

Cyberspace Law Committee Institute and Winter Working Meeting
Hotel Kabuki
San Francisco, CA
January 20-21, 2012

Agenda

Friday, January 20, 2012	
8:00 am – 8:30 am	CONTINENTAL BREAKFAST
8:30 am – 8:45 am	INSTITUTE AND WWM OPENING PLENARY SESSION
8:45 am – 9:15 am	<p>The New Top-Level Domains: Guidance for the Business Lawyer</p> <p><i>Presenters:</i> Kristine Fordahl Dorrain Director of Internet and IP Services, National Arbitration Forum</p> <p>Erik Pelton , Erik M. Pelton & Associates, PLLC</p> <p>This cutting edge panel will investigate the feedback from the first week of the open gTLD application process, update attendees on rights protection mechanisms available for when the new TLDS launch, and discuss options for brand owners who did not opt to participate in the first round of new gTLD applications.</p>
9:15 am – 9:35 am	<p>Internet Governance and Human Rights Law</p> <p><i>Presenters:</i> David Satola, Attorney, Finance, Private Sector Development & Infrastructure Legal Vice Presidency, The World Bank, Washington, DC</p> <p>Henry L. Judy, Attorney, K&L Gates, Washington, DC</p> <p>What do Internet Governance, Digital Freedom, Hillary Clinton, flash mobs, drone planes, Uzbekistan and Weibo have in common? It's not a Zen koan, but our answers will enlighten you. And it's definitely not a joke. In our alliterative way we plan to cut to the conceptual core of a key commonality (of Internet Governance).</p>

Friday, January 20, 2012

9:35 am – 10:05 am

The America Invents Act, The Protect IP Act, and SOPA: Is More IP Protection Desirable?

Presenter:

Sharon K. Sandeen, J.D., LL.M., Professor of Law
Hamline University School of Law

Over the past 40 years there has been a noticeable "ratcheting-up" of intellectual property protection at both the state and federal levels. In the international realm, IP protection was expanded and improved beginning in the mid-1990s with the adoption of the World Trade Organization, Agreement on Trade Related Aspects of Intellectual Property (the "TRIPS Agreement") and the resulting adoption by WTO-member countries of IP laws which largely mirror U.S. law. However, despite the expansion of IP protection worldwide, and improvements in enforcement mechanisms, it seems that complaints about lost IP rights have not subsided. With recent legislative proposals such as the "Stop Online Piracy Act" (SOPA) and the "Protect IP Act," it is clear that those who claim such losses have the ear of Congress.

The CLE Program presented by the IP Committee of the Business Law Section titled "The America Invents Act, The Protect IP Act, and SOPA: Is More IP Protection Desirable?" and scheduled for Friday morning, will examine recent and proposed legislative enactments that are designed to stem alleged piracy and increase IP protection. The related workshop in the afternoon will examine the forces that are leading to legislative proposals for ever greater IP protection and whether more legislation is needed.

10:05 am – 10:15 am

AM BREAK

10:15 am – 10:45 am

Privacy and the European Union

Presenter: Christopher Jeffery, Partner
Taylor Wessing LLP, London

London-based Chris Jeffrey will discuss the EU's recent regulation of cookies including the potential impact on US-based sites and ad platforms. He will further explore the proposed new EU privacy directive/ regulation and the likely implications (based on the first draft). Finally, what is the impact of Patriot Act concerns amongst EU corporates on US-based SaaS companies and hosting providers. What of the exaggerated(?) but genuine concerns that EU companies wanting to choose a US-headquartered cloud provider cannot do so

