

# 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 sixteen Notes in this Issue continue a tradition of covering a wide range of topics. The Notes address developments in patent, copyright, trademark, privacy, and antitrust law.

## I. PATENT LAW

The first Note<sup>1</sup> in this Section examines how patent exhaustion applies to self-replicating technologies, with a focus on plants. The Court narrowly addressed this question in the 2013 case, *Bowman v. Monsanto*,<sup>2</sup> but explicitly left open whether and how exhaustion applies to self-replicating technologies more broadly. The Note uses *Bowman*’s theory and discussion of exhaustion, from the recent *Impression Products v. Lexmark International*<sup>3</sup> decision, to create an exhaustion framework for self-replicating technology. This framework efficiently addresses the questions left unanswered in *Bowman* and can be used for future self-replicating exhaustion questions.

The second Note<sup>4</sup> in this Section investigates whether “re-liberalizing” post-issuance patent claim amendments is beneficial for the patent system, focusing on America Invents Act trials. The Note probes the history of the claim amendments, analyzing the justifications given in three recent events that typify this “re-liberalization” trend—the Federal Circuit’s decision in *Aqua*

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1. Liz Freeman Rosenzweig, Note, *A Framework for Patent Exhaustion of Self-Replicating Technologies*, 35 *BERKELEY TECH. L.J.* 917 (2020).

2. 569 U.S. 278 (2013).

3. 137 S. Ct. 1523 (2017).

4. Julien Crockett, *Capricious Patent Boundaries: The “Reliberalization” of Post-Issuance Patent Claim Amendments*, 35 *BERKELEY TECH. L.J.* 961 (2020).

*Products v. Matal*,<sup>5</sup> the Patent and Trademark Office's embrace of the *Phillips* standard, and the Patent and Trademark Office's Motion to Amend Pilot Program—and collecting data regarding the impact of this “re-liberalization” on various actors within the patent system. The Note concludes by arguing that the “re-liberalization” of post-issuance claim amendments within America Invents Act trials hurts the patent system.

The third and final Note<sup>6</sup> in this Section discusses the Supreme Court's recent decision in *Return Mail v. United States Postal Service*.<sup>7</sup> The Note ultimately concludes that the Court's decision was incorrect, because it incorrectly neglected to apply the PTO's administrative interpretations of reexamination to AIA review proceedings. The Note also suggests how the PTO could rectify this decision via further administrative rules.

## II. COPYRIGHT LAW

The first Note<sup>8</sup> in this Section analyzes the consequences of the Court's holding in *Fourth Estate v. Wall-Street.com*,<sup>9</sup> which finds that plaintiffs must file applications for copyright registration and receive a decision from the Copyright Office, before filing suit. It argues that this harsher approach, of requiring registration, serves as a motivator for registration. This Note concludes that this stricter standard can be combined with academic proposals that call for a required recording of copyright transfer with the Copyright Office, to help mitigate the orphan works problem.

The second Note<sup>10</sup> in this Section examines anticircumvention provisions within the DMCA and finds that a key piece of copyright law, established in *Baker v. Selden*,<sup>11</sup> has been forgotten. *Baker*<sup>12</sup> finds that copyright protections do not extend to functional aspects of a work and this Note argues that courts should inquire whether an accused infringer was accessing functionality, as opposed to copying expressive works. As a more feasible solution, the Note argues that a statutory exception should be added to anticircumvention provisions, as to clarify the law and protect non-infringing uses.

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5. 872 F.3d 1290 (Fed. Cir. 2017).

6. Artin Au-Yeung, Note, *Re-Classifying Governmental Petitioners as “Persons in AIA Review Proceedings*, 35 BERKELEY TECH. L.J. 1003 (2020).

7. 1389 S. Ct. 1853 (2019).

8. Kevin Han Yang, Note, *Fourth Estate As a Vehicle to Impel Registration and Limit Orphan Works*, 35 BERKELEY TECH. L.J. 1041 (2020).

9. 139 S. Ct. 881 (2019).

