

21:4 BERKELEY TECHNOLOGY LAW JOURNAL

Pages

1017

to

1214

Fall
2006

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 © 2006 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.boalt.org

BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 21

NUMBER 4

FALL 2006

TABLE OF CONTENTS

ARTICLES

- TERRITORIALITY AND INCENTIVES UNDER THE PATENT LAWS: OVERREACHING
HARMS U.S. ECONOMIC AND TECHNOLOGICAL INTERESTS 1215
By James R. Farrand
- LAW AND THE SCIENCE OF NETWORKS: AN OVERVIEW AND AN APPLICATION TO THE
“PATENT EXPLOSION” 1293
By Katherine J. Strandburg, Gábor Csárdi, Jan Tobochnik, Péter Érdi, & László
Zalányi
- THE SECRET LIFE OF LEGAL DOCTRINE: THE DIVERGENT EVOLUTION OF SECONDARY
LIABILITY IN TRADEMARK AND COPYRIGHT LAW 1363
By Mark Bartholomew & John Tehranian
- DANGEROUS LIAISONS—SOFTWARE COMBINATIONS AS DERIVATIVE WORKS?
DISTRIBUTION, INSTALLATION, AND EXECUTION OF LINKED PROGRAMS UNDER
COPYRIGHT LAW, COMMERCIAL LICENSES, AND THE GPL 1421
By Lothar Determann
- STRIKING OUT “COMPETITIVE BALANCE” IN SPORTS, ANTITRUST, AND
INTELLECTUAL PROPERTY 1499
By Salil K. Mehra and T. Joel Zuercher

NOTES & COMMENTS COMPETITION WINNER

- REVITALIZING THE DOCTRINE OF TRADEMARK MISUSE 1547
By William E. Ridgway

CUMULATIVE INDEX

- AUTHOR INDEX 1589
- VOLUME INDEX --
- SUBJECT INDEX --

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 University of California School of Law, Berkeley (Boalt Hall). 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, 313 Boalt Hall, Boalt Hall School of Law, 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, 313 Boalt Hall, Boalt Hall School of Law, 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 21 BERKELEY TECH. L.J. ____ (2006).

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.boalt.org>. Our site also contains a cumulative index, general information about the *Journal*, selected materials related to technology law, and links to other related pages. Author, volume, and subject indexes may also be found in 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. 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, 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)

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

FARELLA BRAUN + MARTEL LLP

FENWICK & WEST LLP

LATHAM & WATKINS LLP

NIXON PEABODY LLP

ORRICK, HERRINGTON
& SUTCLIFF LLP

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

WEIL, GOTSHAL & MANGES LLP

WILSON SONSINI GOODRICH
& ROSATI PC

Members

AKIN GUMP STRAUSS HAUER & FELD LLP	HOWREY LLP
ALSCHULER GROSSMAN STEIN & KAHAN LLP	JONES DAY KIRKLAND & ELLIS LLP
BAKER BOTTS LLP	KNOBBE, MARTENS, OLSON & BEAR LLP
BINGHAM MCCUTCHEN LLP	MAYER, BROWN, ROWE & MAW LLP
COVINGTON & BURLING	MCDERMOTT, WILL & EMERY
DAVIS POLK & WARDWELL	MORGAN, LEWIS & BOCKIUS LLP
DAY CASEBEER MADRID & BATCHELDER LLP	MORRISON & FOERSTER LLP
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP	O'MELVENY & MYERS LLP
FISH & RICHARDSON P.C.	ROPES & GRAY LLP
GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN LLP	TOWNSEND AND TOWNSEND AND CREW LLP
HELLER EHRMAN LLP	WHITE & CASE LLP

Patrons

BAKER & MCKENZIE	KENYON & KENYON
GREENBERG TRAUIG LLP	MARGER JOHNSON & MCCOLLOM PC
HICKMAN PALERMO TRUONG & BECKER LLP	TRELLIS IP LAW GROUP
KEKER & VAN NEST LLP	VAN PELT, YI & JAMES 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.

