANU SADASIVAN	

* Denotes Recipient of
Outstanding Member
Award