29:3 BERKELEY TECHNOLOGY LAW JOURNAL

Symposium 2014

Pages
1383
to
1650

Berkeley Technology Law Journal
Volume 29, Number 3
# BERKELEY TECHNOLOGY LAW JOURNAL

## TABLE OF CONTENTS

### ARTICLES

**Fair Use for Free, or Permitted-but-Paid?** .................................................. 1383  
Jane C. Ginsburg

**All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing** ................................................................. 1447  
Rebecca Tushnet

**Copyrightable Subject Matter in the “Next Great Copyright Act”** ................................................................. 1489  
R. Anthony Reese

**Legislating Digital Exhaustion** .................................................................................. 1535  
Aaron Perzanowski & Jason Schultz

**Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions** .................................................................................. 1559  
David R. Hansen

**Copyright’s Private Ordering and the “Next Great Copyright Act”** ................................................................. 1595  
Jennifer E. Rothman
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.
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.      SKADDE, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES
KASOWITZ BENSON TORRES & FRIEDMAN LLP
KIRKLAND & ELLIS LLP        WEAI, GOTSHAL & MANGES LLP
LATHAM & WATKINS LLP        WIlmer Cutler Pickering Hale and Dorr LLP
McDERMOTT WILL & EMERY     WILSON SONSINI GOODRICH & ROSATI
MORRISON & FOERSTER LLP    WINTSON & STRAWN LLP
Members

ALSTON & BIRD LLP

BAKER BOTT LLP

BAKER & MCKENZIE LLP

BINGHAM MCCUTCHEN LLP

DURIE TANGRI LLP

GILLIN JACOBSON ELLIS LARSEN & LUCEY

GTC LAW GROUP LLP & AFFILIATES

GUNDERSON DETTNER 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 & SAMSON, LLP
Executive Committee

Editor-in-Chief
JOSEPH D. MORNIN

Managing Editor
EMILY LY

Senior Articles Editors
DALLAS BULLARD
MAISSA CHOURAKI
MARK ZAMBARDA

Senior Scholarship Editor
ANAGHA KRISHNAN

Senior Annual Review Editors
MISA EIRITZ
ALLISON SCHMITT

Senior Executive Editor
SIENA CARUSO

Senior Online Content Editor
ALI MAHANI

Editorial Board

Submissions Editors
CAROLINA GARCIA
ENEDA HOXHA

Production Editors
ROXANA GUIDERO
JENNA STOKES

Bluebook Editors
DIANA OBRADOVICH
SYDNEY RYAN
DANIELA SPENCER

Annual Review Editors
ALLISON CHO
LISA PATEL

Notes & Comments Editors
PRATUSHA ERRABALLI
THADDEUS HOUSTON

Symposium Editors
GINNY SCHOLTES
EMMIE TRAN

Commentaries Editors
NOAH DRAKE
KELLY VARGAS

Web & Technology Editors
LEIGHANNA MIXTER
STEVE SWANSON

External Relations Editor
JOHN RUSSELL

Member Relations Editor
NATHAN ANDERSEN

Bolt Editor
GOLDA CALONGE

Articles Editors
RAVI ANTANI
TOMMY BARCZYK
ELIZABETH CAPEL
SHELI DE NOLA
ZACH FLOOD

SIMONE FRIEDLANDER
JOHNSON FURMAN
MEREDITH HOUSE
NICK HURT
VANESSA KATZ

JING LUO
JONATHAN MA
MATT REAGAN
MISHA TSUKERMAN
LILY WANG
MEMBERSHIP

Vol. 29 No. 3

Associate Editors

Aylin Akturk  Cassandra Havens  Shintaro Shiba
Waqas Aqmal  Amarelle Hayes  Monsura Sirajee
Israel Bar  Jeffrey Hirschey  Billie Solomon
John Will Binkley  Matt Kempf  Bartek Sudol
Stephanie Cheng  Hilary Krase  YenJin Tan
Max de la Cal  Ricardo Leyva  Jon Tanaka
Danielle Devlin  Benjamin Li  Kirsty Watkins
Janice Dow  Xinyi Li  Faye Whiston
Jitesh Dudani  Tierra Moore Piens  Philip Wiseman
Erica Fisher  Neetika Mutreja  Sarah K Won
Whitney Florian  Evangeline Phang  Winnie Wong
Yesol Han  Swaroop Poudel  Weixiao Wu

Members

Ismael Andani Abdulai  Maya Kaye  Led Redfeam
Annaka Abramson  Aniket Kesar  James Rice
Yasmine Agelidis  Jackie Kimble  Eric Riedel
Junko Akuzawa  Motoya Kubota  Ariel Rodgers
Betul Ayranli  Ludovic Langlois-Therien  John Russell
Norris Booth  Jasmine Latkar  Talia Schwartz
Mario Borisov  Jenna Le  Rachael Shen
Jessica Brodsky  Cynthia Lee  Stella Rose Shin
Joel Broussard  Jinhyo Lee  Aaron Smyth
Maribeth Charvet  Stella Lee  Maria Paula Souza
Molly Cladwell  Yuju Lin  Natcha Srikajon
Katie Dahlinghaus  Aleksandr Markelov  Chaani Srivastava
Gabrielle Dora  Philip Merksamer  Yu Tanebe
James Dunn  Yakov Moldavskiy  Paul Fisher
Joshua Ephraim  Nage Ngerebara  Sergio Torres
Ali Fine  Zachary Nguyen  Anna Tsotsias
Zubin Gautam  Peggy Ni  Sam Ungar
Anna Gasot  Thomas Nolan  Gregory Washington
Jared Ginsburg  Chris Norton  Meg Webb
Mark Gray  Daniel Osborn  Jonathan White
David Hao  Jordyn Ostroff  Yunpeng Xiong
Jenn Hicks  Dylan Leigh Peterson  Chris Yandel
Hannah Jiam  Michael Poon  Sorin Zaharia
Charles S. Johnson  JX Quek  Maya Ziv
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

THOMAS F. VILLENEUVE
Gunderson Dettmer Stough Villeneuve
Franklin & Hachigian LLP
Redwood City, California
BERKELEY CENTER FOR
LAW & TECHNOLOGY
2014–2015

Executive Director
ROBERT BARR

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

Associate Director
LOUISE LEE

Affiliated Faculty
CHRIS JAY HOOFNAGLE
TALHA SYED
JENNIFER M. URBAN

In Memoriam
SUZANNE SCOTCHMER
1950–2014