

## FOREWORD

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The Annual Review is a yearly publication of the *Berkeley Technology Law Journal* that provides a summary of many of the year's major developments at the intersection of law and technology. Our aim is to provide a valuable resource for judges, policymakers, practitioners, students, and scholars. Each Note provides a primer on a particular area of law, a development in that area of law, and commentary on that development.

The seventeen Notes in this issue continue a tradition of covering a wide range of topics. The Notes address developments in patent, copyright, trademark, and privacy, as well as technology-focused regulations and legislature. Following the Notes in each area of law, we have included a Survey of Additional IP Developments, which contains brief descriptions of important issues that were not addressed in the Notes.

### I. PATENT LAW

The first Note<sup>1</sup> in this Section unpacks the Supreme Court's decision in *Life Technologies v. Promega*<sup>2</sup> in light of its objectives as the court of last resort. This Note explores the role the presumption against extraterritoriality has played in shaping U.S. patent law and the Court's deference to the presumption: The Court continues to limit the reach of U.S. patent law overseas, even when Congress created a specific statutory exception.

The second Note<sup>3</sup> analyzes the Supreme Court's decision in *Samsung Electronics Co. v. Apple Inc.*,<sup>4</sup> which introduced apportionment to the world of design patent damages ignoring legislative intent and precedent. This Note presents flaws in the Supreme Court's textual argument and suggests that the

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1. Katharine Cummings, Note, *Just Out of Reach: Congress, Courts, and Industry Struggle to Define the Scope of U.S. Patent Law Overseas*, 33 *BERKELEY TECH. L.J.* 861 (2018).

2. 137 S. Ct. 734 (2017).

3. Ted Kang, Note, *Samsung v. Apple: The Ill-fated Introduction of Apportionment-by-Component for Designs*, 33 *BERKELEY TECH. L.J.* 889 (2018).

4. 137 S. Ct. 429 (2016).

legislative branch was better suited to revise an outdated law. Finally, the Note examines the aftermath of the Supreme Court's decision still playing out in the lower courts and evaluates the chosen test for identifying the relevant article of manufacture.

The third Note<sup>5</sup> examines the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*,<sup>6</sup> where the Court held that defendants in patent infringement suits may not bring the defense of laches to bar damages within the six-year statutory period. This Note argues that the removal of laches fails to serve the fundamental purposes of laches and opens up opportunities for abuse by encouraging patent owners to silently wait until infringing products are well-developed and integrated into the industry.

The fourth Note<sup>7</sup> discusses the Supreme Court's decision in *Impression Products v. Lexmark International*,<sup>8</sup> which applies patent exhaustion to both conditional sales and foreign sales. This Note proposes an alternative framework which allows a narrow exception to the patent exhaustion to balance patent owners' rights and consumers' rights.

The last Note<sup>9</sup> in this Section summarizes the background, reasoning, and aftermath of the Supreme Court's decision in *TC Heartland v. Kraft*,<sup>10</sup> which narrowed venue for corporate defendants in patent infringement actions. Looking forward, the Note evaluates how judicial interpretations of the patent venue statute and legislative reform could better serve the policies at the intersection of patent law and venue.

## II. COPYRIGHT LAW

The first Note<sup>11</sup> in this Section examines the role of human moderation on social media platforms for purposes of copyright infringement liability. The Note critiques the Ninth Circuit's *Mavrix v. LiveJournal*<sup>12</sup> decision, in which agency law is applied to determine whether such moderation undermines the legal protections afforded to Internet service providers. The Ninth Circuit's

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5. Chris Chuang, Note, *SCA v. First Quality: Letting Go of Laches in Patent Law*, 33 BERKELEY TECH. L.J. 917 (2018).

6. 137 S. Ct. 954 (2017).

7. Hye Jin Kim, Note, *Avoiding Patent Exhaustion at Home and Abroad: Impression Products v. Lexmark International*, 33 BERKELEY TECH. L.J. 945 (2018).

8. 137 S. Ct. 1523 (2017).

9. Melissa Wee, Note, *TC Heartland v. Kraft and the Resurrection of the Place of Incorporation or "Regular and Established Place of Business" Test for Patent Venue*, 33 BERKELEY TECH. L.J. 981 (2018).

10. 137 S. Ct. 1514 (2017).

