

18:4 BERKELEY TECHNOLOGY LAW JOURNAL

2003

Pages
945
to
1360

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 © 2003 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
www.btlj.org

BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 18

NUMBER 4

FALL 2003

TABLE OF CONTENTS

ARTICLES

- ELECTRONIC EVIDENCE COMPLIANCE—A GUIDE FOR INTERNET SERVICE PROVIDERS.. 945
By The U.S. Internet Service Provider Association
- THE BUSINESS METHOD PATENT MYTH..... 987
By John R. Allison & Emerson H. Tiller
- ENDING PATENT LAW’S WILLFULNESS GAME 1085
By Mark A. Lemley & Ragesh K. Tangri
- THE INFORMATION SEMICOMMONS..... 1127
By Robert A. Heverly
- A RETURN TO LILLIPUT: THE *LICRA V. YAHOO!* CASE AND THE REGULATION OF
ONLINE CONTENT IN THE WORLD MARKET..... 1191
By Marc H. Greenberg
- CYBERSPACE TECHNOLOGICAL STANDARDIZATION: AN INSTITUTIONAL THEORY
RETROSPECTIVE 1259
By Daniel Benoliel
- PATENTS AND PATH DEPENDENCY: A COMMENT ON BURK & LEMLEY 1341
By R. Polk Wagner

DONORS

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

Benefactors (\$25,000 and above)

COOLEY GODWARD LLP
San Francisco, CA

LATHAM & WATKINS
San Francisco, CA

FARELLA BRAUN + MARTEL LLP
San Francisco, CA

MILBANK, TWEED, HADLEY &
MCCLOY LLP
Palo Alto, CA

FENWICK & WEST LLP
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>	MAYER, BROWN, ROWE & MAW <i>Palo Alto, CA</i>
BINGHAM MCCUTCHEN <i>San Francisco, CA</i>	MCDERMOTT, WILL & EMERY <i>Menlo Park, CA</i>
COVINGTON & BURLING <i>San Francisco, CA</i>	MORRISON & FOERSTER LLP <i>San Francisco, CA</i>
DAY CASEBEER MADRID & BATCHELDER LLP <i>Cupertino, CA</i>	O'MELVENY & MYERS LLP <i>San Francisco, CA</i>
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP <i>Palo Alto, CA</i>	ORRICK, HERRINGTON & SUTCLIFFE LLP <i>San Francisco, CA</i>
FISH & RICHARDSON P.C. <i>Redwood City, CA</i>	PILLSBURY WINTHROP LLP <i>San Francisco, CA</i>
GIBSON, DUNN & CRUTCHER LLP <i>Palo Alto, CA</i>	SHEARMAN & STERLING <i>San Francisco, CA</i>
KIRKLAND & ELLIS <i>San Francisco, CA</i>	TOWNSEND AND TOWNSEND AND CREW LLP <i>San Francisco, CA</i>

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

BAKER & MCKENZIE <i>Palo Alto, CA</i>	KENYON & KENYON <i>San Jose, CA</i>
DEWEY BALLANTINE LLP <i>Palo Alto, CA</i>	KNOBBE MARTENS OLSON & BEAR <i>Newport Beach, CA</i>
FISH & NEAVE <i>Palo Alto, CA</i>	MANATT, PHELPS & PHILLIPS LLP <i>Palo Alto, CA</i>
HOWREY SIMON ARNOLD & WHITE LLP <i>Menlo Park, CA</i>	MUNGER, TOLLES & OLSON <i>San Francisco, CA</i>
IRELL & MANELLA LLP <i>Century City, CA</i>	VAN PELT & YI LLP <i>Cupertino, CA</i>
KEKER & VAN NEST LLP <i>San Francisco, CA</i>	

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*, 587 Simon Hall, Boalt Hall School of Law, University of California, Berkeley, California 94720, (510) 643-6454, or e-mail btlj@law.berkeley.edu.

ADVISORY BOARD

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

ROGER BOROVY
Fish & Richardson P.C.
Redwood City, 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 P.C.
Monterey, California

MARK A. LEMLEY
Elizabeth Josslyn Boalt Professor of Law
& Director of Berkeley Center for Law &
Technology
Boalt Hall School of Law
Berkeley, California

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

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

DIANE WILKINS SAVAGE
Cooley Godward LLP
Palo Alto, California

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

MICHAEL TRAYNOR
Cooley Godward LLP
San Francisco, California

THOMAS F. 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 four times each year (Spring, Summer, Fall, and Annual Review of Law and Technology) by the students of Boalt Hall School of Law, University of California, Berkeley. Application to Mail at Periodicals Postage Rate is Pending at Berkeley, California, and at additional mailing offices. POSTMASTER: Send address changes to Journal Publications Coordinator, Boalt Hall School of Law, 421 North Addition, University of California, Berkeley, CA 94720-7200.

