

Berkeley

[technology law journal]

- 1 **Anticompetitive Innovation and the Quality of Invention**
Alan Devlin & Michael Jacobs
- 55 **Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life**
Joshua A.T. Fairfield
- 117 **Can You See Me Now? Toward Reasonable Standards for Law Enforcement
Access to Location Data That Congress Could Enact**
Stephanie K. Pell & Christopher Soghoian

VOLUME 27
NUMBER 1

20
12

UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
BOALT HALL

Production: Produced by members of the *Berkeley Technology Law Journal*.
All editing and layout 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 © 2012 Regents of the University of California.
All Rights Reserved.

Berkeley Technology Law Journal
University of California
School of Law
3 Boalt Hall
Berkeley, California 94720-7200
btlj@law.berkeley.edu
<http://www.btlj.org>



BERKELEY TECHNOLOGY LAW JOURNAL

VOLUME 27

NUMBER 1

SPRING 2012

TABLE OF CONTENTS

ARTICLES

ANTICOMPETITIVE INNOVATION AND THE QUALITY OF INVENTION.....	1
<i>Alan Devlin & Michael Jacobs</i>	
MIXED REALITY: HOW THE LAWS OF VIRTUAL WORLDS GOVERN EVERYDAY LIFE.....	55
<i>Joshua A.T. Fairfield</i>	
CAN YOU SEE ME NOW? TOWARD REASONABLE STANDARDS FOR LAW ENFORCEMENT ACCESS TO LOCATION DATA THAT CONGRESS COULD ENACT	117
<i>Stephanie K. Pell & Christopher Soghoian</i>	

SUBSCRIBER INFORMATION

The *Berkeley Technology Law Journal* (ISSN1086-3818), a continuation of the *High Technology Law Journal* effective Volume 11, is edited by the students of the University of California, Berkeley School of Law (Boalt Hall) and is published in print three times each year (March, September, December), with a fourth issue published online only (July), by the Regents of the University of California, Berkeley. Periodicals Postage Rate Paid at Berkeley, CA 94704-9998, and at additional mailing offices. POSTMASTER: Send address changes to Journal Publications, University of California, Berkeley Law—Library, LL123 Boalt Hall—South Addition, Berkeley, CA 94720-7210.

Correspondence. Address all correspondence regarding subscriptions, address changes, claims for non-receipt, single copies, advertising, and permission to reprint to Journal Publications, University of California, Berkeley Law—Library, LL123 Boalt Hall—South Addition, Berkeley, CA 94705-7210; (510) 643-6600; JournalPublications@law.berkeley.edu. *Authors:* see section titled Information for Authors.

Subscriptions. Annual subscriptions are \$65.00 for individuals and \$85.00 for organizations. Single issues are \$30.00. 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 non-receipt 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 (\$30.00) will be charged for replacement. Overseas delivery is not guaranteed.

Form. The text and citations in the *Journal* conform generally to the THE CHICAGO MANUAL OF STYLE (16th ed. 2010) and to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Please cite this issue of the *Berkeley Technology Law Journal* as 27 BERKELEY TECH. L.J. ____ (2012).

BTLJ ONLINE

The full text and abstracts of many previously published *Berkeley Technology Law Journal* articles can be found at <http://www.btlj.org>. Our site also contains a cumulative index, general information about the *Journal*, and the Bolt, a collection of short comments and updates about new developments in law and technology written by members of BTLJ.

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. Submissions are accepted in electronic format through the ExpressO online submission system. Authors should include a curriculum vitae and resume when submitting articles, including his or her full name, credentials, degrees earned, academic or professional affiliations, and citations to all previously published legal articles. The ExpressO submission website can be found at <http://law.bepress.com/expresso>.

Citations. All citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

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.

MESSAGE TO SUBSCRIBERS

Welcome to the first issue of Volume 27 of the *Berkeley Technology Law Journal*. With this volume, the Journal continues distribution of the regular Spring, Fall, and Symposium issues but is ceasing subscriber distribution of the Annual Review of Law and Technology. The Spring issue will now begin each volume. The Annual Review, which publishes student-written work surveying recent developments in law and technology, will follow in online format only. Subscribers may always download the current and past Annual Reviews at <http://www.btlj.org> and find them on HeinOnline, LexisNexis, and Westlaw. The Journal will then distribute in print the Fall issue and finish the volume with the Symposium issue, which contains pieces contributed by participants at the annual law and technology Symposium organized jointly by the Berkeley Center for Law and Technology and the Journal and held at the University of California, Berkeley School of Law every spring. With these changes, we look forward to continuing to provide you with timely publication of cutting-edge and influential scholarship in law and technology.

