

31:AR BERKELEY TECHNOLOGY LAW JOURNAL

2016

Pages

363

to

1214

Berkeley Technology Law Journal

Volume 31, Number AR

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 © 2016 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 31

ANNUAL REVIEW 2016

TABLE OF CONTENTS

FOREWORD

- Virginia E. Scholtes & Sorin G. Zaharia*.....363

PATENT LAW

- SAVING PATENT LAW FROM COMPETITION POLICY AND
ECONOMIC THEORIES: *KIMBLE V. MARVEL ENTERTAINMENT, LLC*.....371
Cassandra E. Havens

- TEVA V. SANDOZ*: THE SUPREME COURT REJECTS MILLENNIAL
FEDERAL CIRCUIT'S "CLEARLY ERRONEOUS" REVIEW STANDARD399
Cassandra E. Havens

- THE GLOBAL CONVERGENCE OF FRAND LICENSING PRACTICES:
TOWARDS "INTEROPERABLE" LEGAL STANDARDS429
Benjamin C. Li

- CONCLUDING THE *AKAMAI* CHAPTER OF DIVIDED INFRINGEMENT:
IS THE LIABILITY LOOPHOLE CLOSED?.....467
Jingyuan Luo

- ARIOSA DIAGNOSTICS V. SEQUENOM*: METASTASIS OF *MAYO* AND
MYRIAD AND THE EVISCERATION OF PATENT ELIGIBILITY FOR
MOLECULAR DIAGNOSTICS495
Philip Merksamer

- COMMIL V. CISCO*: IMPLICATIONS OF THE INTENT STANDARD FOR
INDUCEMENT LIABILITY ON WILLFULNESS.....535
Nate Ngerebara

- RETHINKING FINALITY IN THE PTAB AGE.....557
Peggy P. Ni

- MISGUIDED PANIC AND MISSED OPPORTUNITY FOR
PHARMACEUTICAL INVENTIONS: HOW UNEXPECTED RESULTS
ECLIPSED REASONABLE EXPECTATION OF SUCCESS IN *BMS V. TEVA*.....587
Christelle K. Pride

PATENT INFRINGEMENT DEMAND LETTERS: DOES <i>NOERR-PENNINGTON</i> OR THE FIRST AMENDMENT PREEMPT STATE-LAW LIABILITY FOR MISLEADING STATEMENTS?	623
--	-----

Eric J. Riedel

“SHALL” WE DANCE? INTERPRETING THE BPCIA’s PATENT PROVISIONS	659
--	-----

Jon Tanaka

<i>WILLIAMSON V. CITRIX ONLINE</i> : A FUNDAMENTAL SHIFT AND RETURN TO FORM IN MEANS-PLUS-FUNCTION INTERPRETATION	687
---	-----

Shong Yin

COPYRIGHT LAW

OUT OF TUNE: HOW PUBLIC PERFORMANCE RIGHTS ARE FAILING TO HIT THE RIGHT NOTES	725
---	-----

Stasha Loeza

TURTLE POWER: THE CASE FOR COMMON LAW PROTECTION FOR PRE-1972 SOUND RECORDINGS.....	759
---	-----

Christopher J. Norton

<i>GARCIA V. GOOGLE</i> : AUTHORSHIP IN COPYRIGHT	785
---	-----

Diana C. Obradovich

TRADEMARK LAW

STANDING THE TEST OF TIME: LIKELIHOOD OF CONFUSION IN <i>MULTI TIME MACHINE V. AMAZON</i>	815
---	-----

Andrea M. Hall

CYBERLAW AND VENTURE LAW

AUTONOMOUS VEHICLE REGULATION: HOW AN UNCERTAIN LEGAL LANDSCAPE MAY HIT THE BRAKES ON SELF-DRIVING CARS	851
---	-----

Jessica S. Brodsky

ANTITRUST ENFORCEMENT IN THE DEVELOPING E-BOOK MARKET: APPLE, AMAZON, AND THE FUTURE OF THE PUBLISHING INDUSTRY.....	879
--	-----

