

# 20:4 BERKELEY TECHNOLOGY LAW JOURNAL

Pages  
1477  
to  
1925

Fall  
2005

**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 © 2005 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 20

NUMBER 4

FALL 2005

## TABLE OF CONTENTS

### ARTICLES

|  |      |
|--|------|
| A TRANSACTIONAL VIEW OF PROPERTY RIGHTS .....  | 1477 |
| By Robert P. Merges  |      |
| WORTHLESS PATENTS .....  | 1521 |
| By Kimberly A. Moore   |      |
| THE TORT OF NEGLIGENT ENABLEMENT OF CYBERCRIME .....   | 1553 |
| By Michael L. Rustad & Thomas H. Koenig  |      |
| INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE: A PSYCHOLOGICAL<br>APPROACH TO CONFLICTING CLAIMS OF CREATIVITY IN INTERNATIONAL LAW .. | 1613 |
| By Bradford S. Simon   |      |
| PEER-TO-PEER NETWORKS, TECHNOLOGICAL EVOLUTION, AND INTELLECTUAL<br>PROPERTY REVERSE PRIVATE ATTORNEY GENERAL LITIGATION .....           | 1685 |
| By David W. Opperbeck  |      |

### NOTES & COMMENTS COMPETITION WINNER

|   |      |
|---|------|
| THE TAO OF OPEN SOURCE: MINIMUM ACTION FOR MAXIMUM GAIN ..... | 1757 |
| By Matthew D. Satchwell                                       |      |

### CUMULATIVE INDEX

|                     |      |
|---------------------|------|
| AUTHOR INDEX .....  | 1799 |
| VOLUME INDEX .....  | 1835 |
| SUBJECT INDEX ..... | 1867 |

# DONORS

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

## Benefactors

COOLEY GODWARD LLP

DLA PIPER RUDNICK GRAY CARY  
US LLP

FARELLA BRAUN + MARTEL LLP

FENWICK & WEST LLP

LATHAM & WATKINS LLP

ORRICK, HERRINGTON & SUTCLIFFE  
LLP

PILLSBURY WINTHROP SHAW  
PITTMAN LLP

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

WEIL, GOTSHAL & MANGES LLP

WILSON SONSINI GOODRICH &  
ROSATI

## Members

AKIN GUMP STRAUSS HAUER &  
FELD LLP

ALSCHULER GROSSMAN STEIN  
& KAHAN LLP

BAKER BOTTS LLP

BINGHAM MCCUTCHEN LLP

COVINGTON & BURLING

DAVIS POLK & WARDWELL

DAY CASEBEER MADRID  
& BATCHELDER LLP

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER L.L.P.

FISH & RICHARDSON P.C.

HELLER EHRMAN LLP

HOWREY LLP

KIRKLAND & ELLIS

KNOBBE MARTENS OLSON & BEAR  
LLP

MARGER JOHNSON & MCCOLLOM PC

MCDERMOTT, WILL & EMERY

MORGAN, LEWIS & BOCKIUS LLP

MORRISON & FOERSTER LLP

O'MELVENY & MYERS LLP

ROPES & GRAY LLP

TOWNSEND AND TOWNSEND AND  
CREW LLP

WHITE & CASE LLP

VAN PELT, YI & JAMES LLP

## Patrons

|   |  |
|---|--|
| BAKER & MCKENZIE  | HICKMAN PALERMO TRUONG &<br>BECKER LLP |
| DEWEY BALLANTINE LLP  | KEKER & VAN NEST LLP                   |
| GREENBERG TRAURIG LLP   | KENYON & KENYON                        |
| GUNDERSON DETTMER STOUGH<br>VILLENEUVE FRANKLIN &<br>HACHIGIAN, LLP | MILBANK, TWEED, HADLEY &<br>MCCLOY 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 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](mailto:btlj@law.berkeley.edu).

# ADVISORY BOARD

ROBERT BARR  
*Executive Director of 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

ROGER BOROVOY  
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

MARK A. LEMLEY  
*Professor of Law and Faculty Scholar &  
Director of the Stanford Center for Law,  
Science & Technology*  
Stanford Law School  
Palo Alto, California

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

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

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

JAMES POOLEY  
Milbank, Tweed, Hadley & McCloy LLP  
Palo Alto, California

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

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

DIANE WILKINS SAVAGE  
Cooley Godward LLP  
Palo Alto, California

LIONEL S. SOBEL  
*Professor of Law & 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 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 (29th ed. 2000) 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 20 BERKELEY TECH. L.J. \_\_\_\_ (2005).

