Cyberspace Law Committee

January 2012

Message from the Chair

Happy New Year! We have been busy with details and additional planning for the imminent Cyberspace Law Committee Institute and Winter Working Meeting. We are lining up an exciting slate of CLE presentations, some spectacular keynote speakers, and terrific meals and social activities. This year, our format has expanded, with 4.5 hours of CLE, additional moderated roundtable discussions continuing some of the topics from the CLE programming, and our usual blocks of break-out sessions for committee projects. The agenda is outlined below. I am looking forward to seeing many of you here in San Francisco.

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

Upcoming CLC Events

Don't Miss the CLC Winter Working Meeting

Kristine Dorrain, CLC Program Director

If you haven’t yet registered for the Institute on the Law of Cyberspace and the Cyberspace Law Committee (CLC) Winter Working Meeting (WWM), do so today! The meeting officially starts at 8 am on Friday, January 20, but plan to arrive on Thursday so that you can join in the informal networking/socializing Thursday evening. The program will officially end at 3 pm on Saturday, January 21.

Friday’s schedule includes 4.5 hours of CLE programming with sessions on:

- The New Top-Level Domains: Guidance for the Business Lawyer
- Internet Governance and Human Rights Law
- The America Invents Act, the Protect IP Act, and SOPA: Is More IP Protection Desirable?
- Privacy and the European Union
- Qualifying Technology for Meaningful Use: HITECH Benefits
- The Year in Cyberspace - 2011
- Mobile Apps & Geotracking
- Waging War against Anonymous Bad Actors on the Internet
- Digital Death: Can Estates or Heirs Gain Access to Online Pictures, Social Networks, Emails, and Accounts?

Friday’s lunch will feature two keynote speakers: J. Scott Evans, Senior Legal Director - Global Brand & Trademarks at Yahoo! Inc., and Nicole Ozer, Technology and Civil Liberties Policy Director at the ACLU of Northern California and Co-Chair, Cyberspace Law Committee of the California Bar Association. J. Scott and Nicole will discuss the current trends in how the practice of business law is impacted by the Internet and cyberspace, including their thoughts on where cyberspace lawyers will focus their efforts in 2012.

After the CLE, there will be a variety of roundtables to participate in. The various CLC subcommittees will also hold breakout sessions during four different time blocks, from late Friday afternoon through early Saturday afternoon. We encourage you to attend and actively participate in these informal sessions. While the breakout sessions are topic specific, the subcommittees are always looking for and welcome new ideas and
Of course, the Institute and WWM would not be complete without great opportunities to socialize. In addition to Thursday evening's informal get-together, there will be a cocktail reception on Friday evening at the Hotel Kabuki (site of the meeting) followed by dinner at Foreign Cinema Restaurant, which has been rated as "best new" restaurant by multiple newspapers in San Francisco.

Register now for the meeting. And don't forget to make your reservation at Hotel Kabuki (or call the hotel directly at 415.922.3200 or 800.533.4567 and refer to the "ABA Cyberspace Law Institute"), where the deadline for discounted rates is January 5, 2012.

Other Programs of Interest

January 6, 2012 - US Delegation to UNCITRAL Working Group Conference Call

See information below under International Trade Subcommittee.

January 13, 2012 - Hot Topics in E-Privacy: The Impact of the Facebook and Google FTC Settlements

You can register for this live webinar here.

January 26, 2012 - Copyright and Trademark Litigation Update for Entertainment and IP Lawyers

You can register for this live webinar here.

Business Law Section Social Media Campaign

The ABA Business Law Section has embarked upon a social media campaign. If you have not yet "liked" the BLS Facebook page, please check it out. You might also want to follow the BLS on Twitter. See https://twitter.com/ABABusLaw.

