

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 thirteen Notes in this Issue continue a tradition of covering a wide range of topics. The Notes address developments in patent, copyright, trademark, privacy, technology-focused regulations and legislature, and antitrust.

I. PATENT LAW

The first Note¹ in this Section examines the Supreme Court's decision in *WesternGeco v. ION Geophysical Corp.*² to uphold lost profit damages predicated on foreign, non-infringing actions following 35 U.S.C. § 271(f)(2) liability. This Note concludes that the Supreme Court's use of the RJR Nabisco framework in rebutting the presumption against extraterritoriality opens foreign lost profit liability across all modes of 35 U.S.C. § 271 infringement. Additionally, the Note argues that practitioners and judges may restore the presumption's role by importing comity concerns into a policy-driven proximate cause analysis for future infringement cases.

The second Note³ discusses the Supreme Court's *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*⁴ decision, which upheld the constitutionality under Article III and the Seventh Amendment of the inter partes review (IPR)

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1. Nicholas E. Calcaterra, Note, *The Supreme Court Denies Rebuttal: WesternGeco and Salvaging Extraterritorial Bars to Patent Liability*, 34 *BERKELEY TECH. L.J.* 925 (2019).

2. 138 S. Ct. 2129 (2018).

3. Concord Cheung, Note, *Exploring Patent Takings After Oil States*, 34 *BERKELEY TECH. L.J.* 963 (2019).

4. 138 S. Ct. 1365 (2018).

process. This Note further explores the undecided issue of whether the Takings Clause applies to IPR proceedings and describes a framework for applying regulatory takings analysis to patent rights taken during IPR.

The third Note⁵ examines the patent litigation landscape after the Supreme Court's decision in *SAS Institute Inc. v. Iancu*.⁶ To explore the consequences of the decision, the Note analyzes 200 Inter Partes Review (IPR) decisions, district court orders on motions to stay pending IPR, and potential social and institutional ramifications of the decision. Based on this analysis, the Note also suggests pragmatic ways for practitioners to approach litigation strategy in the altered landscape.

The fourth Note⁷ examines how patent venue has continued to evolve in the aftermath of *TC Heartland LLC v. Kraft Foods Group Brands LLC*,⁸ which dramatically restricted where plaintiffs can bring patent infringement suits. Particularly, this Note looks at how both the Federal Circuit and litigants have reacted to the decision, and uses quantitative analysis to map the changes in the landscape of patent venue through the end of 2018.

The fifth Note⁹ evaluates the Federal Circuit's decision in *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals*,¹⁰ which found that tribal sovereign immunity was not an acceptable defense during inter partes review. This Note compares uses of state and tribal sovereign immunity during patent review procedures and patent litigation. Ultimately, this Note argues that sovereign immunity is an inapplicable defense during inter partes review and currently draws an unnecessary distinction between state and tribal immunity.

The sixth Note¹¹ examines recent Federal Circuit cases concerning the factual inquiry underlying the *Mayo/Alice* patent subject matter eligibility framework. The Note asserts that the Federal Circuit's decisions represent an overdue clarification of the uncertainty surrounding patent litigation that involves this framework. This Note also proposes guidelines for the application of an evidentiary principle in the adjudication of patent subject matter eligibility.

5. Victoria Constance Huang, Note, *Patent Litigation Post-SAS: Nuanced Implications of Binary IPR Institution*, 34 BERKELEY TECH. L.J. 993 (2019).

6. 138 S. Ct. 1348 (2018).

7. Alexander S. Krois, Note, *The Evolution of Patent Venue in the Aftermath of TC Heartland*, 34 BERKELEY TECH. L.J. 1023 (2019).

8. 137 S. Ct. 1514 (2017).

9. Julea Lipiz, Note, *Eye See What You're Doing: An Analysis of Allergan's Use of Tribal Sovereign Immunity to Evade IPR of Their Eye Product, Restasis*, 34 BERKELEY TECH. L.J. 1057 (2019).

10. 896 F.3d 1322 (Fed. Cir. 2018).

11. Li Zhang, Note, *Alice Gets a Haircut: Berkheimer and Aatrix Restore Factual Inquiry to Patent Subject Matter Eligibility Under § 101*, 34 BERKELEY TECH. L.J. 1081 (2019).

II. COPYRIGHT LAW

The Note¹² in this Section evaluates the Ninth Circuit's decision in *Williams v. Gaye*,¹³ where the court held that the global best-selling single of 2013, "Blurred Lines," infringed Marvin Gaye's copyright in his 1977 hit song "Got to Give It Up." The Note argues that the Ninth Circuit's decision fails to distinguish between legally protectable and unprotectable elements in music and thus imposes a chilling effect on musical creativity and innovation by allowing composers to seek copyright protection over entire styles and grooves. Specifically, this Note shows how a particular limiting doctrine of copyright law, the scenes a faire doctrine, constitutes an already-existing yet underutilized tool that can bring into legal consideration the tradition and necessity of sharing common elements in music.