10. Madison Bower, Note, *Keeping the DMCA Away From Functional Use*, 35 BERKELEY TECH. L.J. 1067 (2020).

11. 101 U.S. 99 (1879).

12. *Id.*

The third Note<sup>13</sup> in this Section analyzes the Music Modernization Act (MMA)<sup>14</sup> and finds that the act realigns music copyright for those within the music industry, but fails to address a gap in music copyright for those not in the music industry. Video and music sharing platforms act as arbiters of online content and, due to online enforcement realities, readily take down works with copyrighted work, even when the work constitutes fair use. This Note argues that non-commercial mashups and covers constitute fair use, and there should be a statutory presumption of fair use for these types of work, which will allow them to remain on internet platforms and further the goals of copyright law.

The fourth Note<sup>15</sup> in this Section examines *Rimini Street v. Oracle*.<sup>16</sup> The Note looks at American fee shifting and judicial interpretations leading to *Rimini*,<sup>17</sup> and analyzes how cost-shifting affected copyright litigation pre-*Rimini*. Using this background, the Note concludes that *Rimini*<sup>18</sup> was correctly decided, but that legislation should address the heavy transactional costs remaining, so that copyright law can better achieve its goals.

The fifth Note<sup>19</sup> in this Section analyzes the issue of copyright in AI-created works. As artificial intelligence (AI) becomes more sophisticated and extends into the generation of artistic works like music, poetry, novels, paintings, and sculpture, the issue of whether that work can be copyrighted, and by whom, has yet to be answered. This Note argues that AI works can surmount the traditional hurdles of copyrightability and should be protected by a unique regime that incorporates accountability and administrability. By mapping out legal precedent, underlying policies, and recent scholarly debate around copyrightability, this Note reveals and advocates for a continuing willingness to adapt the law to technological advances.

The sixth and final Note<sup>20</sup> in this Section discusses copyright protections in embedded content online. Ultimately, the Note concludes that the negative consequences of copyright protection for linked content outweigh its positive

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13. Shreya M. Santhanam, Note, *Going Beyond the Music Modernization Act: Creation in the Digital Era*, 35 BERKELEY TECH. L.J. 1093 (2020).

14. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

15. Alistair McIntyre, Note, *Rimini Street v. Oracle and the Problem of High Transactional Costs in Copyright Litigation*, 35 BERKELEY TECH. L.J. 1123 (2020).

16. 139 S. Ct. 873 (2019).

17. *Id.*

18. *Id.*

19. Gia Jung, Note, *Do Androids Dream of Copyright?: Examining AI Copyright Ownership*, 35 BERKELEY TECH. L.J. 1151 (2020).

20. Marta Rocha, Note, *The Brewing Battle: Copyright vs. Linking*, 35 BERKELEY TECH. L.J. 1179 (2020).

effects, and proposes a licensing scheme to compensate creators without chilling linking.

### III. TRADEMARK LAW

The Note<sup>21</sup> in this Section examines the Court's holding in *Iancu v. Brunetti*,<sup>22</sup> which found the "immoral or scandalous" provision of the Lanham Act to be unconstitutional. It argues that the Court reached the correct conclusion and that consumers, not Congress, should be entrusted with regulating future trademark morality, since consumers have the power to determine which words can be used as trademarks in the marketplace.

### IV. PRIVACY

The first Note<sup>23</sup> in this Section provides a quantitative summary of the European Union's General Data Protection Regulation (GDPR) and provides an exhaustive Internet search of all GDPR fines and sanctions imposed and pending by EU and EEA nations from May 25, 2018 (the day the GDPR became enforceable), through March 31, 2020. A data set of publicly available enforcements was compiled for all twenty-seven E.U. countries, the United Kingdom, and the three EEA countries—Lichtenstein, Iceland, and Norway, which are also subject to the GDPR. This Note uses descriptive statistics (mean, median, mode, range, and linear regression) to analyze the data and present results, including noteworthy findings, patterns, and trends of enforcement since implementation.

