

9-1-2013

Front Matter

Berkeley Technology Law Journal

Follow this and additional works at: <https://scholarship.law.berkeley.edu/btlj>

Recommended Citation

Berkeley Technology Law Journal, *Front Matter*, 28 BERKELEY TECH. L.J. (2013).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38BD7X>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Technology Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

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.

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Library Materials, ANSI Z39.48—1984.

Copyright © 2013 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

VOLUME 28

ANNUAL REVIEW 2013

TABLE OF CONTENTS

FOREWORD

Winnie Hung & Jane Ann Levich.....341

PATENT LAW

- MAKING ABUSERS PAY: DETERRING PATENT LITIGATION BY SHIFTING ATTORNEYS' FEES
Emily H. Chen.....351
- CLEAR AS MUD: AN EMPIRICAL ANALYSIS OF THE DEVELOPING LAW OF JOINT INVENTORSHIP IN THE FEDERAL CIRCUIT
Eric Ross Cohen.....383
- COMPUTER CLAIM DISARRAY: UNTANGLING THE MEANS-PLUS-FUNCTION DOCTRINE TO ELIMINATE IMPERMISSIBLE FUNCTIONAL CLAIMING IN SOFTWARE PATENTS
Elise S. Edlin.....417
- TRADE SECRET ENFORCEMENT AFTER *TLARUI*: FIGHTING MISAPPROPRIATION THROUGH THE ITC
Natalie Flechsig.....449
- ACCIDENTALLY ON TARGET: THE *MSTG* EFFECTS ON NON-PRACTICING ENTITIES' LITIGATION AND SETTLEMENT STRATEGIES
Alex S. Li.....483
- PATENT AGGREGATION: MODELS, HARMS, AND THE LIMITED ROLE OF ANTITRUST
Justin R. Orr.....525
- THE EYE OF THE STORM: SOFTWARE PATENTS AND THE ABSTRACT IDEA DOCTRINE IN *CLS BANK V. ALICE*
Dina Roumiantseva.....569
- A ROCK AND A HARD PLACE: CHOOSING BETWEEN § 271(A) AND (B) FOR DIVIDED INFRINGEMENT IN *AKAMAI*
Michael Liu Su.....609
- DEFINING A NATURAL PHENOMENON AFTER *PROMETHEUS*
Ethan M. Weiner.....643

COPYRIGHT LAW

- FAIR USE & MASS DIGITIZATION: THE FUTURE OF COPY-DEPENDENT TECHNOLOGIES AFTER *AUTHORS GUILD V. HATHI TRUST*
Angel Siegfried Diaz.....683
- REMITTITUR AND COPYRIGHT
Casey Hultin.....715
- LEVELING PAINS: CLONE GAMING AND THE CHANGING DYNAMICS OF AN INDUSTRY
Nicholas M. Lampros.....743

TRADEMARK LAW

- RED IN THE EYE OF THE BEHOLDER: THE CASE FOR AESTHETIC FUNCTIONALITY
Christina Farmer.....777
- DECIPHERING *ROSETTA STONE*: WHY THE LEAST COST AVOIDER PRINCIPLE UNLOCKS THE CODE TO CONTRIBUTORY TRADEMARK INFRINGEMENT IN KEYWORD ADVERTISING
Sarah Wells Orrick.....805

CYBERLAW

- FOOL ME ONCE: *U.S. V. ALEYNIKOV* AND THE THEFT OF TRADE SECRETS CLARIFICATION ACT OF 2012
Robert Damion Jurens.....833
- OPERATION SEIZING OUR SITES: HOW THE FEDERAL GOVERNMENT IS TAKING DOMAIN NAMES WITHOUT PRIOR NOTICE
Karen Kopel.....859
- HOW NOT TO CATCH A THIEF: WHY THE ECONOMIC ESPIONAGE ACT FAILS TO PROTECT AMERICAN TRADE SECRETS
Robin L. Kuntz.....901