III. TRADEMARK LAW

The Note¹⁴ in this Section focuses on the circuit split over the territoriality principle of U.S. trademark law in protecting non-registered and not-in-use foreign trademarks in the United States. The Note confirms the value of the *Belmora*¹⁵ decision that allows foreign trademark owners to use the unfair competition clause to fight against trademark abuse, while parsing out the considerations that led to the diverging court decisions using both legal and empirical analysis.

IV. PRIVACY LAW

The first Note¹⁶ in this Section analyzes the Clarifying Lawful Overseas Use of Data (CLOUD) Act, passed in March 2018. The CLOUD Act was designed to mitigate existing problems with cross-border data demands made by U.S. and foreign law enforcement. However, the Note argues that in doing so, the law gives the executive branch significant control over extraterritorial data access, which can lead to problems of due process and conflicts of values.

12. Paymaneh Parhami, Note, *Williams v. Gaye: Blurring the Lines of Copyright Infringement in Music*, 34 BERKELEY TECH. L.J. 1113 (2019).

13. *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

14. Su Li, Note, *Belmora LLC v. Bayer Consumer Care AG: Unfair Competition as an Alternative Approach to Penetrate the Territorial Principle in U.S. Trademark Law*, 34 BERKELEY TECH. L.J. 1145 (2019).

15. 819 F.3d 697 (4th Cir. 2016).

16. Miranda Rutherford, Note, *The CLOUD Act: Creating Executive Branch Monopoly Over Cross-Border Data Access*, 34 BERKELEY TECH. L.J. 1177 (2019).

The second Note¹⁷ is created in the wake of the *Carpenter v. United States*¹⁸ decision. *Carpenter v. United States* is probably the most significant privacy case of this generation. It has a huge impact on data privacy, the third-party doctrine, and Fourth Amendment searches. This Note summarizes this monumental decision, traces the history of data privacy and the third-party doctrine, and discusses the future of the Fourth Amendment in the Post-*Carpenter* era.

V. REGULATION AND LEGISLATION

The first Note¹⁹ in this Section discusses the history and text of the Allow States and Victims to Fight Online Sex Trafficking Act of 2018 (SESTA/FOSTA),²⁰ which creates new criminal and civil liability for interactive computer services (ICSs) involved in the facilitation of sex trafficking on the Internet. Most significantly for the purposes of this Note, SESTA/FOSTA interjects a “knowledge” standard in the existing sex trafficking statute.²¹ This Note asserts that this knowledge standard muddles the existing sex trafficking statute, concluding that courts should draw on other areas of the law as well as real-world ICS practices in defining ICS knowledge of user-posted, sex trafficking-related content.

The second Note²² analyzes and explains the Foreign Risk Review Modernization Act, tracing its history and analyzing its contents as perhaps the most consequential change in the history of the Committee on Foreign Investment in the United States, commonly known as CFIUS. Ultimately, it argues that Congress took an obscure national security committee and turned it into a quasi-agency technology regulator—but by accident, and without properly equipping CFIUS to do its new job.

17. Elle Xuemeng Wang, Note, *Erecting a Privacy Wall Against Technological Advancements: The Fourth Amendment in the Post-Carpenter Era*, 34 BERKELEY TECH. L.J. 1205 (2019).

18. 138 S. Ct. 2206 (2018).

19. Megan McKnelly, Note, *Untangling SESTA/FOSTA: How the Internet’s “Knowledge” Threatens Anti-Sex Trafficking Law*, 34 BERKELEY TECH. L.J. 1239 (2019).

20. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018).

21. See *id.* at § 5.

22. Evan J. Zimmerman, Note, *The Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office*, 34 BERKELEY TECH. L.J. 1267 (2019).

VI. ANTITRUST

The Note²³ in this Section examines the consequences of the Supreme Court's decision in *Ohio v. American Express*²⁴ on technology platforms. It applies an economic lens to the majority holding to understand how the decision affects the potential antitrust liability faced by platform companies. This Note analyzes the dynamics of commonly-recognized platform business models to argue that the ruling should not broadly confer antitrust immunity on two-sided platforms.

23. Sanjana Parikh, Note, *Defining the Market for Two-Sided Platforms: The Scope of Ohio v. American Express*, 34 BERKELEY TECH. L.J. 1305 (2019).

24. 138 S. Ct. 2274 (2018).