	<p>and be compliant with EU privacy requirements because of US LEA access to their data under the Patriot Act. How serious is this for US providers, and what can be done?</p>
<p>10:45 am – 11:15 am</p>	<p>Qualifying Technology for Meaningful Use: HITECH Benefits</p> <p><i>Presenter:</i> Katheryn A. Andresen, Attorney at Law Hellmuth and Johnson, PLLC</p> <p>Under the incentives program developed as part of the HITECH Act, healthcare providers who acquire software meeting the standards and cost control initiatives established by the Secretary of Health and Human Services will be reimbursed from the incentives program to offset purchase price. The license agreement terms for such qualifying “meaningful use” software need to include both conditions as to certification of the software module, as well as warranties as to ongoing compliance with both current and future modifications as to what software qualifies for the incentives program reimbursement payments. The presenter will provide examples of the terms and discuss the negotiation considerations for both providers and acquirers of such technology.</p>
<p>11:15 am – 11:55 am</p>	<p>The Year in Cyberspace – 2011</p> <p><i>Presenter:</i> Eric Goldman, Associate Professor and Director, High Tech Law Institute Santa Clara University School of Law</p> <p>In a 40 minute whirlwind tour, Prof. Goldman will highlight the biggest and most interesting Cyberlaw developments of 2011.</p>
<p>12:00 pm – 1:15 pm</p>	<p>LUNCH AND KEYNOTE ADDRESS</p> <p><i>Speakers:</i> J. Scott Evans, Senior Legal Director - Global Brand & Trademarks, Yahoo!, Inc. Nicole Ozer, Technology and Civil Liberties Policy Director ACLU of Northern California and Co-Chair, Cyberspace Law Committee of the California Bar Association</p> <p>J. Scott Evans of Yahoo! will discuss the current trends in the way the practice of business law is impacted by the internet and cyberspace, including his thoughts on where cyberspace lawyers will be focusing their efforts in 2012.</p> <p>Nicole Ozer of the ACLU will discuss some of the civil liberties issues</p>

	that her organization is focused on now, as well as some of the new civil liberties problems created by technology developments to come.
1:30 pm – 2:00 pm	<p>Mobile Apps & Geotracking</p> <p><i>Presenters:</i> Theodore F. Claypoole, Partner, Womble Carlyle Sandridge & Rice, PLLC Richard C. Balough, Member, Balough Law Offices, LLC</p> <p>In the past year, legislators and regulators have publically struggled with geolocation issues. The US Senate has held hearings on mobile apps and geotracking, and the FTC has issued statements on how collecting UDID information facilitates tracking consumers. Issues the U.S. Supreme Court will address this year include police power to inspect cell phone location records (People v. Diaz) and to track mobile phone users (United States v. Jones). To what extent do the First Amendment and Fourth Amendment protect US citizens from certain government tracking? Rules of business and personal geolocation use are being formed now in the US, while Europe and Canada consider geolocation to be protected “sensitive data”. As the technology becomes pervasive, the law is struggling to catch up.</p>
2:00 pm – 2:20 pm	<p>Waging War against Anonymous Bad Actors on the Internet</p> <p><i>Presenter:</i> Karl S. Kronenberger, Kronenberger Rosenfeld, LLP</p> <p>“Waging War Against Anonymous Bad Actors on the Internet” is a two part presentation about how attorneys can address the problem of an anonymous bad actor defaming a client or infringing a client’s IP. The presentation first covers in bunker forensic techniques used to identify anonymous infringers and defamers, like WHOIS databases, reverse IP tools, DNS lookups, etc., as well as more sophisticated tools like web bugs, dummy websites and read receipts. Second, the presentation will cover the most underused and effective tactic for attorneys (aka the Secret Weapon), the mechanics of John Doe litigation in state and federal courts, and the limitations of John Doe actions, like the Communications Decency Act, anti-SLAPP motions and First Amendment arguments. The presentation employs several war stories to demonstrate how triangulation and other techniques can be used to identify bad actors based on data provided by ISPs in response to subpoenas, and how well pleaded complaints with even weak facts can survive even the most aggressive and sophisticated defensive attacks.</p>
2:20 pm – 3:00 pm	Digital Death: Can Estates or Heirs Gain Access to Online Pictures, Social Networks, Emails, and Accounts?

	<p><i>Presenters:</i> James Lamm, Attorney, Gray Plant Mooty Damien Riehl, Associate, Robins, Kaplan, Miller & Ciresi L.L.P Christina Kunz, Professor of Law, William Mitchell College of Law</p> <p>Which rights pass to the estate or heirs, in terms of passwords, email accounts, social network material, photo websites, online back-up sites, other “cloud-related” services, digital certificates under digital signature law, digital authentication devices that control electronic payments, and even virtual "goods" and avatars in online games?</p>
3:00 pm – 3:10 pm	PM BREAK
3:10 pm – 4:10 pm	ROUNDTABLES
1	<p>Moderator: John E. Ottaviani, Edwards Wildman Palmer LLP</p> <p>Did the Viacom court get it right? The decision in Viacom v. YouTube shed some needed light on various provisions of the Digital Millennium Copyright Act (DMCA), including what websites may qualify for protection, whether a website operator has a duty to police its site for infringing content, what is required for an "adequate repeat infringer policy," and the obligations of a content owner in providing notices of infringement to the website. The court in Viacom interpreted the DMCA favorably to YouTube on these issues and dismissed all charges. But many content owners believe that the court's arguments are flawed and should be reversed. We use this decision and other recent decisions interpreting the DMCA on a daily basis to advise our Internet clients. Are they correctly decided, and will our advice stand up over time? Join us for a discussion of the obligations of service providers and content owners under the DMCA, whether the courts have gone too far (or not far enough) in one direction or another, and how to advise our clients while the debate rages.</p>
2	<p>Moderators: Dr. Charles C. Palmer, *Founding Director, IBM's Institute for Advanced Security *CTO for Security and Privacy IBM Research *Senior Technical Advisor Institute for Information Infrastructure Protection (I3P) Dartmouth College</p> <p>Roland Trope Trope and Schramm LLP</p> <p>In October, 2011, the SEC's Division of Corporate Finance surprised</p>