PRIVACY LAW

- THE FOURTH AMENDMENT AND GOVERNMENT INTERCEPTION OF UNSECURED WIRELESS COMMUNICATIONS
Shaina Hyder.....937
- *FRALEY V. FACEBOOK*: THE RIGHT OF PUBLICITY IN ONLINE SOCIAL NETWORKS
Jesse Koehler.....963
- JONESING FOR A TEST: FOURTH AMENDMENT PRIVACY IN THE WAKE OF *UNITED STATES V. JONES*
Lauren Elena Smith..... 1003

OTHER DEVELOPMENTS IN INTELLECTUAL PROPERTY

- WHEN THE MILLION-DOLLAR PITCH DOESN'T PAY A DIME: WHY IDEA SUBMISSION CLAIMS SHOULD SURVIVE COPYRIGHT PREEMPTION
Julie A. Byren 1037
 - NONCOMPETE CLAUSES: EMPLOYEE MOBILITY, INNOVATION ECOSYSTEMS, AND MULTINATIONAL R&D OFFSHORING
Grant R. Garber..... 1079
- SURVEY OF ADDITIONAL IP DEVELOPMENTS** 1111

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.

Form. The text and citations in the *Journal* conform generally to the THE CHICAGO MANUAL OF STYLE (16th ed. 2010) and to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Please cite this issue of the *Berkeley Technology Law Journal* as 28 BERKELEY TECH. L.J. ____ (2013).

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*, and the Bolt, a collection of short comments and updates about new developments in law and technology written by members of BTLJ.

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.

DONORS

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

COOLEY LLP

FENWICK & WEST LLP

COVINGTON & BURLING LLP

ORRICK, HERRINGTON &
SUTCLIFFE LLP

Benefactors

FISH & RICHARDSON P.C.

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP & AFFILIATES

KASOWITZ BENSON TORRES &
FRIEDMAN LLP

WEIL, GOTSHAL & MANGES LLP

KIRKLAND & ELLIS LLP

WHITE & CASE LLP

LATHAM & WATKINS LLP

WILMER CUTLER PICKERING HALE
AND DORR LLP

MCDERMOTT WILL & EMERY

WILSON SONSINI

MORRISON & FOERSTER LLP

GOODRICH & ROSATI

WINSTON & STRAWN LLP

Members

ALSTON & BIRD LLP	HOGAN LOVELLS LLP
BAKER BOTTS LLP	IRELL & MANELLA LLP
BAKER & MCKENZIE LLP	KILPATRICK TOWNSEND & STOCKTON LLP
BINGHAM MCCUTCHEN LLP	KNOBBE MARTENS OLSON & BEAR LLP
DURIE TANGRI LLP	MORGAN, LEWIS & BOCKIUS LLP
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP	MUNGER, TOLLES & OLSON LLP
GTC LAW GROUP & AFFILIATES	ROPES & GRAY LLP
GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN, LLP	SIDLEY AUSTIN LLP
HAYNES AND BOONE, LLP	SIMPSON THACHER & BARTLETT LLP
HICKMAN PALERMO TRUONG BECKER BINGHAM WONG, LLP	TURNER BOYD LLP
KEKER & VAN NEST LLP	VAN PELT, YI & JAMES LLP
	WEAVER AUSTIN VILLENEUVE & SAMPSON, LLP

Berkeley Technology Law Journal

Annual Review 2013

Senior Faculty Adviser
PETER S. MENELL

Faculty Advisers
ROBERT BARR
BRIAN CARVER
CHRIS HOOFNAGLE
PETER MENELL

Senior Annual Review Editors
WINNIE HUNG
JANE ANN LEVICH

Production Editors
JARAD BROWN
DOMINIQUE CAAMANO
JENNA STOKES

Editor-in-Chief
DAVID ROSEN

Annual Review Editors
ANGEL DIAZ
LALITHA MADDURI

Advisers

SAMANTAK GHOSH
CONRAD GOSEN
WINNIE HUNG

RYAN KLIMCZAK
JANE LEVICH
CIARA MITTAN

JOHN OWEN
DAVID ROSEN
WEI WANG

Authors

JULIE A. BYREN
EMILY H. CHEN
ERIC ROSS COHEN
ANGEL SIEGFRIED DIAZ
ELISE S. EDLIN
CHRISTINA FARMER
NATALIE FLECHSIG

GRANT R. GARBER
CASEY HULTIN
SHAINA HYDER
ROBERT DAMION JURRENS
JESSE KOEHLER
KAREN KOPEL
ROBIN L. KUNTZ
NICHOLAS M. LAMPROS

