Message from the Chair

Dear Members of the Cyberspace Law Committee:

We’ve just left summer and are heading into a fall that does not yet portend great economic news—but you wouldn’t know it here in San Francisco. The sun is finally out, it’s t-shirts and flip flops everywhere, and the streets are chockablock with mobile apps, newly minted Facebook-millionaires-to-be, and lots and lots of fresh-faced technologists and investors. The startup technology demo events are S.R.O. and the venture capitalists are hogging all the good restaurant tables. Meanwhile, there are significant changes on the intellectual property and cyberlaw fronts that would-be clients will stumble over, and, in the words of an FCC commissioner, the developers seem to think the privacy and data security problems are someone else’s concern.

With the new patent laws and the advent of the new top-level-domains, there are already some significant developments many businesses are hearing about from their lawyers. Members of this committee will be looking further into these areas and others in the months ahead. Committee projects on the near horizon include:

- The committee’s much-anticipated second edition of *Internet Law for the Business Lawyer* is expected to be completed in the first quarter of 2012.
- A new book on RFID will be completed soon.
- The committee’s annual *Survey of the Law of Cyberspace* is in final editing and off to *the Business Lawyer’s* editors for publication.
- We are finalizing content for the next several meetings.

At 1625 members, our committee is one of the largest within the ABA’s Business Section, and we are growing. New members are always encouraged to reach out and let us know what your interests are, where you might like to contribute, and where your help may be needed. There are several projects brewing within the committee that are actively seeking writing, editing, or management assistance, and there will be more to come.

A good way to find out more about specific projects and opportunities is by attending our committee’s Institute on the Law of Cyberspace and Winter Working Meeting on January 20-21, 2012, at the Hotel Kabuki in San Francisco. At this stand-alone meeting, our members gather in small groups for editing, brainstorming, and development of committee projects, as well as roundtable discussions of hot topics and new cyberlaw issues. We also will be presenting 4-5 hours of CLE content at the beginning of the meeting, and we invite new members as well as oldtimers to participate. We are now accepting proposals for CLE programming for that portion of the meeting. Please see below for more info.

Regards,
Jon

Jonathan T. Rubens
Chair, Cyberspace Law Committee, Business Law Section
Jonathan.Rubens@leclairryan.com

Message from the Newsletter Editors

By Lois Mermelstein and Cheryl Dancey Balough
If you have been a committee member for some time, you will notice that this newsletter is a bit different. We want to make it an ongoing resource for you and your practice, even if you cannot make it to a meeting in person. We plan regular reports on members’ activities, as well as pointers to other ABA activities and resources you might find helpful. We will highlight upcoming meetings and CLE opportunities you might find interesting. We will also note ongoing committee projects, including opportunities for you to contribute. One such opportunity is the Institute on the Law of Cyberspace/Winter Working Meeting next January, for which program proposals are due very soon—see more details elsewhere in this issue.

We do want to emphasize that this newsletter is not just a learning resource for you. It is also a way for you to help others learn. Have you written a law review article, done a presentation, or blogged on an issue relevant to committee members’ interests? Send us a blurb and a link! As the new Communications Directors for the Cyberspace Law Committee, we are responsible for both this newsletter and the committee website. You can reach Cheryl at cbalough@balough.com and Lois at lois@loismermelstein.com. We look forward to hearing from you.

Upcoming Programs, Events and Projects

Winter Working Meeting - Save the Date and Submit Program Ideas Now

The Winter Working Meeting and 2012 Institute on the Law of Cyberspace are right around the corner. They will be held on January 20-21 at the Hotel Kabuki in San Francisco. Plan to arrive the night of Thursday, January 19, as the program will begin bright and early Friday morning. Once again, we will begin the meeting with a block of CLE programming devoted to issues that are more advanced or more specialized than those we would typically address in CLE programming at the Business Section spring meeting or ABA annual meeting. The 4 to 5 hours of CLE programming will be comprised of 30-40 minute presentations. Please formulate your proposals now for presentations, and submit them to Kristine Dorrain at kdorrain@adrforum.com. Decisions on CLE programming will be made soon. We will send out information about registration and hotel accommodations as soon as it is available. In the interim, do check out the website for the San Francisco’s premiere Japanese-style hotel, Hotel Kabuki.

Business Law Section Fall Meeting

The 2011 Fall Meeting of the Business Law Section will be held November 18-19 in Washington, DC. Early registration is open until October 28. To register or for more information, visit the meeting page.

Input Needed on Cloud Contracting and IT M&A Transactions

By William Denny and Philip Schmandt, Cloud Computing & IT Services Subcommittee

This subcommittee will focus this year on (1) how businesses use internet based technologies to carry out their business functions, including the contracts for acquiring those technologies and related services and the implications of the growing role of these internet technologies, and (2) how businesses manage IT related risks in carrying out their business, including sales of businesses. Two principal projects in the works are:

Cloud Computing. This program continues to be a hot, rapidly developing issue, so we are designing a new program for presentation in 2012, which will serve as a springboard for publication material on the topic. Part of our effort will be to collect data from committee members on the contract negotiation practices of different cloud service vendors.