	<p>registrants with “guidance” requiring disclosure of cyber-events, prevention efforts, and post-event remediation. The staff guidance was not published in the Federal Register or released by the SEC's press office. The staff slid it onto the web in the most quiet manner possible for considerably more extensive disclosure requirements under the "business risk assessment" and “management discussion and analysis” disclosure duties for registrants. Criticism poured out from lawyers representing registrants.</p> <p>This roundtable will introduce this new guidance and raise a number of problems it poses for registrants, regardless of size. The presentation will engage participants in discussion of the unintended consequences of the specific disclosure guidance from the SEC's staff and invite participants' reactions to how registrants may deal with the guidance.</p> <p>If you represent companies already publicly traded or soon to be registered, this is a Winter Working Meeting roundtable not to miss.</p>
3	<p>Moderator: Christina Kunz, Professor of Law, William Mitchell College of Law</p> <p>Following the CLE on "Digital Death," the panelists (a probate attorney and an e-commerce attorney) open up the discussion to a wide range of questions, such as</p> <ul style="list-style-type: none"> * How to find, access, value, protect, and transfer online accounts and digital property; * How to plan ahead for (or deal with) passwords, online accounts, and digital property during incapacity and after death; * How to value digital property on an inventory or estate tax return; * How the intersection of privacy laws and criminal laws with fiduciary roles (guardian, conservator, agent under a power of attorney, personal representative of an estate, and trustee of a trust) can have a chilling effect on estate administration; * To what extent online service providers can alter the rights of the user’s estate and heirs to access and use online accounts and digital property; * To what extent the user can determine which electronic rights pass or do not pass to his or her estate or heirs, despite the contract governing the online account; and * What happens to an online account that is accessed by biometrics, such as the fingerprint or retinal scan of the decedent?
4	<p>Moderator: Sharon K. Sandeen, J.D., LL.M., Professor of Law, Hamline University School of Law</p> <p>This roundtable will examine the forces that are leading to legislative proposals for ever greater IP protection and whether more legislation</p>

	is needed; it is a followup to the CLE offered earlier in the day.
5	<p>Moderator: Warren E. Agin, Partner, Swiggart & Agin, LLC</p> <p>Cyberspace 4.0: This session will build on last year’s exploration of the committee’s mission and focus by brainstorming ways the committee can stay relevant and ahead of the curve. What are some of the ways we need to anticipate how the law is changing? How should we reframe the discussion of some of the key areas of cyberspace law? What kind of projects should we work on in the near future?</p>
6	<p>Moderator: Ernesto M. Rubi, Esq., Carey Rodriguez Greenberg O’Keefe, LLP</p> <p>The finite supply of IPv4 numbers that make it possible for workstations and mobile devices throughout the world to connect via the Internet is exhausted. As we face this new reality key questions come to mind: Can IPv4 numbers be owned? What legal relationship do Internet Service Providers (“ISPs”) have to the IPv4 numbers on their networks? What is the value of an IPv4 block of numbers? The recent case of In re Nortel, which recognized in a bankruptcy context the property rights of legacy IPv4 number owners over the numbers themselves is a watershed moment in Internet history. In re Nortel and the sale of Nortel legacy IPv4 numbers to Microsoft, Inc. have shifted the debate from a purely theoretical discourse to a now practical real-world application of the legal principles here discussed. As IPv4 number holders begin to reflect on these questions, the speaker concludes that the concept of alienability and property rights over IPv4 numbers is legally and practically unavoidable.</p>
4:15 pm – 5:30 pm	WINTER WORKING MEETING BREAKOUT SESSIONS
	<p>Internet Law for the Business Lawyer, 2nd Edition, book project <i>Chair:</i> Juliet Moringello</p> <p>We will be making final refinements to the chapters and final adjustments to the overall book structure. We’ll also need to discuss index terms and probably the Top 10 laws chapter as well as points that need to be covered in the introduction to the book.</p>
	<p>Identity Management Task Force - Task Force Report project <i>Chair:</i> Tom Smedinghoff</p> <p>This session will be devoted to reviewing and revising the Task Force Report (tentatively titled "Building the Legal Framework for Identity Management"), circulated as a draft to the Task Force for review in Early December. The goal is to finalize and release the Report by the Annual Meeting this Summer.</p>
	<p>mCommerce Subcommittee <i>Chairs:</i> Ted Claypoole & Richard Balough</p>

