Production: Produced by members of the Berkeley Technology Law Journal. All editing and layout done using Microsoft Word.

Printer: Joe Christensen, Inc., Lincoln, Nebraska. Printed in the U.S.A.

Copyright © 2014 Regents of the University of California. All Rights Reserved.

Berkeley Technology Law Journal
University of California
School of Law
3 Boalt Hall
Berkeley, California 94720-7200
btlj@law.berkeley.edu
http://www.btlj.org
# Berkeley Technology Law Journal

## Table of Contents

### Foreword
Robin Kuntz & Julie Kent .......................................................... 377

### Patent Law
- **Association for Molecular Pathology v. Myriad Genetics, Inc.: The Product of Nature Doctrine Revisited**
  Tup Ingram .................................................................................. 385
- **Breaching RAND and Reaching for Reasonable: Microsoft v. Motorola and Standard-Essential Patent Litigation**
  Kassandra Maldonado ................................................................. 419
- **Bowman v. Monsanto: Bowman, the Producer and the End User**
  Tabetha Marie Peavey ................................................................. 465
- **Competition Ahead? The Legal Landscape for Reverse Payment Settlements After Federal Trade Commission v. Actavis, Inc.**
  Allison A. Schmitt ........................................................................ 493
- **Misjoinder or Mishap? The Consequences of the AIA Joinder Provision.**
  Dongbiao Shen ........................................................................... 545
- **Breaking Bad Patents: The Formula for Quick, Inexpensive Resolution of Patent Validity**
  Jonathan Tamimi ......................................................................... 587
- **Damaging Royalties: An Overview of Reasonable Royalty Damages**
  Zelin Yang ................................................................................. 647

### Copyright Law
- **On Appropriation: Carjou v. Prince and Measuring Contextual Transformation in Fair Use**
  Jonathan Francis ......................................................................... 681
• THE MURKY WATERS OF FIRST SALE: PRICE DISCRIMINATION AND DOWNSTREAM CONTROL IN THE WAKE OF KIRTS/AENG V. JOHN WILEY & SONS, INC.
  S. Zubin Gautam .............................................................................................................................................. 717
• NEW RULES FOR A NEW DECADE: IMPROVING THE COPYRIGHT OFFICE’S ANTI-CIRCUMVENTION RULEMAKINGS
  Mark Gray .......................................................................................................................................................... 759
• ASSOCIATED PRESS V. MELTWATER US HOLDINGS, INC.: FAIR USE, A CHANGING NEWS INDUSTRY, AND THE INFLUENCE OF JUDICIAL DISCRETION AND CUSTOM
  Rosalind Jane Schonwald ..................................................................................................................................... 799

TRADEMARK LAW
• SHOULD INTELLECTUAL PROPERTY OWNERS JUST DO IT? AN EXAMINATION INTO THE EFFECTS OF NIKE’S COVENANT NOT TO SUE
  Misa K. Eiritz ...................................................................................................................................................... 837
• MUCH ADO ABOUT NOTHING: ICANN’S NEW GTLDs
  Daniela Michele Spencer ...................................................................................................................................... 865

CYBERLAW
• SYMBIOTIC RELATIONSHIPS: PRAGMATIC ACCEPTANCE OF DATA SCRAPING
  Jeffrey Kenneth Hirschey ..................................................................................................................................... 897
• THE INDECENT INTERNET: RESISTING UNWARRANTED INTERNET EXCEPTIONALISM IN COMBATING REVENGE PORN
  Jenna K. Stokes ...................................................................................................................................................... 929

PRIVACY LAW
• REBUILDING BRIDGES: ADDRESSING THE PROBLEMS OF HISTORIC CELL SITE LOCATION INFORMATION
  Mark Daniel Langer ............................................................................................................................................... 955
• NSA METADATA COLLECTION AND THE FOURTH AMENDMENT
  Joseph D. Mornin .................................................................................................................................................. 985
• STANDING IN THE WAY OF PRIVACY PROTECTIONS: THE ARGUMENT FOR A RELAXED ARTICLE III STANDING REQUIREMENT FOR CONSTITUTIONAL AND STATUTORY CAUSES OF ACTION
  Lexi Rubow ......................................................................................................................................................... 1007

SURVEY OF ADDITIONAL IP AND TECHNOLOGY LAW DEVELOPMENTS ............................................................................... 1043
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., 19th ed. 2010).