Zachary C. Flood

NET NEUTRALITY AND THE FCC’s 2015 OPEN INTERNET ORDER	905
---	-----

Simone A. Friedlander

REGULATING PERSONALIZED MEDICINE	931
--	-----

Sarah Y. Kwon

EDTECH AND STUDENT PRIVACY: CALIFORNIA LAW AS A MODEL	961
---	-----

Dylan Peterson

INTERNET OF THINGS: UNDERLYING TECHNOLOGIES, INTEROPERABILITY, AND THREATS TO PRIVACY AND SECURITY	997
<i>Swaroop Poudel</i>	
SHARING ECONOMY MISCLASSIFICATION: EMPLOYEES AND INDEPENDENT CONTRACTORS IN TRANSPORTATION NETWORK COMPANIES	1023
<i>Robert L. Redfearn III</i>	
PRIVACY LAW	
PROTECTING THE GOOD, THE BAD, AND THE UGLY: “EXPOSURE” DATA BREACHES AND SUGGESTIONS FOR COPING WITH THEM	1057
<i>Yasmine Agelidis</i>	
FAIR NOTICE OF UNFAIR PRACTICES: DUE PROCESS IN FTC DATA SECURITY ENFORCEMENT AFTER <i>WYNDHAM</i>	1079
<i>J. William Binkley</i>	
<i>ELONIS V. UNITED STATES</i> : THE NEXT TWELVE YEARS	1109
<i>Jing Xun Quek</i>	
<i>CITY OF LOS ANGELES V. PATEL</i> : THE FOURTH AMENDMENT’S “SPECIAL NEEDS” IN THE INFORMATION AGE	1137
<i>Maximilian Sladek de la Cal</i>	
SURVEY OF ADDITIONAL IP AND TECHNOLOGY LAW DEVELOPMENTS	1169

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., 20th ed. 2015). Please cite this issue of the *Berkeley Technology Law Journal* as 31 BERKELEY TECH. L.J. ____ (2016).

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*; the *Bolt*, a collection of short comments and updates about new developments in law and technology written by BTLJ members; and *BTLJ Commentaries*, an exclusively online publication for pieces that are especially time-sensitive and shorter than typical law review articles.

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/expreso>.

Citations. All citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

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

SIDLEY AUSTIN LLP

FISH & RICHARDSON P.C.