ADVISORY BOARD

ROBERT BARR

*Executive Director of the 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

JESSE H. CHOPER

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

PETER S. MENELL

*Professor of Law and
Director of the Berkeley Center for
Law & Technology*
Boalt Hall School of Law
Berkeley, California

ROBERT P. MERGES

*Wilson Sonsini Goodrich & Rosati
Professor of Law and Director of the
Berkeley Center for Law & Technology*
Boalt Hall School of Law
Berkeley, California

REGIS MCKENNA

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

DEIRDRE K. MULLIGAN

*Director of the Samuelson Law,
Technology & Public Policy Clinic and
Clinical Professor of Law*
Boalt Hall School of Law
Berkeley, California

JAMES POOLEY

*Pooley & Oliver
Palo Alto, California*

MATTHEW D. POWERS

Weil, Gotshal & Manges LLP
Redwood Shores, California

PAMELA SAMUELSON

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

LIONEL S. SOBEL

*Professor of Law and 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 STERN

Cooley Godward LLP
PALO ALTO, CALIFORNIA

MICHAEL TRAYNOR

Cooley Godward LLP
San Francisco, California

THOMAS F. VILLENEUVE

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

BOARD OF EDITORS

2006-2007

Editor-in-Chief
CORRIN DRAKULICH

Managing Editor
YAS RAOUF

Senior Article Editors
TIMOTHY P. BEST
ANNA ZICHTERMAN

Senior Executive Editor
TASHICA WILLIAMS

Senior Annual Review Editors
A.H. RAJANI
ALISON WATKINS

Submissions Editors
ALAN GALLOWAY
JEFF THOMAS

Production Editor
LIYING SUN

Symposium Editors
SAJJAD MATIN
SARALA NAGALA

Notes & Comments Editor
DANIEL DOBRYGOWSKI

Article Editors

JAN-MICHAEL COHEN
MICHAEL DAVIS-WILSON
JAYNI FOLEY
SARAH GETTINGS

GALEN HANCOCK
DAVID JACKSON
JEFFREY KUHN
JEREMY MULDER

DEANA SOBEL
WINSTON SU
NIKI WOODS
CHRISTOPHER YEH

Executive Editors

PAUL FINLAYSON
BOBBY GLUSHKO
YASER HERRERA

PUNEET KAKKAR
SHAKTI NARAYAN

LORI SANTOS
NATALIE SKORDILIS
MARGARET THOMSON

MEMBERSHIP

2006-2007

Associate Editors

DANIEL DOBRYGOWSKI
TOM FLETCHER
ALAN GALLOWAY
ROBERT GLUSHKO
JING GU
ERIC HANSON

THOMAS KING
JEFFREY KUHN
JENNIE LEVIN
SHAKTI NARAYAN
JEFF THOMAS

ANNA TSIFTSOGLU
JULIA WEINERT
STEPHANIE WELLS
NIKI WOODS
VIRGINIA ZAUNBRECHER

Members

PARKER ANKRUM
JEREMY BUXBAUM
LAURA COHEN
NATE DAVIS
PAUL FINLAYSON
JAYNI FOLEY
ALICIA GÁMEZ
SARAH GETTINGS
BLAKE GREENE
ANDREA GROVES
SANDY HABERNY
ROBERT HAMILTON
YASER HERRERA
DANA HOWELLS
DAVID JACKSON
CAROL JOHNS
FAITH JONES

PUNEET KAKKAR
JOSH KAMZAN
THOMAS KUA
JENNIFER LANE
KEVIN MACK
KAMILLA MAMEDOVA
SAJJAD MATIN
KRISTY MURPHY
JOSEPHINE MUTUGU
SARALA NAGALA
WILLIAM NEWMARK
JASON RICHARDSON
EDUARDO ROCHA
ADAM ROSENBLUM
LORIANI SANTOS
MICHAEL SAUNDERS
JASON SAVICH
DANIEL SCHACHT

AARON SCHOHN
BOBAK SIAVOSHY
SARAH SIMMONS
NATALIE SKORDILIS
DEANA SOBEL
JESSE SOLOMON
M. LEAH SOMOANO
WINSTON SU
LILA SUBRAMANIAN
DIRAN TASHJIAN
MARGARET THOMSON
MORRIS TU
CECILIA WALSH
CHRIS WESTBERG
CHRISTOPHER YEH
ISSAC ZAUR
KAI ZHU