**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.
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

<table>
<thead>
<tr>
<th>Company</th>
<th>Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>COOLEY LLP</td>
<td>FENWICK &amp; WEST LLP</td>
</tr>
<tr>
<td>COVINGTON &amp; BURLING LLP</td>
<td>ORRICK, HERRINGTON &amp; SUTCLIFFE LLP</td>
</tr>
</tbody>
</table>

### Benefactors

<table>
<thead>
<tr>
<th>Company</th>
<th>Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>FISH &amp; RICHARDSON P.C.</td>
<td>SKADDEN, ARPS, SLATE, MEAGHER &amp; FLOM LLP &amp; AFFILIATES</td>
</tr>
<tr>
<td>KASOWITZ BENSON TORRES &amp; FRIEDMAN LLP</td>
<td>WEIL, GOTSAL &amp; MANGES LLP</td>
</tr>
<tr>
<td>KIRKLAND &amp; ELLIS LLP</td>
<td>WHITE &amp; CASE LLP</td>
</tr>
<tr>
<td>LATHAM &amp; WATKINS LLP</td>
<td>WILMER CUTLER PICKERING HALE AND DORR LLP</td>
</tr>
<tr>
<td>MCDERMOTT WILL &amp; EMERY</td>
<td>WILSON SONSINI</td>
</tr>
<tr>
<td>MORRISON &amp; FOERSTER LLP</td>
<td>GOODRICH &amp; ROSATI</td>
</tr>
<tr>
<td>WINSTON &amp; STRAWN LLP</td>
<td></td>
</tr>
</tbody>
</table>
Members

ALSTON & BIRD LLP

BAKER BOTTs LLP

BAKER & MCKENZIE LLP

BINGHAM MCCUTCHEON LLP

DURIE TANGRI LLP

GILLIN JACOBSON ELLIS LARSEN & LUCEY

GTC LAW GROUP LLP & AFFILIATES

GUNDERSOHN DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN, LLP

HAYNES AND BOONE, LLP

HICKMAN PALERMO TRUONG BECKER BINGHAM WONG, LLP

HOGAN LOVELLS LLP

IRELL & MANELLA LLP

KEKER & VAN NEST LLP

KILPATRICK TOWNSEND & STOCKTON LLP

KNOBBE MARTENS OLSON & BEAR LLP

MUNGER, TOLLES & OLSON LLP

O'MELVENY & MYERS LLP

PAUL HASTINGS LLP

ROPES & GRAY LLP

SIDLEY AUSTIN LLP

SIMPSON THACHER & BARTLETT LLP

TURNER BOYD LLP

VAN PELT, YI & JAMES LLP

WEAVER AUSTIN VILLENEUVE & SAMPSON, LLP
BERKELEY TECHNOLOGY LAW JOURNAL
ANNUAL REVIEW 2014

Senior Faculty Adviser
PETER S. MENELL

Faculty Advisers
ROBERT BARR
BRIAN CARVER
CHRIS HOOFNAGLE
PETER MENELL

Senior Annual Review Editors
JULIE KENT
ROBIN KUNTZ

Production Editors
DOMINIQUE CAAMANO
ROXANA GUIDERO
JENNA STOKES

Editor-in-Chief
EMILY CHEN

Annual Review Editors
LAUREN BLAKELY
EMILY LY

Advisers
EMILY CHEN
E. ROSS COHEN
DAMION JURRENS

JULIE KENT
JESSE KOEHLER
ROBIN KUNTZ
ALEX LI

JUSTIN ORR
MICHAEL LIU SU
ETHAN WEINER

Authors
MISA K. EIRITZ
JONATHAN FRANCIS
S. ZUBIN GAUTAM
MARK GRAY
JEFFREY KENNETH HIRSCHEY
TUP INGRAM

MARK DANIEL LANGER
KASSANDRA MALDONADO
JOSEPH D. MORNIN
TABETHA MARIE PEAVEY
LEXI RUBOW
ALLISON A. SCHMITT

ROALD L. JEFFREY
KENNETH HIRSCHEY
TUP INGRAM

ROSALIND JANE SCHONWALD
DONGBIAO SHEN
DANIELA MICHELE SPENCER
JENNA K. STOKES
JONATHAN TAMMI
ZELIN YANG

Contributors
OM ALLADI
RAVI ANTANI
NORRIS BOOHE
VIOLAYNE BRUNET
NICOLE CABRERA
YIN CHOI
DANIELA CRONEMBOLD

MOJDEH FARI
JOHN FLYNN
JESUS Raul Garcia
ZIYAN HUANG
TUP INGRAM
PRAORUJEE KANTHASORN
JORDYN OSTROFF

LISA PATEL
ORNNATTHA SABYEROOP
DONGBIAO SHEN
MICHAEL LIU SU
IRENE SULAIMAN
CURTIS WHATLEY
SORIN ZAHARIA
BOARD OF EDITORS 2013–2014