IT Issues in M&A Transactions. We have a detailed outline in place of IT issues in corporate transactions, along with some commentary on the issues. We are looking for one or several M&A specialists within the committee to spearhead the development of commentary on the remaining topic areas and preparation of the collection for publication by the ABA.
Finally, in advance of the next Winter Working Meeting, we will be circulating a list of potential projects for the subcommittee and asking for volunteers who have an interest in driving these new projects.

**Drafting of Positions on UNECE CEFACT and UNCITRAL Issues**
*By Hal Burman and John Gregory, International Trade Subcommittee*

The International Trade Subcommittee has participated in two conference calls about the UNECE CEFACT (UN Economic Commission for Europe, Center for Trade Facilitation and E-business) draft rules for e-evidence and e-signatures. In the second call, European and other commentators also participated. International Trade Subcommittee participants, along with members of the ABA Sci-Tech section, played a major role in the US detailed comments, and they expect to continue their involvement through the fall with two more conference calls planned for October.

Subcommittee participants will also join a meeting/conference call on September 30 to review what positions should be advanced at a mid-October UNCITRAL (UN Commission on International Trade Law) meeting of its working group on e-commerce. The meeting's focus is the transferability of rights by computer. A second call will take place in late October. The International Trade Subcommittee and ABA Sci-Tech will be a primary source of the US positions that are advanced.

In addition, the subcommittee will review UNECE CEFACT's activity on "single window" systems, structured channels for e-documentation, and customs clearance procedures for cross-border trade including movement of goods. This review, along with a review e-commerce activity at APEC, ASEAN, OAS, and other regional bodies, will help the subcommittee assess what information would be useful for programming by the Cyberspace Law Committee and other ABA sections.

**Hot Topics in Internet Law and Strategy Webinar**

ABA's Science & Technology Law Section is offering a webinar on "Hot Topics in Internet Law and Strategy" to be held on October 25. For more information or to register, click [here](http://www.americanbar.org). For more information or to register, click [here](http://www.americanbar.org).

**FTC Workshop on Facial Recognition Technology**
*By Richard Balough and Ted Claypoole, mCommerce Subcommittee*

A workshop examining the privacy and security implications of facial recognition technology will be conducted on December 8, 2011, by the Federal Trade Commission. The use of facial recognition by online social networks and mobile apps has increased dramatically. The workshop will cover such topics as how can consumers benefit from the technology? What are the privacy and security concerns for such technology when consumers may be unaware that the information is being collected and used? Should there be special considerations for teens and children? The FTC is seeking written reports and studies for the workshop, which is free and open to the public. You can find more information [here](http://www.americanbar.org).

**Cyber News You Can Use**

**.XXX Domain Registration Begins**
*By Erik M. Pelton, Marketing & Advertising Subcommittee*

On September 8, the 'sunrise' period for a new top level domain (TLD) began, and brand owners worldwide are taking note. The .XXX top level domain will go live in the next few months; the 'sunrise' period allows certain brand owners to pre-register certain .XXX domain names to essentially block anyone else from gaining ownership of them. As you can imagine, the .XXX domain name is targeted at adult industries.

Who is eligible to pre-register? Owners of adult website domains and trademarks, as well as owners of registered trademarks in any industry who wish to block names from use in .XXX.
In order to submit a pre-registration claim during the sunrise period, an application and payment must be submitted to a qualified registrar no later than October 28, 2011. Beginning December 6th (after an auction of premium .XXX domains), the unsecured adult domain names will be available to the general public.

Brand owners would be wise to consider the value of the pre-registration process in order to protect their brands and trademarks from potential attempts by others to use them for .XXX domains. Brand tarnishment, trademark infringement or cybersquatting issues could be far more expensive to manage than the domain registration costs. For more information, see http://www.icmregistry.com/about/

Council of Europe and Online Freedom of Speech
By David Satola and Hank Judy, Internet Governance Task Force

The Council of Europe announced the adoption by its Committee of Ministers of two recommendations and two declarations calling, inter alia, on CoE member states to take action to protect online freedom of speech, even in the face of national security responses to cyber threats. Of particular interest is the statement on the link below between net neutrality and human rights, contained in the Declaration of Internet Governance Principles. While avoiding the term "net neutrality," which was used in earlier draft versions of the Declaration, Principle 9, entitled "Open Network" provides: "Users should have the greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice. Traffic management measures which have an impact on the enjoyment of fundamental rights and freedoms, in particular the right to freedom of expression and to impart and receive information regardless of frontiers, as well as the right to respect for private life, must meet the requirements of international law on the protection of freedom of expression and access to information, and the right to respect for private life."

The CoE's press release, the recommendations and declarations are available here.