CLC Projects

International Trade Subcommittee’s Involvement in UNCITRAL Developments

John Gregory and Hal Burman, Co-Chair of the International Trade Subcommittee

The United Nations Commission on International Trade Law (UNCITRAL) has just published the official report on the meeting of the Working Group on Electronic Commerce in October 2011. The topic is the law of electronic transferable records. The Report is UN document A/CN.9/737, and it is available with other documents of the Working Group here. In order to assist the UNCITRAL considerations and in particular to help develop the position of the US delegation to the Working Group, the US Department of State will host a conference call on January 6, 2012 to discuss the topic. A good deal of time has been set aside for this call (10 a.m. to 2 p.m. EST) to help the US delegation to the UNCITRAL Working Group. If you are interested in participating, you can get the call-in number and code from Tricia Smeltzer at the Department of State: phone 202-776-8423 or email smeltzerk@state.gov. (The call will not last for four hours unless the discussions warrant.). This topic will also be discussed as part of the breakout session for the International Trade Subcommittee of the CLC at the Winter Working Meeting in San Francisco.

Some of the key issues before the UN group are:
Is there a market demand for international rules governing electronic transferable records? Some mention was made at the October meeting of US experience under Section 16 of the UETA or Article 9.05 of the UCC, in areas such as land financing and auto financing. Are there other areas where this kind of e-document is used? Is there cross-border trade using electronic transferable records, or might there be if the rules were available in different legal systems? At the UNCITRAL meeting, several delegations expressed skepticism about the need for such rules. Do non-negotiable ocean waybills or private organizations like BOLEBO replace the functioning of negotiable documents of title in the electronic era?

- Should such rules cover negotiable instruments and documents of title, or just one type of record? Can the rules be the same for both?
- What should the rules be? Should the UN leave room for both 'digital objects,' which can satisfy the requirements to be unique and transferable, and registers of title interests in the underlying assets? Is one method better than the other? In all cases?
- If one prefers a register system, how does one sort out the priorities between the various domestic registries for security interests and one or more eventual international registers?

**Development of a Publication on Privacy in Mobile Technologies**

*Ted Claypoole and Richard Balough, Co-Chairs of mCommerce Subcommittee*

The mCommerce Subcommittee will discuss "Privacy in Mobile Technologies" at the Winter Working Meeting and is looking for collaborators on a publication dealing with these and related issues. If you can't make it but are interested in collaborating, contact Ted Claypoole or Richard Balough.

Here are two recent cases outlining some of the issues:

One case claims that intrusive and unprotected software is a consumer defect under the consumer protection laws in Goodman v. HTC America, Case Number: 2:2011cv01793, filed October 23, 2011, in the United States District Court, Western District of Washington at Seattle. Plaintiffs allege that a mobile phone manufacturer and application developer installed the AccuWeather application on their phones ostensibly to provide convenient weather reports, but subsequently used the application to transmit plaintiffs' locations for other purposes (including "fine" geographic location data, which identifies the latitude and longitude of a particular device's location within several feet at a given date and time). Plaintiffs also claim that defendants failed to meet accepted baseline information security standards (by transmitting the information in an unencrypted manner), and acknowledged a product defect but failed to alert purchasers, rectify the defect, investigate data usage and/or onward transfer of detailed geographic location data, or remediate the third-party retention of the data.

The class-action complaint alleges violations of Minnesota's Prevention of Consumer Fraud Act (Defendants engaged in consumer fraud by failing to disclose the defects in the Smartphone product), Minnesota's Unlawful Trade Practices Act (Defendants mislead consumers as to the quality of the product), California’s Consumer Legal Remedies Act (Defendants represented that the smart phones with the integrated app were defect-free), and California's Business and Professional Code (Plaintiffs had a reasonable expectation that the devices would be defect-free and designed and functioning according to reasonable security standards). The AccuWeather application apparently cannot be uninstalled or easily disabled, allowing Plaintiffs to claim that Defendants had intentionally planted a Trojan horse application on their phones masked as a weather guide. Ultimately, this case may serve as the basis for consumers to classify overly intrusive software and hardware as violating Federal and various state consumer protections laws, and to forum shop for the laws most likely to support their favored conclusions.

