# Table of Contents

**Foreword**

Jessica Brodsky, Cassy Havens & Jon Tanaka ........................................................ 311

**Patent Law**

TREATMENT OF PTAB CLAIM CONSTRUCTION DECISIONS: ASPIRING TO CONSISTENCY AND PREDICTABILITY ................................................................. 315

   Niky R. Bagley

DECONSTRUCTING WONDERLAND: MAKING SENSE OF SOFTWARE PATENTS IN A POST-ALICE WORLD ................................................................. 359

   Joseph Allen Craig

PREEMPTION, DIAGNOSTICS, AND THE MACHINE-OR-TRANSFORMATION TEST: FEDERAL CIRCUIT REFINEMENT OF BIOTECH METHOD ELIGIBILITY ................................................................. 379

   Joyce C. Li

BALANCING INTERESTS POST-HALO: A PROPOSAL FOR CONSTITUTIONALLY BOUNDED ENHANCED DAMAGES IN PATENT INFRINGEMENT ................................................................. 413

   G. W. Moler

**Copyright Law**

DC COMICS v. TOWLE: PROTECTING FICTIONAL CHARACTERS THROUGH STEWARDSHIP ................................................................. 437

   Michael Deamer

**Trade Secret**

CRITICISM OF THE DEFEND TRADE SECRETS ACT OF 2016: FAILURE TO PREEMPT ................................................................. 469

   Brittany S. Bruns
PRIVACY/CYBER SECURITY

SPOKEO, INC. v. ROBINS: DETERMINING WHAT MAKES AN INTANGIBLE HARM CONCRETE ................................................................. 503
Vanessa K. Ing

ENCRYPTION SERVED THREE WAYS: DISRUPTIVENESS AS THE KEY TO EXCEPTIONAL ACCESS .............................................................. 531
Dustin Taylor Vandenberg

REGULATION AND LEGISLATURE

A FEDERAL GMO LABELING LAW: HOW IT CREATES UNIFORMITY AND PROTECTS CONSUMERS .......................................................... 563
Jordan James Fraboni

TESTING THE BOUNDS OF NET NEUTRALITY WITH ZERO-RATING PRACTICES ........................................................................ 591
Jessica A. Hollis

PAPERWEIGHTS: FAA REGULATION AND THE BANISHMENT OF COMMERCIAL DRONES ............................................................. 621
Robert Glenn Olsen

FOLLOWING CLEARCORRECT: A GUIDELINE FOR REGULATING DIGITAL TRADE ............................................................. 653
Barclay Oudersluys

RIGHT OF PUBLICITY

JOHN DOE’S RIGHT OF PUBLICITY ........................................................................ 673
Noa Dreymann
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; 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/expresso.

**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

HOGAN LOVELLS

ORRICK, HERRINGTON & SUTCLIFFE LLP

WHITE & CASE LLP

Benefactors

FISH & RICHARDSON P.C.

COVINGTON & BURLING LLP

KASOWITZ BENSON TORRES & FRIEDMAN LLP

WEIL, GOTSHAL & MANGES LLP

KIRKLAND & ELLIS LLP

SIDLEY AUSTIN LLP

LATHAM & WATKINS LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

MCDERMOTT WILL & EMERY

WILSON SONSINI GOODRICH & ROSATI

MORRISON & FOERSTER LLP

WINSTON & STRAWN LLP
Corporate Benefactors

BLOOMBERG LAW

FINJAN CYBERSECURITY

FUTURE OF PRIVACY FORUM

GOOGLE, INC.