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

KASOWITZ BENSON
TORRES & FRIEDMAN LLP

VAN PEEL, YI & JAMES LLP

KIRKLAND & ELLIS LLP

WEIL, GOTSHAL & MANGES LLP

LATHAM & WATKINS LLP

WHITE & CASE LLP

MCDERMOTT WILL & EMERY

WILMER CUTLER PICKERING
HALE AND DORR LLP

MORRISON & FOERSTER LLP

WILSON SONSINI
GOODRICH & ROSATI

WINSTON & STRAWN LLP

Members

BAKER BOTTS LLP

KILPATRICK TOWNSEND &
STOCKTON LLP

BAKER & MCKENZIE LLP

KNOBBE MARTENS
OLSON & BEAR LLP

DURIE TANGRI LLP

LEE TRAN & LIANG LLP

GJEL ACCIDENT ATTORNEYS

MUNGER, TOLLES & OLSON LLP

GTC LAW GROUP LLP &
AFFILIATES

O'MELVENY & MYERS LLP

GUNDERSON DETTMER STOUGH
VILLENEUVE FRANKLIN &
HACHIGIAN, LLP

PAUL HASTINGS LLP

HAYNES AND BOONE, LLP

ROPES & GRAY LLP

HOGAN LOVELLS LLP

SIMPSON THACHER & BARTLETT
LLP

IRELL & MANELLA LLP

TURNER BOYD LLP

KEKER & VAN NEST LLP

WEAVER AUSTIN VILLENEUVE &
SAMPSON, LLP

BERKELEY TECHNOLOGY LAW JOURNAL

ANNUAL REVIEW 2016

Senior Faculty Adviser
PETER S. MENELL

Faculty Advisers
CHRIS HOOFNAGLE
JIM DEMPSEY

Senior Annual Review Editors
VIRGINIA SCHOLTES
SORIN ZAHARIA

Production Editors
DUSTIN VANDERBERG
KRISTOFER HATCH

Editor-in-Chief
JOSHUA D. FURMAN

Annual Review Editors
CYNTHIA LEE
BENJAMIN LI

Advisers
RAVI ANTANI
ELIZABETH CAPEL
JOSHUA D. FURMAN

THAD HOUSTON
VANESSA KATZ
JING LUO
JORDYN OSTROFF

VIRGINIA SCHOLTES
SORIN ZAHARIA
MAYA ZIV

Authors
YASMINE AGELIDIS
J. WILLIAM BINKLEY
JESSICA S. BRODSKY
MAXIMILIAN SLADEK
DE LA CAL
ZACHARY C. FLOOD
SIMONE A.
FRIEDLANDER
ANDREA M. HALL
CASSANDRA E. HAVENS

SARAH Y. KWON
BENJAMIN C. LI
STASHA LOEZA
JINGYUAN LUO
PHILIP MERKSAMER
NATE NGEREBARA
PEGGY P. NI
CHRISTOPHER J.
NORTON

DIANA C. OBRADOVICH
DYLAN PETERSON
SWAROOPOUDEL
CHRISTELLE K. PRIDE
JING XUN QUEK
ROBERT L. REDFEARN III
ERIC J. RIEDEL
JON TANAKA
SHONG YIN

Contributors
BARCLAY OUDERSLUYS
JULIE LEE
KEVIN CHIU
MARGHERITA FARINA
RAOUL GRIFONI-
WATERMAN
NOA DREYMAN
FAITH SHAPIRO
KELSEA CARLSON
PAMUDH KARIYAWASAM
CHRISTELLE PRIDE
JOYCE LI
EUNICE PARK
SARAH SUWANDA
TESS MUCKENSTRUM

BOARD OF EDITORS 2015–2016

Executive Committee

Editor-in-Chief

JOSHUA D. FURMAN

Managing Editor
MISHA TSUKERMAN

Senior Articles Editors
RAVI ANTANI
ZACHARY FLOOD
KELLY VARGAS

Senior Executive Editor
DIANA OBRADOVICH

Senior Scholarship Editor
CAROLINA GARCIA

Senior Annual Review Editors
VIRGINIA SCHOLTES
SORIN ZAHARIA

Senior Online Content Editor
NOAH DRAKE

Editorial Board

Commentaries Editors
SWAROOP POUDEL
YU TANEBE
BONNIE WATSON

Production Editors
ROXANA GUIDERO
DUSTIN VANDENBERG

Technical Editors
KRISTINA PHAM
CHRISTOPHER YANDEL

Annual Review Editors
CYNTHIA LEE
BENJAMIN LI

Notes & Comments Editors
WAQAS AKMAL
ERICA FISHER

Symposium Editors
TOMMY BARCZYK
JOHN RUSSELL

Submissions Editors
PHILIP MERKSAMER
MAYA ZIV

Web Content Editor
FAYE WHISTON

Web & Technology Editors
JOE CRAIG
LEIGHANNA MIXTER

Member Relations Editor
STEPHANIE CHENG

Alumni Relations Editor
GOLDA CALONGE

External Relations Editor
SIMONE FRIEDLANDER

JESSICA ANNIS
JOEL BROUSSARD
CHRISTIAN CHESSMAN
DANEILLE DEVLIN
KELSEY GUANCIALE

Articles Editors
YESOL HAN
CASSY HAVENS
MARK JOSEPH
BILAL MALIK

CHRIS NORTON
LIDA RAMSEY
ERIC RIEDEL
ARIEL ROGERS
MAX SLADEK DE LA CAL

MEMBERSHIP

Vol. 31 No. AR

Associate Editors

WILL BINKLEY	PAMUDH KARIYAWASAM	ALEJANDRO ROTHAMEL
BRITTANY BRUNS	HILARY KRASE	LUKAS SIMAS
DAPHNE CHEN	JOYCE LI	RICHARD SIMS
YUHAN (ALICE) CHI	MATTHEW MCCLELLAN	FERNANDA SOLIS CAMARA
KEVIN CHIU	GAVIN MOLER	SARAH SUWANDA
SARA CHUGH	CATALINA MONCADA	JON TANAKA
NOA DREYMAN	SHELBY NACINO	VALERIE TRUONG
RAN DUAN	JUAN NAZAR	RAOUL GRIFONI-WATERMAN
JORDAN FRABONI	ROBERT OLSEN	REID WHITAKER
JEREMY ISARD	EUNICE PARK	
NATASA JANEZ	JAIDEEP REDDY	

