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 twelve Notes in this Issue continue a tradition of covering a wide range of topics. The Notes address developments in patent, copyright, trademark, privacy, antitrust, and content and media regulation.

I. PATENT LAW

The first Note[1] in this Section examines the patent-eligible subject matter doctrine after the Federal Circuit's decision in *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*.[2] In *American Axle*, the Federal Circuit applied the *Mayo/Alice* framework to determine whether an invention was eligible for patent protection. This Note asserts that the *Mayo/Alice* framework is problematic, as it overlaps with other patentability tests and disregards how all inventions inevitably include some level of abstraction. This Note proposes a revised notion of patent eligibility that is anchored in utility doctrine.

The second Note[3] in this Section addresses a conflict in the pharmaceutical industry. To obtain approval from the Federal Drug Administration (FDA), a pharmaceutical company must present its product as being similar to already-approved drugs. However, when the pharmaceutical company seeks patent protection from the United States Patent and Trademark Office (USPTO) for

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1. Caressa N. Tsai, Note, *The Utility of Patent Eligibility*, 38 BERKELEY TECH. L.J. 1093 (2024).

2. 967 F.3d 1285 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 2902 (2022).

3. Garreth W. McCrudden, Note, *Drugs, Deception, and Disclosure*, 38 BERKELEY TECH. L.J. 1131 (2024).

the same product, it must distinguish the product from existing prior art. To resolve this conflict, this Note recommends a new system for USPTO-FDA interaction during patent prosecution and a complementary post-patent-issuance solution.

II. COPYRIGHT LAW

The first Note[4] in this Section examines the interplay between copyright, state sovereign immunity, and the federal Takings Clause. After the Texas Supreme Court's decision in *Jim Olive Photography v. University of Houston*,[5] state actors can essentially appropriate copyrighted material with impunity. To hold state actors liable for the unauthorized taking of an individual's copyrighted material, this Note explores the feasibility of bringing lawsuits under the Takings Clause and proposes a revised, narrowly tailored version of the Copyright Reform Clarification Act.

The second Note[6] in this Section asserts that copyright law inherently favors certain genres of cultural expression over others, because certain genres of music, such as Indian classical music, inevitably either infringe upon another's copyright or contain a high amount of *scenes a faire* elements. To encourage investment in these genres of music, this Note proposes narrowing the scope of copyright's derivative and reproductive rights.

The third Note[7] in this Section examines the Supreme Court's decision in *Unicolors v. H&M*.[8] While the legal issue in the case—whether good faith mistakes of fact or law render copyright registration applications invalid—was a narrow one, this Note asserts that the underlying facts of the case suggest there is an issue with "copyright trolling." This Note recommends several policy solutions to deter copyright trolls from abusing the copyright system.

4. Sarah Davidson, Note, *Take A Picture: Copyright and State Sovereign Immunity*, 38 BERKELEY TECH. L.J. 1169 (2024).

5. 624 S.W.3d 764, 768 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

6. Akshat Agrawal, Note, *Resolving Copyright's Distortionary Effects*, 38 BERKELEY TECH. L.J. 1207 (2024).

7. Samantha Cox-Parra, Note, *Understanding* Unicolors*: Mistakes of Law Don't Necessarily Invalidate Copyright Registration Certificates*, 38 BERKELEY TECH. L.J. 1249 (2024).

8. Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941 (2022).

III. TRADEMARK LAW

The Note[9] in this Section critiques the Federal Circuit's decision in *In re Elster*.[10] In *In re Elster*, the Federal Circuit held that the USPTO's refusal to register "TRUMP TOO SMALL" as a trademark violated the First Amendment's protection of political speech. This Note asserts that the Federal Circuit in *In re Elster* failed to properly consider the context of the speech at issue and that the Federal Circuit should have analyzed the registrability of the trademark under the First Amendment's limited public forum framework.

IV. PRIVACY

The first Note[11] in this Section asserts that law enforcement's use of the geofence search warrant endangers individuals' rights to privacy and political speech. In light of these dangers, this Note recommends that Congress enact a blanket prohibition on all law enforcement use of the geofence search warrant.

The second Note[12] in this Section examines the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, where the Court held that there is not a constitutional right to receive an abortion. This Note posits that, post-*Dobbs*, digital data surveillance will become the primary mode of enforcing abortion bans.[13] This Note argues that the use of data surveillance will chill desirable, legal activities and that Congress should enact privacy legislation to limit the use of data surveillance.

V. ANTITRUST

The first Note[14] in this Section examines the relationship between antitrust law and regulation in the context of Personal Social Networks. This Note argues that the relationship between antitrust law and regulation is symbiotic, and not adversarial. To properly balance the relationship between antitrust law and regulation in the context of Personal Social Networks, this Note asserts that the Personal Social Networks must first be broken down to manageable

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9. Brigitte Desnoes, Note, *Dangling the Carrot of Trademark Registration*, 38 BERKELEY TECH. L.J. 1273 (2024).

10. 26 F.4th 1328 (Fed. Cir. 2022).

11. Danny Drane, Note, *Why It's Time to Ban Geofence Searches in Light of* United States v. Chatrie, 38 BERKELEY TECH. L.J. 1307 (2024).

12. Leila Nasrolahi, Note, *Externalities of Maximally Enforcing Abortion Bans*, 38 BERKELEY TECH. L.J. 1341 (2024).

13. 142 S. Ct. 2228 (2022).

14. M. A. Katz, Note, *Clearly Repugnant: Correcting the Court's Failed Approach to Antitrust Enforcement*, 38 BERKELEY TECH. L.J. 1373 (2024).

sizes before regulation can be crafted to protect consumers from harms like hate speech and privacy invasions.

The second Note[15] in this Section examines the goals of antirust law in the context of vertical mergers. This Note contends that the purpose of antitrust law is to protect competition. As vertical mergers do not directly eliminate competitors, this Note asserts that vertical mergers present a unique situation to test the meaning of competition.

VI. MEDIA AND CONTENT REGULATION

The first Note[16] in this Section scrutinizes regulations by Texas and Florida that restrict the ability of social media platforms to moderate content.[17] This Note concludes that the regulations are unconstitutional, as they are not narrowly tailored, and that they cannot be modified to become constitutional.

The second Note[18] in this Section examines the Supreme Court's decision in *FCC v. Prometheus Radio Project*.[19] In that case, Court held that the Federal Communication Commission (FCC) had the authority to revoke media cross-ownership rules. This Note asserts that the Court largely sidestepped the normative issues concerning the public interest standard, which requires broadcast licensees to operate in the "public interest, convenience and necessity." This Note argues that the FCC should revitalize the public interest standard in light of an alarming trend of deregulation in the media broadcasting industry.

15. Zhudi Huang, Note, *Protecting the Competitive Process in Vertical Merger*, 38 BERKELEY TECH. L.J. 1405 (2024).

16. Utkarsh Srivastava, Note, *Gotta Catch 'Em All: Legislative Overreach in Florida and Texas Anti-Moderation Laws*, 38 BERKELEY TECH. L.J. 1437 (2024).

17. FLA. STAT. § 501.2041 (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021).

18. Bogdan Belei, Note, *The Forgotten Public Interest Standard*, 38 BERKELEY TECH. L.J. 1469 (2024).

19. 141 S. Ct. 1150 (2021).