In the case *In the Matter of An Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information*, a district court in New York denied the government's request for cell tower information. The court noted that the use of "cell-site location records present
even greater constitutional concerns than the tracking at issue in Maynard."
The court found that cell-site location records enable the tracking of the vast majority of Americans. The court stated that "the collection of cell-site location records effectively enables "mass" or "wholesale" electronic surveillance" and raises Fourth Amendment concerns. The court concluded that "cell-phone users maintain a reasonable expectation of privacy in long-term cell-site-location records and that the Government's obtaining these records constitutes a Fourth Amendment search." The court rejected the argument that a cell-phone user voluntarily discloses his location by turning on his phone and making and receiving calls and text messages. "Applying the third-party-disclosure doctrine to cumulative cell-site-location records would permit governmental intrusion into information which is objectively recognized as highly private," the opinion stated.

Cyber News You Can Use

ABA Committees Continue SOPA Debate, OPEN Act Raises New Legislative Questions
From the ABA-IPL Newsletter

H.R. 3261, known as the Stop Online Piracy Act, continues to spur ABA-IPL committee members to action on both sides of the table. Both the Copyright and Trademark Legislation Committees are involved in analyzing SOPA as it makes its way through the legislative process and are currently developing policy resolutions to be presented to Section Council. The recently authored Online Protection and Enforcement of Digital Trade Act (OPEN), an alternative to the PROTECT-IP and Stop Online Piracy Acts, purports to fight the unauthorized transacting of digital goods while protecting Internet security, commerce and speech. Sen. Ron Wyden (D-OR) and Congressman Darrell Issa (D-CA) have released a draft text of the bill and opened it for public comment. Check out the Copyright or Trademark Legislation Committee web pages for more information on their activities on this front.

EU Draft Regulations on Privacy

The European Commission issued in late November version 56 of its proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. You can access the proposal here.

Additional Incidents in the "Year of the Hack"
Roland Trope and Tom Smedinghoff, Co-Chairs of Cybersecurity Subcommittee

China Hackers Breach U.S. Chamber of Commerce Computers
In an account published by the Wall Street Journal on December 21, 2011, a group of hackers in China reportedly breached the computer defenses of the US Chamber of Commerce and, as a result, stole emails and may have had access to the Chamber's files for over a year. A spokesperson for the Chinese Embassy claimed that the report was "irresponsible" and that China has laws against hacking, but the spokesperson did not assert that China takes any action to prevent such hacking when the result would be of potential benefit to companies or government entities in China.

'Anonymous' Hackers Target Stratfor
The hacking movement Anonymous claims to have stolen thousands of credit card numbers of clients of the U.S.-based security think tank Strategic Forecasting Inc (Stratfor), and it announced plans to steal funds from those clients and to donate the funds to charity. See AP story dated December 25, 2011, and The Christian Science Monitor story dated December 26, 2011.
Top Ten Trademark Trends of 2011
Erik Pellon, Co-Chair of Marketing & Advertising Subcommittee

Newsworthy trademarks. Numerous celebrities made news in 2011 with their trademarks: “The Situation” and Abercrombie are contesting the apparel company's use of "The Fitchuation" and other parodies, Charlie Sheen filed numerous trademark applications after his well-publicized blow up with CBS, and the Kardashian trademark empire continues to grow with the filing of more than 40 USPTO trademark applications.

Political trademarks. Sarah and Bristol Palin made headlines for receiving registered trademarks covering their names in connection with motivational speaking services. President Obama's re-election campaign filed to protect its logos and recently sued a merchandise maker for infringement. The death of Osama Bin Laden was followed by Disney trademark applications for SEAL TEAM 6, which it soon abandoned after the ensuing public relations backlash. More than 20 "Occupy Wall Street" related applications were filed.

Steve Jobs. The October death of Apple Inc. founder and CEO Steve Jobs inspired many retrospectives about how he changed our culture over the last 30 years by teaching us to THINK DIFFERENTly. Along the way, Jobs helped make several Apple brand names and logos among the most recognized and most valuable in the world.