11. Katherine Burkhart, Note, *Mavrix v. LiveJournal: Unsafe Harbors in the Age of Social Media*, 33 BERKELEY TECH. L.J. 1015 (2018).

12. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045 (9th Cir. 2017).

approach, this Note argues, is not only fundamentally at odds with the goals underlying copyright law itself, but a departure from modern dealings with online platforms, as well.

The second Note<sup>13</sup> evaluates the Ninth Circuit's decision in *Fox Television Stations, Inc. v. Aereo LLC*,<sup>14</sup> which held that Internet video retransmitters are not eligible for the Copyright Act's section 111 compulsory license. By examining the lengthy legislative history behind section 111 and the current regulatory backdrop of telecommunications, this Note argues that the *Aereo* decision breaks with a national policy tradition that favors television innovation, and pairs uncomfortably with the U.S. Supreme Court's decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.* to create a legal roadblock that gives Internet retransmitters the burden of cable system designation, but not the benefits of any statutory license.

The third Note<sup>15</sup> criticizes the Copyright Office's recent Section 1201 Report for rejecting the nexus to copyright infringement requirement for liability, most notably put forth by the Federal Circuit's 2004's *Chamberlain* decision, of section 1201 of the DMCA and argues that instead Congress should amend the anti-circumvention provisions to require this nexus. This note examines the history of the DMCA's Passage, the harm to innovation and erosion of fair use caused by its passage, and the circuit split borne of its unclear language. The note concludes that Congress should disregard the Copyright Office's advice and instead amend section 1201 to require a nexus to copyright infringement as this would be the simplest solution to correct the harms of its passage and end the chilling effect on legal activities that benefit the public.

The fourth Note<sup>16</sup> analyzes the Supreme Court's decision in *Star Athletica v. Varsity Brands*,<sup>17</sup> where the Court created a new separability test for copyright's useful article doctrine. This Note explores the aftermath of the opinion, providing a summary of scholars' concerns and interpretations, and examining a few of the cases that have since used the new test. This Note argues that, in light of these concerns and the new test, courts should keep in mind certain limiting principles when applying the test in order to avoid

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13. Dina Ljekperic, Note, *Fox Television Stations, Inc. v. Aereo LLC: How the Narrow Framework of the 1976 Copyright Act Cut the Cord on Internet Television Retransmissions*, 33 BERKELEY TECH. L.J. 1037 (2018).

14. 851 F.3d 1002 (9th Cir. 2017).

15. Derek Russell Chipman, Note, *More Breaking, Less Rulemaking: Why Congress Should Go Beyond the Copyright Office's 1201 Report and Amend the DMCA to Require a Nexus to Infringement*, 33 BERKELEY TECH. L.J. 1067 (2018).

16. Trenton Davis, Note, *A Missed Opportunity: The Supreme Court's New Separability Test in Star Athletica*, 33 BERKELEY TECH. L.J. 1091 (2018).

17. 137 S. Ct. 1002 (2017).

providing copyright protection to functional aspects of useful articles.

This fifth Note<sup>18</sup> evaluates the Ninth Circuit's recent decision to uphold the constitutionality of national security letter nondisclosure orders, which are routinely imposed upon ISPs that have received government demands for user information. The Note argues that the court should have found that such nondisclosure orders constitute invalid prior restraints on political speech.

The last Note<sup>19</sup> in this Section examines the Ninth Circuit's decision in *Antonick v. Electric Arts*,<sup>20</sup> where the court held that expert testimony was not relevant under the intrinsic prong of the extrinsic/intrinsic test, a test for determining non-literal copyright infringement. The note examines software copyright infringement cases in other Circuits and argues that courts should allow expert testimony in software copyright cases.

### III. TRADEMARK LAW

The first Note<sup>21</sup> in this Section evaluates the Ninth Circuit's decision in *Elliott v. Google*,<sup>22</sup> where the court held that verb usage of a registered trademark does not render that mark generic under the Lanham Act. Analyzing the evolution of branding techniques, this note hypothesizes how the decision in Elliott could further incentivize companies to circumvent the restrictions set by the genericide doctrine.