Changes to the Children's Online Privacy Protection Rule
By Richard Balough and Ted Claypoole, mCommerce Subcommittee

The Federal Trade Commission has published for comment a proposed rule that would make significant changes to Children's Online Privacy Protection Rule. The proposed changes are in response to the use by children of mobile devices, their participation in social networking, and interactive gaming. Among the changes, the FTC proposes to expand the definition of "personal information" to include screen, user names, and persistent identifiers when the information is used for other than "internal operations of the website or online services." In addition, the rule would expand "personal information" to include the posting of video and audio files containing a child's image or voice." Comments on the proposed changes must be filed with the FTC before November 28, 2011.

Revisions to Patent Law
By Lois Mermelstein

On September 16, President Obama signed the Leahy-Smith America Invents Act (H.R. 1249), implementing a major overhaul of the US patent system. Many procedural changes and increases in Patent Office fees take effect right away; broader changes, including switching from a first-to-invent to a first-to-file system and adding new post-grant-review mechanisms, take effect in 2012 and 2013. For more details and extensive analysis, start with IP blogs PatentlyQ and IPWatchdog.

Bogus SSL Certificates
By Tom Smedinghoff and Roland Trope, Cybersecurity Subcommittee

The Dutch government recently released an intermediate report on its investigation of DigiNotar, an internet security certificate issuer. During July
2011, hackers used compromised access to DigiNotar to issue their own SSL certificates, allowing the hackers access to trusted systems, including the web-based email of as many as 300,000 Iranians. A summary of the report is available here and a copy of the full report can be accessed here.

Possible Liability for Cybersecurity Breaches
By Tom Smedinghoff and Roland Trope, Cybersecurity Subcommittee

The New York Court of Appeals recently reversed a lower court ruling with potential cybersecurity implications. The lower court decision affirmed a jury verdict finding the Port Authority, as landlord, 68% responsible for the damage caused by the 1993 truck bombing of the World Trade Center. This had raised the possibility of companies being held responsible for failure to protect against terrorism and, by analogy, cybersecurity breaches, when there are known security vulnerabilities. The Court of Appeals, however, reversed on the ground of a government immunity defense and did not reach the security responsibility issue. The full decision is available here.

Presentations and Papers of Interest

Legal Implications of Social Media

On September 21, John Rothchild, Associate Dean and Associate Professor at Wayne State University Law School, presented a talk on "Legal Implications of Social Media" at the 4th Annual Information Technology Law Seminar, sponsored by the Institute of Continuing Legal Education in Plymouth, Michigan. You can access the program description here.

Can Your Heirs See What You Posted Online?

Two Cyberspace Law Committee members were featured at a September 29 program sponsored by the Minnesota State Bar Association on "Digital Death: Can Estates or Heirs Gain Access to Online Pictures, Social Networks, Emails, and Accounts?" Christina Kunz, Professor at William Mitchell College of Law, moderated the program, and Michael McGuire or Littler Mendelson PC participated on the panel. The panelists discussed how to find, access, value, protect, and transfer online accounts and digital property; what rights estates and heirs have to this property; how online service providers can alter these rights; and practical steps one can take now to make it easier for one's estate and heirs. More details are available here.

Domain Name Dispute Resolution

This committee's own Programming Director Kristine Dorrain, of the National Arbitration Forum, spoke at two conferences in September. At the dot-nxt conference in San Francisco, she presented on the topic of domain name dispute resolution in new gTLDs. You can access more information at http://www.dot-nxt.com/. At INTA's Trademarks and the Internet Conference in Washington, DC, she addressed whether or not there should be changes to the UDRP. More information about Kristine's presentation and the conference is available here.

No Place to Hide: First Amendment

In "No Place to Hide: First Amendment Protection for Location Privacy," which appeared in the June 2011 issue of the BNA Electronic Commerce Law Reporter, mCommerce subcommittee co-chair Theodore Claypoole writes:

"The place you stand on the earth can speak volumes about you. Are you at home or at work? Are you in a meeting of political radicals or dining at an expensive restaurant? Are you peeking into a neighbor's window or accepting an award for your contributions to humanity? Given the lack of public discourse on the subject, it seems that most Americans are not concerned about the privacy of their location. But the ability of family, friends, employers and the government to know where you are at any given moment
is increasing dramatically with modern technology, and this loss of location privacy is affecting your fundamental rights under the Constitution." Read more ...

**Enforceability of Online Terms**

In "Of Course Your Online Terms Are Enforceable. Unless the Other Party Has No Reason to Know of Them," Juliet Moringiello, Professor at Widener University School of Law and Cyberspace Law Committee Editor of Internet Law for the Business Lawyer 2.0, writes:

"Today, there is no longer much of a question about whether online terms of service, presented in a clickwrap format, are enforceable. For over a decade, courts applying traditional contract rules of offer and acceptance have found that so long as the offeree knows or has reason to know of the terms, the offeree can be bound by them.

Notice of the terms is key, and a recent case in North Carolina, *Marso v United Parcel Service, Inc.*, No. 09 CVS 2582 (N.C. Ct. App. Sept 20, 2011) reminds us of this fact." Read more ...

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