	<p>The subcommittee will conduct a roundtable in conjunction with the Cyberspace Law Committee's Institute and Winter Working Meeting beginning January 20-21, 2012, in San Francisco, CA. At the Institute, the mCommerce subcommittee will seek input for projects for 2012 and 2013. Potential topics include:</p> <ul style="list-style-type: none"> • Geolocation issues, including the primary tools (GPS, cellular location, wireless positioning and IP location), involuntary tracking, location coupons and other business models, applications using location data, law enforcement and business positions; • Regulation of mobile technologies, including FCC, FTC, telecom and datastream regulations on the federal, state, and relevant international levels; • Operational liabilities for businesses relying on m-commerce; • mCommerce business structures and contracting models and party liabilities, including customer/seller/payment providers; • Device identification, including UDID usage, manufacturer's posturing and FTC position (also USIM and other ID capture systems); • Crimes associated with mCommerce, including link capture, spoofing, fraud, impersonation, and viral infection; • Jurisdiction, where does commerce take place? • Secondary consumer charges for mobile transactions, from phone bill to iTunes store to bank fees.
<p>6:00 pm – 7:00 pm</p>	<p>COCKTAIL RECEPTION <i>Sponsor:</i> Reception will be held at the Hotel Kabuki.</p>
<p>7:30 pm – 10:00 pm</p>	<p>COMMITTEE DINNER @ FOREIGN CINEMA RESTAURANT Foreign Cinema Restaurant, 2534 Mission Street, San Francisco</p>

Saturday, January 21, 2012	
8:30 am – 9:00 am	CONTINENTAL BREAKFAST
9:00 am – 10:15 am	WWM BREAKOUT SESSIONS BLOCK 1
	<p>Identity Management Task Force - Task Force Report project <i>Chair: Tom Smedinghoff</i></p> <p>This session will be devoted to reviewing and revising the Task Force Report (tentatively titled "Building the Legal Framework for Identity Management"), circulated as a draft to the Task Force for review in Early December. The goal is to finalize and release the Report by the Annual Meeting this Summer.</p>
	<p>Internet Law for the Business Lawyer, 2nd Edition, book project <i>Chair: Juliet Moringello</i></p> <p>We will be making final refinements to the chapters and final adjustments to the overall book structure. We'll also need to discuss index terms and probably the Top 10 laws chapter as well as points that need to be covered in the introduction to the book.</p>
	<p>Consumer Subcommittee <i>Co-chairs: John Rothchild / James Nehf</i></p> <p>-- We will Devise a plan for updating the safeshopping.org website. We will also address the safeselling.org website. As Very little of the material on this site relates to consumer protection, We will discuss if our subcommittee is/is not best positioned to maintain it.</p> <p>-- We will explore the possibility of initiating a project on emerging consumer issues in mobile commerce. the FTC has held hearings, issued at least one report, and taken some enforcement actions relating to m-commerce, so the time may be right for CLC to get involved in this area.</p> <p>-- General brainstorming about other possible initiatives.</p>
10:15 am – 10:45am	AM BREAK
10:15 am – 12:00 Noon	WWM BREAKOUT SESSIONS BLOCK 2
	<p>Subcommittee on International Trade <i>Co-chairs: John Gregory and Hal Burman</i></p> <p>The International Trade subcommittee would like a 90-minute break-out session for these topics:</p> <p>i) UNCITRAL Working Group on Electronic Commerce: update on and prospects for work on electronic transferable records, including impact of US law on the UN product,</p>

