TABLE OF CONTENTS

FOREWORD
Ryan Iwahashi & Britt Lovejoy .............................................................. 197

PATENT LAW

- FIGHTING THE SMARTPHONE PATENT WAR WITH RAND-ENCUMBERED PATENTS
  Thomas H. Chia ................................................................. 209

- GENE PATENTS: BALANCING THE MYRIAD ISSUES CONCERNING THE PATENTING OF NATURAL PRODUCTS
  Samantak Ghosh ................................................................. 241

- TiVO, INC. V. ECHOSTAR CORP.: PROVIDING CLARITY TO CONTEMPT PROCEEDINGS IN PATENT CASES
  Conrad Gosen ................................................................. 273

- I4I AND THE PRESUMPTION OF VALIDITY: LIMITED CONCERNS OVER THE INSULATION OF WEAK PATENTS
  Ryan R. Klimczak .............................................................. 299

- GLOBAL-TECH APPLIANCES, INC. V. SEB, S.A.: DISCOVERING WILLFULLY BLIND TERRITORY IN INDUCED PATENT INFRINGEMENT
  Yvonne Lee ................................................................. 325

- BRINGING EQUITY BACK TO THE INEQUITABLE CONDUCT DOCTRINE?
  Priscilla G. Taylor .......................................................... 349

- UNKNOTTING UNILOC
  Edward Torous .............................................................. 381

- NON-PRACTICING COMPLAINANTS AT THE ITC: DOMESTIC INDUSTRY OR NOT?
  Wei Wang ................................................................. 409

- THE PUBLIC PAID FOR THE INVENTION: WHO OWNS IT?
  Robert M. Yeh .............................................................. 453
COPYRIGHT LAW

• THE NEXUS ANALYSIS: LICENSE ENFORCEMENT IN THE WAKE OF MDY v. BLIZZARD
  Erik Bauman ............................................................................................................. 503

• COPYRIGHT DAMAGES: INCORPORATING REASONABLE ROYALTY FROM
  PATENT LAW
  Kevin Bendix ........................................................................................................... 527

• GRADUATED RESPONSE SYSTEMS AND THE MARKET FOR COPYRIGHTED WORKS
  John M. Owen ........................................................................................................... 559

• BEYOND THE GAP: A PRACTICAL UNDERSTANDING OF COPYRIGHT’S TERMINATION OF TRANSFERS PROVISIONS
  Kiley C. Wong ........................................................................................................... 613

TRADEMARK LAW

• LIMITING INITIAL INTEREST CONFUSION CLAIMS IN KEYWORD ADVERTISING
  Winnie Hung .............................................................................................................. 647

• AMBIGUITY IN FEDERAL DILUTION LAW CONTINUES: LEVI STRAUSS & CO. v. ABERCROMBIE & FITCH TRADING CO., CASE IN POINT
  Jane Ann Levich ....................................................................................................... 677

CYBERLAW

• TO TAX OR NOT TO TAX? THAT’S NOT THE QUESTION: THE ROLE OF TAX WITHIN THE MATURING WORLD OF E-COMMERCE
  Hannah V. Minkevitch ............................................................................................. 705

• LIMITING EMPLOYEE LIABILITY UNDER THE CFAA: A CODE-BASED APPROACH TO “EXCEEDS AUTHORIZED ACCESS”
  David J. Rosen ......................................................................................................... 737

• NO SERVICE: FREE SPEECH, THE COMMUNICATIONS ACT, AND BART’S CELL PHONE NETWORK SHUTDOWN
  Jennifer Spencer ....................................................................................................... 767

PRIVACY LAW

• A WAY FORWARD AFTER WARSHAK: FOURTH AMENDMENT PROTECTIONS FOR E-MAIL
  Courtney M. Bowman ............................................................................................. 809

• USING SOCIAL NETWORKING TO DISCUSS WORK: NLRB PROTECTION FOR DEROGATORY EMPLOYEE SPEECH AND CONCERTED ACTIVITY
  Ariana C. Green ....................................................................................................... 837
OTHER DEVELOPMENTS IN INTELLECTUAL PROPERTY

- **Wyeth and PLIVA: The Law of Inadequate Drug Labeling**
  Daniel Kazhdan ................................................................................................................. 893

- **Compensated Injunctions: A More Equitable Solution to the Problem of Inevitable Disclosure**
  Sonya P. Passi ......................................................................................................................... 927

- **Still an Alternative Way to Protect Traditional News: Why Barclays Did Not Kill the “Hot News” Tort**
  Luis Zambrano .......................................................................................................................... 957

SURVEY OF ADDITIONAL IP DEVELOPMENTS ....................................................... 981
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.


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.
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

FENWICK & WEST LLP

Orrick, Herrington & Sutcliffe LLP

Benefactors

COVINGTON & BURLING LLP

FISH & RICHARDSON P.C.

KASOWITZ BENSON TORRES & FRIEDMAN LLP

KIRKLAND & ELLIS LLP

LATHAM & WATKINS LLP

MCDERMOTT WILL & EMERY

MORRISON & FOERSTER LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES

WEIL, GOTSHAL & MANGES LLP

WHITE & CASE LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

WILSON SONSINI GOODRICH & ROSATI

WINSTON & STRAWN LLP
Members

ALSTON + BIRD LLP
Baker Botts LLP
Bingham McCutchen LLP
Dewey & LeBoeuf LLP
Durie Tangri LLP
FinneGAN, Henderson, Farabow, Garrett & Dunner, LLP
Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP
Haynes and Boone, LLP
Hickman Palermo Truong Becker, LLP
Keker & Van Nest LLP

Kilpatrick Townsend & Stockton LLP
Knobbe Martens Olson & Bear LLP
Morgan, Lewis & Bockius LLP
Munger, Tolles & Olson LLP
Ropes & Gray LLP
Schwegman Lundberg Woessner
Sidley Austin LLP
Van Pelt, Yi & James LLP
Weaver Austin Villeneuve & Sampson, LLP

Patrons

Baker & McKenzie
# Berkeley Technology Law Journal

## Annual Review 2012

**Senior Faculty Adviser**  
Peter S. Menell

**Faculty Advisers**  
Robert Barr  
Jeremy Bock  
Brian Carver  
Chris Hoofnagle  
Michael Mattioli

**Senior Annual Review Editors**  
Ryan Iwahashi  
Britt Lovejoy

**Production Editors**  
Jarad Brown  
Lauren Sims

**Editor-in-Chief**  
Taras M. Czebiniak

**Annual Review Editors**  
Ross Barbash  
Reza Dokhanchy

**Advisers**  
Ebby Abraham  
Ryan Iwahashi  
Parker Kuhl  
Michelle Leu  
Britt Lovejoy  
Miles Palley  
Alexander Reicher  
Arielle Singh

**Authors**  
Erik Bauman  
Ryan R. Klimczak  
Vyonne Lee  
Jane Ann Levich  
Hannah V. Minkevitch  
John M. Owen  
Sonya P. Passi  
David J. Rosen  
Jennifer Spencer  
Priscilla Taylor  
Edward Torous  
Wei Wang  
Kiley C. Wong  
Robert M. Yeh  
Luis Zambrano

**Contributors**  
Samira Anfi  
James Hicks  
Dina Roumiantseva  
Angel Diaz  
Ryan Klimczak  
Priscilla Taylor  
Alan Enriquez  
Lalitha Madduri  
Jennifer Truong  
Natalie Flechsig  
Justin Orr  
Robert Underwood  
Felicity Grisham  
Yue Wang
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. SONSONI
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