INLEXION POINT

INTEL

HEWLETT FOUNDATION, THROUGH
THE CENTER FOR LONG-TERM
CYBERSECURITY

LITINOMICS

MICROSOFT CORPORATION

NOKIA

PALANTIR

THE WALT DISNEY COMPANY
Members

BAKER BOTT LLP

BAKER & MCKENZIE LLP

DESMARAILS LLP

DURIE TANGRI LLP

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

GILLIN JACOBSON ELLIS LARSEN & LUCEY

GTC LAW GROUP LLP & AFFILIATES

HAYNES AND BOONE, LLP

IRELL & MANELLA LLP

KEKER & VAN NEST LLP

KILPATRICK TOWNSEND & STOCKTON LLP

KNOBBE MARTENS OLSON & BEAR LLP

PAUL HASTINGS LLP

ROPES & GRAY LLP

SIMPSON THACHER & BARTLETT LLP

TURNER BOYD LLP

VAN PELT, YI & JAMES LLP

WEAVER AUSTIN VILLENEUVE & Sampson, LLP
BERKELEY TECHNOLOGY LAW JOURNAL
ANNUAL REVIEW 2017

Senior Faculty Adviser
MOLLY VAN HOUWELING

Faculty Advisers
TEJAS NARECHANIA
JIM DEMPSEY
SONIA KATYAL

Senior Annual Review Editors
JESSICA BRODSKY
CASSY HAVENS
JON TANAKA

Production Editors
DUSTIN VANDERBERG
KRISTOFER HATCH

Annual Review Editors
BARCLAY OUDERSLUYS
JOYCE LI

Advisers
CASSY HAVENS
ERIC RIEDEL
JON TANAKA
CHRISTOPHER NORTON
WILL BINKLEY
NIR MAOZ
ROYCE WANG
DJENAB CONDE

Annual Review Editors
JESSICA BRODSKY
CHRISTOPHER NORTON
WILL BINKLEY
MAX DE LA CAL
JESSICA BRODSKY
G. W. MOLER
JOYCE LI
ROBERT GLENN OLSN
BARCLAY OUDERSLUYS

Authors
BRITTANY S. BRUNS
NIKY R. BAGLEY
JOSEPH ALLEN CRAIG
MICHAEL DEAMER
NOA DREYMANN
JORDAN JAMES FRABONI
JESSICA A. HOLLIS
VANESSA K. ING
JOYCE C. LI
G. W. MOLER

Contributors
TRENTON DAVIS
ALYSE RITVO

MERCEDES SEGOVIANO
KEXI WANG

LINDSAY SZYMANSKI
AMIT ELAZARI
RACHEL DALLAL
# Board of Editors 2016–2017

## Executive Committee

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
<th>Role</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Editor-in-Chief</td>
<td>Max De La Cal</td>
<td>Senior Articles Editors</td>
<td>Waqas Akmal</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Christian Chessman</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Bilal Malik</td>
</tr>
<tr>
<td>Managing Editor</td>
<td>Chris Yandel</td>
<td>Senior Executive Editor</td>
<td>Erica Fisher</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senior Scholarship Editor</td>
<td>Mark Joseph</td>
<td>Senior Annual Review Editors</td>
<td>Jessica Brodsky</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Cassy Havens</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Jon Tanaka</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Senior Online Content Editor</td>
<td>Lida Ramsey</td>
</tr>
<tr>
<td>Editorial Board</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Commentaries Editors

- Tiffany Leung

## Production Editors

- Kristofer Hatch
- Dustin Vandenberg
- Chelsea Mori
- Louise Decoppet

## Technical Editors

- Ayn Su Woodward
- Richard Sims

## Annual Review Editors

- Barclay Oudersluys
- Joyce Li

## Notes & Comments Editors

- Stephen Chao
- Kelsey Carlson

## Symposium Editors

- Vanessa Ing
- Michelle Park

## Submissions Editors

- Kevin Chiu
- Brittany Bruns

## Online Content Editor

- Kate Bridge

## Web & Technology Editors

- Joe Craig
- Ted Kang

## Member Relations Editor

- Tamara Wiesebron

## Alumni Relations Editor

- Jessica Annis

## External Relations Editor

- Gavin Moler

## Articles Editors

- Alice Chi
- Brian Hall
- Darius Dehghan
- Ethan Friedman
- Faith Shapiro
- Jeremy Isard
- Meghan Fenzel
- Mei Liu
- Noa Dreymann
- Tim Hsieh
- Robert Olsen
- My Than
- Stephen Wilson
- Jonathon Maddern
- Brandon Orewyler
MEMBERSHIP
Vol. 32 No. AR

Associate Editors

BLAKE ANDERSON        BRITTANY JOHNSON        ANDREW NGUYEN
ALEX BARATA           YARDEN KAKON           ALYSE RITVO
ANTHONY BDEEL          LAURA KELLY           MERCEDES SEGOVIANO
KATIE BURKHART         ROMAN KRUPENIN         GUILARTE
EDUARDO CORDOVA        KURT KURZENHAUSER      ORNAN STEINBERG
SAKIKI                 ANNIE LEE              ERICA SUN
KATHERINE CUMMINGS     NIR MAOZ                SADAF TABATABAI
AMIT ELAZARI           CHARLES MILLER         CHANTE

Members

LAUREN AZEKA           DARIUS DEGHAN          BIHTER OZEDIRNE
DAVID BEHREND          BROOKES DEGEN          REID PAOLETTA
MARIA BELTRAN          JORDAN FRABONI         RAJAN PATEL
CHRISTOPHER BROWN      ANDREW GLIDDEN         ANDREW SCHMIDT
NIKY BUKOVCAN          ADAM GREENE            NATHAN THEOBALD
ALEXIS CALIGURI         MARK JAYCOX            AAMIR VIRANI
DEREK CHIPMAN          PATRICK JOHNSON         PAUL WAGNER
ERIC CHUANG            JIMMY JOHNSTON          KEXI WANG
RACHEL DALLAL          AARON LEE               JIHYUN YU
TRENTON DAVIS          DINA LJEPKERIC          EMRE YUZAK
BLAKE MEREDITH
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