.XXX domain names. The 'sunrise' or pre-registration period began for the new .xxx top level domain name extension came and went, when owners of registered trademarks and operators of adult websites were given the opportunity to secure .xxx domains before the full public release on December 6th.

New gTLDs. ICANN announced the long discussed launch of new generic top-level domain names with an application process commencing in 2012. Reaction ranged from excitement by some brand owners to serious concerns by many others as the procedures for protecting and blocking "brand" domain names are convoluted, expensive, and not guaranteed to provide quick and affordable resolutions to disputes.

Trademark filings increase. Through the end of November 2011, USPTO trademark application filings increased 6.5% over the same period last year. The increase may be a positive indicator for the economy's growth as filing levels are approaching a return to the record high of 2008. At the close of FY2011, the USPTO register of trademarks contained 1,719,247 trademarks.

Bullies Study Released. The Department of Commerce released a study mandated by Congress, "Trademark Litigation Tactics and Federal Government Services to Protect Trademarks and Prevent Counterfeiting," to assess the extent of trademark "bullying." The study fell short of making sweeping recommendations or identifying any significant perceived problems and suggested (1) private sector pro bono efforts, (2) additional legal education programs for attorneys, and (3) enhancing outreach from government agencies.

USPTO outreach. The USPTO continued expanding its dialogue and collaboration with trademark filers and applicants as it hosted several roundtables and the National Trademark Expo. The agency also requested comments from the public on several proposed changes to its practices.

Popular Trademark Words in trademark applications filed in 2011 through December 1 included SOCIAL (753), NETWORK (1000), CLOUD (827), GREEN (1607), MOBILE (708), and BOOK (606).

Louboutin's Red Soles Put to the Test. In 2008, designer Christian Louboutin registered a mark consisting of red sole in connection with "women's high fashion designer footwear" and this year sued Yves Saint Laurent for infringement based on YSL's all red shoes, which included a red sole. The court not only failed to side with Louboutin, but it also indicated that the registration could not be enforced and might be cancelled. The case has since been appealed to the Second Circuit.
U.S. Senator Seeks Answers about Smart Phone Collection of Personal Data
Ted Claypoole and Richard Balough, Co-Chairs of mCommerce Subcommittee

U.S. Senator Franken has demanded answers from Carrier IQ about an application it has developed and that is installed on millions of cell phones. Franken, who is the head of the Senate's panel on privacy issues, has also asked the carriers about the allegedly key logging functions of the software.

Presentations and Papers of Interest

Cyberspace Feature in Business Law Today

ABA's Business Law Today's December 2011 issue contains a mini-theme on "Topics in Cyberspace Law" with an introduction by Jonathan T. Rubens. It contains the following articles:

- New Legislation Renews Conflict Between Content Creators and Content Distributors
  By Jon M. Garon
- Business Interests Under Attack in Cyberspace: Is International Regulation the Right Response?
  By Henry L. Judy and David Satola
- The SEC Staff's 'Cybersecurity Disclosure' Guidance: Will It Help Investors or Cyber-thieves More?
  By Roland L. Trope and Sarah Jane Hughes
- Going Mobile: Are Your Company's Electronic Communications Policies Ready to Travel?
  By Kathleen M. Porter

Your Name Here

Want to be in this newsletter? Have you written or presented on something your fellow committee members would be interested in? Let us (and them) know! Email your contribution to committee Communications Directors, Cheryi Balough (cbalough@balough.com) and Lois Mermelstein (lois@loismermelstein.com).

You are receiving this Committee Newsletter because you are a member of the ABA Business Law Section Cyberspace Law Committee. To opt-out of this publication, please visit the ABA Subscription Portal. You can access the Cyberspace Law Committee website here. Your e-mail address will only be used within the ABA and its entities. We do not sell or rent e-mail addresses to anyone outside the ABA. Update your profile | Unsubscribe | Privacy Policy

American Bar Association: 321 N Clark | Chicago, IL 60654 | 800-285-2221
Business Law Section: 312-988-5588 | Section Staff | businesslaw@americanbar.org | www.ababusinesslaw.org
Copyright © 2011