Members

YASMINE AGELIDIS	NOAH GUINEY	MICHELLE PARK
NIKI BAWA	BRIAN HALL	DYLAN PETERSON
KATE BRIDGE	ANDREA HALL	KEVIN PORMIR
JESSICA BRODSKY	JESSICA HOLLIS	CHRISTELLE PRIDE
KELSEA CARLSON	JENNIFER HSU	JING XUN QUEK
STEPHEN CHAO	KENSUKE INOUE	LEE REDFEARN
JOSEPH CHRISTIE	HYE JIN KIM	MATT RICE
RACHEL CORRIGAN	RITHIKA KULATHILA	FAITH SHAPIRO
MICHAEL DEAMER	SARAH KWON	DARINA SHTRAKHMAN
THOMAS DEC	TIFFANY LEUNG	JOSHUA STEELE
DARIUS DEHGHAN	MEI LIU	EVE TAI
ELENA FALLOON	STASHA LOEZA	MY THAN
MEGHAN FENZEL	SARAH MULLINS	CASEY TONG
EVAN FERGUSON	ELI NESS	ELISSA WALTER
WHITNEY FLORIAN	NATE NGEREBARA	MELISSA WEE
ETHAN FRIEDMAN	PEGGY NI	TAMARA WIESEBRON
ANDREY GAVRILENKO	JESSICA OGLESBEE	SHONG YIN
KAN GU	BARCLAY OUDERSLUYS	YU ZHAO
	ROBERT PARIS	

BTLJ ADVISORY BOARD

JIM DEMPSEY
*Executive Director of the
Berkeley Center for Law & Technology*
U.C. Berkeley School of Law

ROBERT C. BERRING, JR.
Walter Perry Johnson Professor of Law
U.C. Berkeley School of Law

MATTHEW D. POWERS
Tensegrity Law Group, LLP

JESSE H. CHOPER
Earl Warren Professor of Public Law
U.C. Berkeley School of Law

PAMELA SAMUELSON
*Professor of Law & Information
and Faculty Director of the
Berkeley Center for Law & Technology*
U.C. Berkeley School of Law

PETER S. MENELL
*Professor of Law and Faculty
Director of the Berkeley Center
for Law & Technology*
U.C. Berkeley School of Law

LIONEL S. SOBEL
Visiting Professor of Law
U.C.L.A. School of Law

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

LARRY W. SONSINI
Wilson Sonsini Goodrich & Rosati

REGIS MCKENNA
Chairman and CEO
Regis McKenna, Inc.

MICHAEL STERN
Cooley LLP

DEIRDRE K. MULLIGAN
*Assistant Professor and Faculty Director
of the Berkeley Center for
Law and Technology*
U.C. Berkeley School of Information

MICHAEL TRAYNOR
Cobalt LLP

JAMES POOLEY
*Deputy Director General of the
World Intellectual Property
Organization*

THOMAS F. VILLENEUVE
Gunderson Dettmer Stough
Villeneuve Franklin & Hachigian LLP

BERKELEY CENTER FOR LAW & TECHNOLOGY

2015–2016

Executive Director

JIM DEMPSEY

Faculty Directors

KENNETH A. BAMBERGER	PETER S. MENELL	PAMELA SAMUELSON
CATHERINE CRUMP	ROBERT P. MERGES	PAUL SCHWARTZ
CHRIS HOOFNAGLE	DEIRDRE MULLIGAN	JENNIFER URBAN
SONIA KATYAL		MOLLY S. VAN HOUWELING

Staff Directors

LOUISE LEE	RICHARD FISK	CLAIRE TRIAS
------------	--------------	--------------