The second and last Note<sup>23</sup> in this Section examines the Supreme Court's decision in *Matal v. Tam*,<sup>24</sup> which held the disparagement provision of the Lanham Act to be unconstitutional. This Note applies the *Tam* analysis to trademark dilution and discusses the potential implications of the current state of trademark law.

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18. Rachel Dallal, Note, *Speak No Evil: National Security Letters, Gag Orders, and the First Amendment*, 33 BERKELEY TECH. L.J. 1115 (2018).

19. Ran Duan, Note, *Antonick v. Electronic Arts: Expert Witnesses and Software Copyright Infringement*, 33 BERKELEY TECH. L.J. 1147 (2018).

20. 841 F.3d 1062 (9th Cir. 2016).

21. Christopher Brown, Note, *Let Me Google that for You: Elliot v. Google and its Conflicts with the Genericide Doctrine in a Digital Age*, 33 BERKELEY TECH. L.J. 1169 (2018). 860 F.3d 1151 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 362 (2017)

22. 860 F.3d 1151 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 362 (2017).

23. Zahraa Hadi, Note, *If Disparagement is Dead, Dilution Must Die Too*, 33 BERKELEY TECH. L.J. 1189 (2018).

24. 137 S. Ct. 1744 (2017).

#### IV. PRIVACY LAW

The first Note<sup>25</sup> in this Section analyzes how courts are applying the particularity requirement of the Fourth Amendment to cloud content. The Note asserts that the approaches taken by the courts can be organized into four categories and explores existing and novel methods to satisfy the particularity requirement.

The second and last Note<sup>26</sup> in this Section discusses the meaning of personally identifiable information (PII) in the Video Privacy Protection Act (VPPA) to understand what scope of protection should be implemented for digital identifiers, following a trend of VPPA cases against online service providers. This Note examines broad and narrow interpretations of PII implemented by district courts and concludes that a broad interpretation of PII best fits the VPPA's purpose and congressional intent.

#### V. REGULATION AND LEGISLATURE

The first Note<sup>27</sup> in this Section focuses on the Supreme Court's decision in *Sandoz Inc. v. Amgen Inc.*,<sup>28</sup> which interprets critical provisions of the Biologics Price Competition and Innovation Act (BPCIA). It begins by providing a summary of recent cases and clarity about the remedies associated with the BPCIA. The Note then argues that *Sandoz* may be inconsistent with the greater purpose and text of the BPCIA, and the decision may have unintended consequences as a result. For instance, the Supreme Court's holding may incentivize pay-for-delay settlements, and force reference product sponsors to "blindly litigate" all of its patents early. *Sandoz* still left many questions open and much of the BPCIA requires more interpretation. The Note concludes that lower courts will continue to face challenges with interpreting the BPCIA and reconciling it with rules of civil procedure and discovery.

The final Note<sup>29</sup> examines the different paradigms for interpreting the meaning of "unauthorized access" under the Computer Fraud and Abuse Act (CFAA) and the implications of each paradigm for algorithmic auditors and online competitors whose work aims to root out discrimination in online

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25. Bihter Ozedirne, Note, *Fourth Amendment Particularity in the Cloud*, 33 BERKELEY TECH. L.J. 1221 (2018).

26. Yarden Kakon, Note, *"Hello, My Name is User #101": Defining PII Under the VPPA*, 33 BERKELEY TECH. L.J. 1249 (2018).

27. Rithika Kulathila, Note, *BPCIA Update: Entropy is the Price of an Ordered Framework*, 33 BERKELEY TECH. L.J. 1275 (2018).

28. 137 S. Ct. 1664 (2017).

29. Annie Lee, Note, *Algorithmic Auditing and Online Competition Under the CFAA: The Revocation Paradigm of Interpreting Access and Authorization*, 33 BERKELEY TECH. L.J. 1305 (2018).

artificial intelligence algorithms. It examines the Ninth Circuit's recent articulation of a new revocation paradigm in *Facebook v. Power Ventures*,<sup>30</sup> and argues that while the new paradigm brings some clarity to the notoriously vague statute, it also creates a powerful ability for dominant online platforms to single out third parties for access denial, which is particularly problematic for algorithmic auditors and competitors. Finally, the Note calls for renewed interest in legislative reform of the CFAA to narrow the scope of the statute by adding an additional scienter requirement.

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30. 844 F.3d 1058 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 313 (2017).