The second Note<sup>24</sup> in this Section examines Article 22 of the GDPR and its "right to contest" artificial intelligence (AI) automated decision-making. This Note provides a technical overview of "opaque AI," including the technological tools currently available to help explain AI behavior and what it might mean to explain an AI. This understanding is used to examine Article 22's "right to contest" and argues that it grants a right to an ex post explanation of AI decisions. The Note also looks forward and analyzes due process issues and recommends explanations that are most likely to fulfill the obligations listed in Article 22.

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21. Kyung-Lee Kelly Go, Note, *Flaunting the Scarlett Letter: Consumer Regulation of Trademark Morality After Iancu v. Brunetti*, 35 BERKELEY TECH. L.J. 1213 (2020).

22. 139 S. Ct. 2294 (2019).

23. Erin Hilliard, Note, *The GDPR Two Years In: A Retrospective and Prospective Look*, 35 BERKELEY TECH. L.J. 1245 (2020).

24. Walter A. Mostowy, Note, *Explaining Opaque AI Decisions: How to Satisfy the GDPR's Right to an Ex Post Explanation*, 35 BERKELEY TECH. L.J. 1291 (2020).

The third Note<sup>25</sup> of this Section analyzes data inferences, which are information derived or predicted from pre-existing data. Inferences are generated and used by businesses and other data controllers in great amounts, and they have become the type of data that drives most of the digital economy. This Note concludes that the paradigmatic data protection statutes in the European Union and the United States—the General Data Protection Regulation and the California Consumer Privacy Act, respectively—leave concerning gaps in the protection of this type of data. Consequentially, the Note argues that inferences deserve the same protection as the most sensitive types of data receive in both statutes, as data inferences were among the primary reasons both statutes were enacted.

The fourth Note<sup>26</sup> of this Section surveys lower court decisions in the wake of *Carpenter v. United States*.<sup>27</sup> The Note identifies that lower courts have declined to expand *Carpenter*'s holding past cell site location information. However, the Note suggests that lower courts may need to consider broadening *Carpenter* as new technologies present even more sophisticated opportunities for law enforcement surveillance.

The fifth and final Note<sup>28</sup> of this Section analyzes the standing requirement under Illinois's Biometric Information Privacy Act (BIPA).<sup>29</sup> Courts have disagreed as to whether plaintiffs can sue for a mere procedural violation of BIPA, without an additional showing of harm. The Note argues that BIPA provides a concrete interest in controlling one's own private information, and as such, additional concrete harm should not be necessary for standing.

## V. ANTITRUST

The Note<sup>30</sup> in this Section analyzes the Court's decision in *Apple Inc. v. Pepper*<sup>31</sup> and argues that the "indirect purchaser rule" from *Illinois Brick*<sup>32</sup> is not a suitable tool for analyzing antitrust standing in two-sided marketplaces. The

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25. Allan E. Holder, Note, *What We Don't Know They Know: What to Do About Inferences in European and California Data Protection Law*, 35 BERKELEY TECH. L.J. 1331 (2020).

26. Tiffany Chen, Note, *Defining the Privacies of Life: Lower Court Trends in the Wake of Carpenter*, 35 BERKELEY TECH. L.J. 1365 (2020).

27. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

28. Carmen Sobczak, Note, *BIPA and Article III Standing: Are Notice and Consent More Than "Bare Procedural" Rights?*, 35 BERKELEY TECH. L.J. 1391(2020).

29. 740 ILL. COMP. STAT. 14/1 et seq.

30. Haley Johnson, Note, "Illinois Brick-Breaker" For Sale in the App Store: *Apple v. Pepper and the Need for a New Antitrust Standing Doctrine*, 35 BERKELEY TECH. L.J. 1427 (2020).

31. 139 S. Ct. 1514 (2019).

32. 431 U.S. 720 (1977).

Note proposes an alternative test that would be better suited to two-sided marketplaces and applies this test to *Apple*.<sup>33</sup>

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33. *Apple*, 139 S. Ct. at 1514.