2011–12 Executive Committee
Berkeley Technology Law Journal

DONORS

The *Berkeley Technology Law Journal* and the Berkeley Center for Law & Technology acknowledge the following generous donors to Berkeley Law's Law and Technology Program:

Partners

COOLEY LLP	ORRICK, HERRINGTON & SUTCLIFFE LLP
FENWICK & WEST LLP	

Benefactors

COVINGTON & BURLING LLP	SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES
FISH & RICHARDSON P.C.	WEIL, GOTSHAL & MANGES LLP
KASOWITZ BENSON TORRES & FRIEDMAN LLP	WHITE & CASE LLP
KIRKLAND & ELLIS LLP	WILMER CUTLER PICKERING HALE AND DORR LLP
LATHAM & WATKINS LLP	WILSON SONSINI GOODRICH & ROSATI
MCDERMOTT WILL & EMERY	WINSTON & STRAWN LLP
MORRISON & FOERSTER LLP	

Members

ALSTON + BIRD LLP	KILPATRICK TOWNSEND & STOCKTON LLP
BAKER BOTTS LLP	KNOBBE MARTENS OLSON & BEAR LLP
BINGHAM MCCUTCHEN LLP	MORGAN, LEWIS & BOCKIUS LLP
DEWEY & LEBOEUF LLP	MUNGER, TOLLES & OLSON LLP
DURIE TANGRI LLP	ROPES & GRAY LLP
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP	SCHWEGMAN LUNDBERG WOESSNER
GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN, LLP	SIDLEY AUSTIN LLP
HAYNES AND BOONE, LLP	VAN PELT, YI & JAMES LLP
HICKMAN PALERMO TRUONG BECKER, LLP	WEAVER AUSTIN VILLENEUVE & SAMPSON, LLP
KEKER & VAN NEST LLP	

Patrons

BAKER & MCKENZIE

BOARD OF EDITORS

2011–2012

Executive Committee

Editor-in-Chief

TARAS M. CZEBINIAK

Managing Editor

MICHELLE MA

Senior Articles Editors

AARON MACKEY

MILES PALLEY

ARIELLE SINGH

Senior Executive Editor

WYATT GLYNN

Senior Annual Review Editors

RYAN IWAHASHI

BRITT LOVEJOY

Senior Scholarship Editor

ALEXANDER REICHER

Editorial Board

Submissions Editors

DANIEL KAZHDAN

ZACHARY MARKARIAN

Production Editors

JARAD BROWN

LAUREN SIMS

Bluebook Editors

JILLIAN FEINBERG

CONRAD GOSEN

MIKE SHEEN

Annual Review Editors

ROSS BARBASH

REZA DOKHANCHY

Notes & Comments Editors

COURTNEY BOWMAN

WINNIE HUNG

Symposium Editors

CIARA MITTAN

KILEY WONG

Web Content Editor

MICHAEL SOBOLEV

Information Management Editor

ANDREW FONG

Web & Technology Editor

ANDREA YANKOVSKY

External Relations Editor

ARIANA GREEN

Publishing Editor

NICK WOLOSZCZUK

Member Relations Editor

JEN SPENCER

LAUREN ESCHER

AMY HAYDEN

KAREN KOPEL

RUBINA KWON

Articles Editors

YVONNE LEE

JANE LEVICH

ANGELA MAKABALI

TAYLOR MARGOT

NIKHIL MATANI

HANNAH MINKEVITCH

SONYA PASSI

DAVID ROSEN

JOE SEXTON

MEMBERSHIP

Vol. 27 No. 1

Associate Editors

ARUSYAK ABRAHAMYAN	GRANT GARBER	LALITHA MADDURI
JULIE BYREN	CASEY HULTIN	MARIENNA MURCH
EMILY CHEN	DAMION JURENS	JEAN PAUL NAGASHIMA
SHRUTI CHOPRA	GARY JUSKOWIAK	JUSTIN ORR
KEYNA CHOW	RYAN KLIMCZAK	SARAH ORRICK
ROSS COHEN	JESSE KOEHLER	DINA ROUMIANTSEVA
ANGEL DIAZ	JULIA KOLIBACHUK	MANE SARGSYAN
CHRISTINA FARMER	CLAUDIA LANGER	LAUREN SMITH
NATALIE FLECHSIG	ALEX LI	JENNIFER TRUONG
BENJAMIN FOX	NICOLE LUEDDEKE	PENNI TAKADE
NICOLE A. FRITZ	GAVIN LIU	ROBERT UNDERWOOD
HILARY FRUITMAN		KENNETH VILLA