Correspondence. Address all correspondence regarding subscriptions, address changes, claims for nonreceipt, single copies, advertising, and permission to reprint to Journal Publications Coordinator, Boalt Hall School of Law, 421 North Addition, 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 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 18 BERKELEY TECH. L.J. ____ (2003).

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.btlj.org>. 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, 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.

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

2003-2004

Editor-in-Chief

TARRA ZYNDA

Managing Editor
MATTHEW C. STAPLES

Senior Article Editors
WENFANG CHEN
MICHELE GUSTAFSON
RYAN OWENS

Senior Executive Editor
AMALIE M. WEBER

Annual Review Editors
AARON BURSTEIN
WILL THOMAS DEVRIES

Submissions Editors
DAVID ALBAN
JEFF DANLEY

Production Editor
TITI NGUYEN

Symposium Editors
SEÁN PATRICK BUTLER
JOSEPH WIEDMAN

Article Editors

STEPHEN BURDICK
ALEX EATON-SALNERS
BRIAN PAUL GEARING
DANIEL HIGGS

MATTHEW HOLOHAN
JAE HONG LEE
JULIETA LERNER

NICK MARTINI
ELIZABETH MILES
MARC SHARP
RUOYU ROY WANG

Executive Editors

RAEHEL GROOM
TERESA HUANG
STEVEN KAM

ALICE KAO
JOE MARRA

KRISTOFFER MAYFIELD
JOSEPH TELTSEER
SVETLANA VAS

Annual Review Advisors

AARON BURSTEIN
WILL THOMAS DEVRIES
KAREN FESSLER

C. ALAN FU
RYAN OWENS
BHANU SADASIVAN

ALBERT SIEBER
MATTHEW C. STAPLES
KATE WILLIAMS

MEMBERSHIP

2003-2004

Submissions Advisory Committee

ERIC BROXMAYER
ANDREA OTTOLIA
JOO-YOUN PARK

SAMUEL ROGOWAY
RICHARD RONALD

SUSAN A. RUSSELL
BRYAN WAHL
FELIX WU

Associate Editors

KARINA ABOLINA
TONY BROWN
MICHELLE CAI
DANIEL CASTRO
CARLOS CERDA

KRISTINA GROENNINGS
CHARLES HUSE
CHERYL KAHN
OLGA V.
KOTLYAREVSKAYA

KENDRA NIELSEN
JOO-YOUN PARK
SHERWIN SIY
FELIX WU
ELIZABETH ZIRKER

Members

DANNY ANDREWS
AMANJIT ARORA
DIANE BARKER
LILY BLUE
JEFFREY BOLES
LARISSA BURFORD
BRIAN W. CARVER*
JANETTE CATRON
CYNTHIA CHEN
JEFF CHENG
PATTY CHENG
YVONNE SHIAO CHIEN
EUGENE CHOO
WES DERRICK
CARRIE DUONG
ANDREA FREEMAN*
ALICIA GAMEZ*
J. RYAN GILFOIL
SERENA GREEN
GALEN HANCOCK
TOMOMI HARKEY

CHERYL KAWEZYA
HUTCHINSON
CAROL JOHNS
ANN L. KIM*
GRACE KIM
CHARLENE KON
ANDREW LEE
ANNA LEE
CHRISTEN LEE
JADE XIAOYU LIN
SUNNY LU
JENNIFER LYNCH
LIWEN MAH
AZRA MEDJEDOVIC*
ESTEBAN MENDOZA
JONATHAN MUKAI
ROBERT MUSSIG
KATIE NOLAN-STEVAUX
GREGORY NOVOTNY
KATHERINE A. OYAMA
AARON PERZANOWSKI

NATHAN PHILLIPS
MIGUEL RUIZ
CHRISTOPHER SANCHEZ
RANGANATH SUDARSHAN
GEMMA SUH
JOCELYN SUM
ADWAIT TALATHI
CHELSEA TANAKA-
DELGADO
NIDHI TANDON
NATALIA THURSTON
ROB VARTABEDIAN
DEREK WALTER
JANE WANG
TARA WHEATLAND*
TINA WONG
JOHNAS WRIGHT
DAVID C. YANG
JUNE YI
LILY ZHANG

*Denotes Recipient of
Outstanding Member Award