ALEX S. LI
JUSTIN R. ORR
SARAH WELLS ORRICK
DINA ROUMIANTSEVA
LAUREN ELENA SMITH
MICHAEL LIU SU
ETHAN M. WEINER

Contributors

LAUREN BLAKELY
WILSON DUNLAVEY
ALAN ENRIQUEZ
JONATHAN FRANCIS
MIKE GAFFNEY

ELIZABETH HADZIMA
JULIA HOFFMANN
SAHAR MAALI
PURBA MUKERJEE

MARIE PHAMMATTER
LEXI RUBOW
MARTIN STIERLE
JENNIFER TRUONG
MATTHEW WASSERMAN

BOARD OF EDITORS 2012–2013

Executive Committee

Editor-in-Chief

DAVID ROSEN

Managing Editor
LAUREN ESCHER

Senior Articles Editors
YVONNE LEE
HANNAH MINKEVITCH

Senior Executive Editor
JOE SEXTON

Senior Annual Review Editors
WINNIE HUNG
JANE ANN LEVICH

Senior Scholarship Editor
COURTNEY BOWMAN

Editorial Board

Submissions Editors
DANIEL KAZHDAN
ZACHARY MARKARIAN

Production Editors
JARAD BROWN
DOMINIQUE CAAMANO
JENNA STOKES

Bluebook Editors
GABRIEL MILITELLO
YUE WANG
ZACH WOOD

Annual Review Editors
ANGEL DIAZ
LALITHA MADDURI

Notes & Comments Editors
ELISE EDLIN
BRITT HARWOOD

Symposium Editors
KAREN KOPEL
KILEY WONG

Web Content Editor
CHRISTOPHER CIVIL

Publishing Editor
DINA ROUMIANTSEVA

Web & Technology Editor
EDUARD MELESHINSKY
ANDREA YANKOVSKY

External Relations Editor
GAVIN LIU

Member Relations Editor
CASEY HULTIN

BRADY BLASCO
JULIE BYREN
EMILY CHEN
E. ROSS COHEN
CHRISTINA FARMER

Articles Editors
GRANT GARBER
ROBIN KUNTZ
NICHOLAS LAMPROS
MARK LANGER

MARIENNA MURCH
JUSTIN ORR
SARAH ORRICK
LAUREN SMITH
ETHAN WEINER

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 Technology 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
*Clinical 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
*Professor of Law and Director of the
International Entertainment & Media Law
Summer Program in London, England*
Southwestern University 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 2012–2013

Executive Director

ROBERT BARR

Faculty Directors

KENNETH BAMBERGER

PETER MENELL

ROBERT MERGES

DEIRDRE MULLIGAN

PAMELA SAMUELSON

PAUL SCHWARTZ

SUZANNE SCOTCHMER

MOLLY VAN HOUWELING

Associate Director

LOUISE LEE

Affiliated Faculty and Scholars

AARON EDLIN

JOSEPH FARRELL

RICHARD GILBERT

BRONWYN HALL

THOMAS JORDE

MICHAEL KATZ

DAVID MOWERY

DAVID NIMMER

DANIEL RUBINFELD

ANNALEE SAXENIAN

JASON SCHULTZ

HOWARD SHELANSKI

CARL SHAPIRO

MARJORIE SHULTZ

LON SOBEL

TALHA SYED

DAVID TEECE

JENNIFER M. URBAN

HAL R. VARIAN

DAVID WINICKOFF