## BTLJ ONLINE

The full text and abstracts of many *Berkeley Technology Law Journal* and *High Technology Law Journal* articles published in previous issues 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 home pages. Author, volume, and subject indexes may also be found in this issue, 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@law.berkeley.edu](mailto:btlj@law.berkeley.edu). 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.

**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. A photocopy of such written permission should accompany the submission.

**Mailing Address.** BTLJ highly prefers electronic submissions sent as Microsoft Word attachments to [btlj@law.berkeley.edu](mailto:btlj@law.berkeley.edu), but also accepts hardcopy manuscripts sent 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

# 2005-2006

---

*Editor-in-Chief*

TOMOMI HARKEY

*Managing Editor*

LON SORENSEN

*Senior Article Editors*

KATIE NOLAN-STEVAUX  
KATHERINE OYAMA

*Senior Executive Editor*

ANDREA FREEMAN

*Senior Annual Review Editors*

AARON PERZANOWSKI  
TARA WHEATLAND

---

*Submissions Editors*

JAMEEL HARB  
ERIN C. JONES

*Production Editor*

A. H. RAJANI

*Symposium Editors*

DOV GREENBAUM  
MARK LEZAMA

---

*Article Editors*

TIMOTHY P. BEST  
STEPHEN DANG  
CORRIE DRAKULICH  
MATTHEW J. KUYKENDALL

LAURA MASON  
FARBOD MORIDANI  
MICHAEL PASAHOW  
TORI PRAUL  
DAVID SANKER

ALISON WATKINS  
BETHELWEL WILSON  
ANNE WOOD  
ANNA ZICHTERMAN

---

*Executive Editors*

ADRIENNE CHENG  
PAUL FINLAYSON  
GALEN HANCOCK

NARAYAN D. MELGIRI  
YAS RAOUF  
MARTIN WHITE

TASHICA WILLIAMS  
MATTHEW WISE

---

*Annual Review Advisors*

CHARLES C. HUSE  
SUNNY LU  
JONATHAN MUKAI

AARON PERZANOWSKI  
LON SORENSEN  
KATIE NOLAN-STEVAUX

JOCELYN SUM  
DEREK WALTER  
TARA WHEATLAND

# MEMBERSHIP

# 2005-2006

---

## *Associate Editors*

---

DANIEL DOBRYGOWSKI  
TOM FLETCHER  
ALAN GALLOWAY  
SARAH GETTINGS

ROBERT GLUSHKO  
SANDRA HABERNY  
CAROL JOHNS  
EYAD LATIF

WILLIAM NEWMARK  
ANNA TSIFTSOGLU  
VIRGINIA ZAUNBRECHER

---

## *Members*

---

SARA ADIBISEDEH  
JOCELYN BELLONI  
ALICE BODNAR  
ANDREW BRAGIN  
JEREMY BUXBAUM  
CLAIRE CHABAT  
JACOB CHAPMAN  
YUANYUAN CHENG  
JAMES CLAXTON  
LAURA COHEN  
NATE DAVIS  
CATHERINE DUBOC  
JAYNI FOLEY  
DIANA FU  
BLAKE GREENE  
ANDREA GROVES  
ROBERT HAMILTON  
YASER HERRERA  
DANA HOWELLS  
OLIVE HUANG  
DAVID JACKSON  
PUNEET KAKKAR

JOSH KAMZAN  
KIMBERLY KENNEDY  
THOMAS KING  
THOMAS KUA  
JEFFRY KUHN  
JENNIFER LANE  
LIBIO LATIMER  
REBECCA LYNN  
CHIA-CHI LI  
KEVIN MACK  
SAJJAD MATIN  
CHRISTINE MOKHTARIAN  
KRISTY MURPHY  
JOSEPHINE MUTUGU  
SARALA NAGALA  
SHAKTI NARAYAN  
EMILY PROSKINE  
EDUARDO ROCHA  
ADAM ROSENBLUM  
GENEVIEVE ROSLOFF  
LORIANI SANTOS  
MICHAEL SAUNDERS

JASON SAVICH  
DANIEL SCHACHT  
AARON SCHOHN  
MAIREAD SCHWAB  
SARAH SIMMONS  
STEFANI SMITH  
DEANA SOBEL  
JESSE SOLOMON  
M. LEAH SOMOANO  
LEWIS STILLER  
WINSTON SU  
LILA SUBRAMANIAN  
JEFF THOMAS  
MARGARET THOMSON  
NENG-MO (MORRIS) TU  
JULIA WEINERT  
STEPHANIE WELLS  
CHRIS WESTBERG  
NIKI WOODS  
CHRISTOPHER YEH  
ISAAC ZAUR  
KAI ZHU