	<p>and the potential impact of the UN work on US law.</p> <p>ii) UNCITRAL Working Group on Online Dispute Resolution: update on and prospects for work on this topic, including procedural and substantive rules for B2B and B2C disputes</p> <p>iii) UNCITRAL Convention on Electronic Communications (ECC): update on and prospects for work on US ratification of this Convention. The ABA has formally supported signature, and Cyberspace has done a resolution on ratification. Find out what is happening now and what we can do to support ratification.</p> <p>iv) Electronic commerce: general issues of import and export law and procedure, including the status of the ‘single window’ projects.</p> <p>It’s always hard to know what topics will inspire discussion. Last year we had a vigorous exchange on a technical recommendation on digital evidence certificates that led to the US taking a strong position at a UN body against the proposal that our group discussed, based on our reasoning. So if you had a spill-over spot, we might be able to continue any discussions that last longer than 25 minutes or so in our main time.</p> <p>Maybe the ODR topic, with draft procedural rules and the like, will attract attention. The UN Working Group is meeting this week, and we will be able to find out what happened well before the WWM.</p>
	<p>Internet Law for the Business Lawyer, 2nd Edition, book project <i>Chair: Juliet Moringello</i></p> <p>We will be making final refinements to the chapters and final adjustments to the overall book structure. We’ll also need to discuss index terms and probably the Top 10 laws chapter as well as points that need to be covered in the introduction to the book.</p>

Saturday, January 29, 2011

	<p>Cybersecurity Subcommittee <i>Chairs:</i> Roland Trope and Tom Smedinghoff</p> <p>Discuss and decide upon new projects for the Subcommittee, including one or more of the following -- and any proposed by meeting participants:</p> <ul style="list-style-type: none">a. Drafting of written materials for the Spring Meeting CLEb. Guide to Directors' Legal Obligations for Cyber Security.c. Guide to Cybersecurity Risks in Use of Cloud Computing Services and Best Practices for Safeguarding Digital Assets of Corporate Enterprises and Public Institutionsd. Guide on Cybersecurity Risks and Related Legal Issues for Public Museum Registrars : Legal Obligations Before and After Cyberattacks
<p>12:00 Noon – 1:15 pm</p>	<p>LUNCH (ON YOUR OWN)</p>
<p>1:30 pm – 2:45 pm</p>	<p>WWM BREAKOUT SESSIONS BLOCK 3</p>
	<p>Electronic Financial Services Subcommittee <i>Chair:</i> Ed Morse</p> <p>I would like to discuss the possibility of putting together a CLE program on insurance coverage for data security breaches. There are legal issues arising from policy coverage (as mentioned in the Fall program discussion) as well as variation in the products available in this emerging market. Do you think that is worthy? We could put it out as a discussion idea and if anyone in attendance is interested, we'll pursue it. If not, I'll just melt into another discussion group. I realize this doesn't directly fit the parameters of my group/committee, but it is what is on my mind at the moment.</p>
	<p>Cloud & IT Services Subcommittee <i>Co-chairs:</i> Philip Schmandt / Bill Denny</p> <p>Review recent cloud computing developments Progress and status report(s) on Subcommittee projects</p> <ul style="list-style-type: none">a. Cloud Computing: Collect data from committee members on the contract negotiation practices of different cloud service vendors and prepare model cloud services agreements.b. IT issues in corporate transactions: Develop commentary on topic areas in the outline and prepare articles for publication by the ABA <p>Discuss and decide upon new projects for the Subcommittee, including one or more of the following -- and any proposed by meeting participants:</p> <ul style="list-style-type: none">a. Preparing CLE program for Annual Meeting or Spring Meeting

	<p>2013</p> <ul style="list-style-type: none"> b. IT issues in facilitating online transactions c. Best practices in managing open source software d. Data breach best practices e. Others topics or projects
	<p>Digital Media Subcommittee & Online Advertising & Marketing Subcommittee <i>Chairs:</i> Erik Pelton and John Garon</p> <p>Outline of discussion (moderated by subcommittee chairs):</p> <ul style="list-style-type: none"> - Legislative update: <ul style="list-style-type: none"> o Protect IP Act o Stop Online Piracy Act (SOPA) - Copyright Update <ul style="list-style-type: none"> o Golan v. Holder (can congress remove works from public domain to comply with international treaty?) o Congressional hearings: Fashion protection o Viacom v. YouTube appeal update - Trademark Update <ul style="list-style-type: none"> o Aesthetic Functionality / Betty Boop o Color trademarks – Louboutin appeal - Patent Update <ul style="list-style-type: none"> o American Invents Act - Online Privacy law update <ul style="list-style-type: none"> o General privacy issues/changes - Domain Name update <ul style="list-style-type: none"> o New gTLDs update / Coalition for Responsible Internet Domain Oversight - General discussion <ul style="list-style-type: none"> o Adwords, sweepstakes, social media, domain names, and other issues - Updates on any ongoing projects / written materials - Proposals for new projects / written materials / CLE’s
<p>2:45pm – 3:00 pm</p>	<p>CLOSING SESSION</p>