Executive Committee

Editor-in-Chief
EMILY CHEN

Managing Editor
SARAH ORRICK

Senior Articles Editors
E. ROSS COHEN
MARK LANGER
ETHAN WEINER

Senior Executive Editor
LALI MADDURI

Senior Annual Review Editors
JULIE KENT
ROBIN KUNTZ

Senior Scholarship Editor
NICHOLAS LAMPROS

Editorial Board

Submissions Editors
BRADY BLASCO
ANAGHA KRISHNAN

Production Editors
DOMINIQUE CAAMANO
JENNA STOKES

Bluebook Editors
ANTHONY CHANRASMI
DANIELA CHANRASMI
MARGARET YI

Annual Review Editors
LAUREN BLAKELY
EMILY LY

Notes & Comments Editors
SIENA CARUSO
STEVEN S. MCCARTY-SNEAD

Symposium Editors
CHRISTINA FARMER
ALEX S. LI

Web Content Editor
DINA ROUMIANTESEVA

Web & Technology Editors
EDUARD MELESHINSKY
STEVEN SWANSON

External Relations Editor
GAVIN LIU

Member Relations Editor
ANDREW YOCOPIS

Articles Editors
DALLAS BULLARD
JONATHAN FRANCIS
S. ZUBIN GAUTAM
JEFFREY HIRSCHIEY
BAILEY LANGNER

KASSANDRA MALDONADO
JOE MORRIS
LEXI RUBOW
ALLISON SCHMITT
ROSALIND SCHONWALD

BENJAMIN TAKEMOTO
AMY TU
BONNIE WATSON
MARK ZAMBARDA
BTLJ ADVISORY BOARD

ROBERT BARR
Executive Director of the
Berkeley Center for Law & Technology
U.C. Berkeley School of Law
Berkeley, California

ROBERT C. BERRING, JR.
Walter Perry Johnson Professor of Law
U.C. Berkeley School of Law
Berkeley, California

JESSE H. CHOPER
Earl Warren Professor of Public Law
U.C. Berkeley School of Law
Berkeley, California

PETER S. MENELL
Professor of Law and Faculty Director of the
Berkeley Center for Law & Technology
U.C. Berkeley School of Law
Berkeley, California

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
Berkeley, California

REGIS MCKENNA
Chairman and CEO
Regis McKenna, Inc.
Palo Alto, California

DEIRDRE K. MULLIGAN
Assistant Professor and Faculty Director of the Berkeley Center for Law and Technology
U.C. Berkeley School of Information
Berkeley, California

JAMES POOLEY
Deputy Director General of the
World Intellectual Property Organization
Washington, D.C.

MATTHEW D. POWERS
Tensegrity Law Group, LLP
Redwood Shores, California

PAMELA SAMUELSON
Professor of Law & Information and Faculty Director of the Berkeley Center for Law & Technology
U.C. Berkeley School of Law
Berkeley, California

LIONEL S. SOBEL
Visiting Professor of Law
U.C.L.A. School of Law
Los Angeles, California

LARRY W. SONSINI
Wilson Sonsini Goodrich & Rosati
Palo Alto, California

MICHAEL STERN
Cooley LLP
Palo Alto, California

MICHAEL TRAYNOR
Cobalt LLP
Berkeley, California

THOMAS F. VILLENEUVE
Gunderson Dettmer Stough Villeneuve
Franklin & Hachigian LLP
Redwood City, California
BERKELEY CENTER FOR
LAW & TECHNOLOGY
2013–2014

Executive Director
ROBERT BARR

Faculty Directors
KENNETH A. BAMBERGER
ROBERT P. MERGES
DEIRDRE MULLIGAN
KENNETH A. BAMBERGER
PETER S. MENELL
PAUL SCHWARTZ
PAMELA SAMUELSON
MOLLY S. VAN HOUWELING

Associate Director
LOUISE LEE

Affiliated Faculty
CHRI$ JAY HOO$NA$LE
TALHA SYED
JENNIFER M. URBAN

In Memoriam
SUZANNE SCOTCHMER
1950–2014