Members

SAMIRA ANFI	FUMIYO DOI	CODY LONNING
CRAIG ARMSTRONG	MATTHEW DONOHUE	CHRIS MACIEL
JENNIFER BARNETTE	ELISE EDLIN	RENUKA MEDURY
ERIK BAUMAN	ALAN ENRIQUEZ	KEVIN MEIL
ZACH BARON	MAKOTO FURUYA	EDUARD MELESHINSKY
KEVIN BENDIX	JOSHUA GLUCOFT	MIKI NAITO
CAROLYN BLUMENFELD	FELICITY GRISHAM	JOHN OWEN
TRISTAN BROWN	BRITT HARWOOD	GLORIA POON
NORMA CERROS	KEIGO HIDAKA	FELIX PRUEMMER
CHRISTINA CHAREMI	NAOMI HUNG	JINGWEN REN
DENA CHEN	GWYNNE HUNTER	SANDRA SANZ
JOSIE CHEN	JESSICA KENNY	SEAN SHIH
CHRIS CIVIL	PUNEET KOHLI	MICHAEL SU
NOAM COHEN	MILA KONOVALCHUK	PRISCILLA TAYLOR
PAUL COX	ROBIN KUNTZ	EDWARD TOROUS
ERIC CUELLAR	NICHOLAS LAMPROS	YUE WANG
KARAN DHADIALLA	NICK LEEFER	ETHAN WEINER
LUIZA DIAS	SENTA LEYKE	HAILEY YOU

BTLJ ADVISORY BOARD

ROBERT BARR

*Executive Director of the
Berkeley Center for Law & Technology*
U.C. Berkeley School of Law
Berkeley, California

ROBERT C. BERRING, JR.

Walter Perry Johnson Professor of Law
U.C. Berkeley School of Law
Berkeley, California

JESSE H. CHOPER

Earl Warren Professor of Public Law
U.C. Berkeley School of Law
Berkeley, California

PETER S. MENELL

*Professor of Law and Faculty Director of the
Berkeley Center for Law & Technology*
U.C. Berkeley School of Law
Berkeley, California

ROBERT P. MERGES

*Wilson Sonsini Goodrich & Rosati Professor
of Law and Technology and Faculty Director of
the Berkeley Center for Law & Technology*
U.C. Berkeley School of Law
Berkeley, California

REGIS MCKENNA

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

DEIRDRE K. MULLIGAN

*Clinical Professor and Faculty Director of the
Berkeley Center for Law and Technology*
U.C. Berkeley School of Information
Berkeley, California

JAMES POOLEY

*Deputy Director General of the
World Intellectual Property Organization*
Washington, D.C.

MATTHEW D. POWERS

Tensegrity Law Group, LLP
Redwood Shores, California

PAMELA SAMUELSON

*Professor of Law & Information
and Faculty Director of the
Berkeley Center for Law & Technology*
U.C. Berkeley 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 LLP
Palo Alto, California

MICHAEL TRAYNOR

Cobalt LLP
Berkeley, California

THOMAS F. VILLENEUVE

Gunderson Dettmer Stough Villeneuve
Franklin & Hachigian LLP
Redwood City, California

BERKELEY CENTER FOR LAW & TECHNOLOGY 2011–2012

Executive Director

ROBERT BARR

Faculty Directors

PETER MENELL
ROBERT MERGES

DEIRDRE MULLIGAN
PAMELA SAMUELSON
PAUL SCHWARTZ

SUZANNE SCOTCHMER
MOLLY VAN HOUWELING

Associate Director

LOUISE LEE

Assistant Director

JULIA TIER

Affiliated Faculty and Scholars

AARON EDLIN
JOSEPH FARRELL
RICHARD GILBERT
BRONWYN HALL
THOMAS JORDE
MICHAEL KATZ
DAVID MOWERY

DAVID NIMMER
DANIEL RUBINFELD
ANNALEE SAXENIAN
JASON SCHULTZ
HOWARD SHELANSKI
CARL SHAPIRO

MARJORIE SHULTZ
LON SOBEL
TALHA SYED
DAVID TEECE
JENNIFER M. URBAN
HAL R. VARIAN
DAVID WINICKOFF