Thanks are due to many for helping us put on a very well-received meeting: First, thanks to our sponsors! By bringing in sponsorship dollars for the meeting, we could host a cocktail party, extend our off-site dinner, and provide transportation (torrential downpour notwithstanding). So, many thanks to these folks for participating as sponsors: Winston Krone, of Kivu Consulting; Staci Dresher, of the James Mintz Group, Cristina De la Cruz of Robert Half Legal Staffing and Heather Seward of ID Experts. Thanks for joining in ... and thanks for sticking around to participate in our working groups and roundtables! We hope you come back (and we know where to find you)! Thanks, too, to our meeting committee (Kristine Dorrain and Donna Williams) and local operations team Cathy Gellis, John Pavoloty and Ryan Parker. On the ground help was much appreciated.

We were very pleased to have a stellar group of speakers for the CLE portion of the meeting. Thanks to all of you, newcomers and old-timers alike. Shout-outs go to new committee presenters Karl Kronenberger, James Lamm, Damien Riehl and Kate Andresen - we knew we'd bring you into the fold - as well to committee stalwarts Hank Judy, David Satola, Chris Kunz, Ted Claypoole, Richard Balough, Erik Pelton, Kristine Dorrain and Sharon Sandeen - and special thanks to longtime committee member/supporter/contributor Professor Eric Goldman of Santa Clara University's High Tech Law Institute, who thrilled us with a whirlwind edition of his greatest cyberlaw hits of 2011, leaving us wanting more!

Our luncheon was highlighted by two stellar speakers, Nicole Ozer of the ACLU of Northern California, whose beat is civil liberties and technology and who also happens to be the co-chair of the California Bar's cyberspace law committee, and J Scott Evans of Yahoo's legal department, who shared with us some views from the trenches. Repeating something we had tried in Austin, we were pleased to have this connection to cyberspace and technology lawyers from the region who focus on many of the issues that concern our committee. We will continue the effort at future meetings to make these kinds of connections with leading tech companies, legal departments, and other cyberspace lawyers from the places where we meet. We will also continue to develop avenues to collaborate with other organizations addressing the issues we look at, including state bar committees, other technology law groups, and associations of business non-lawyer business professionals who address technology and cyberspace topics.

This year we tried something new: moderated roundtable discussions, continuing examinations of topics addressed during the earlier CLE portions or looking at areas that might also be addressed by our subcommittees and task forces in projects and programs. This new format seemed to offer a nice complement to the rest of the schedule, and we will be looking at how it might be added to future meetings. We'll also be thinking about venues for
upcoming Winter Working Meetings/Institutes - with an emphasis on locales with interesting connections to technology and other cyberspace lawyers.

Meanwhile, the meeting concluded with the committee's traditional break-out sessions, which are devoted to keeping this meeting in large part a working meeting. And as many new attendees noted, these sessions, and all the work of the committee, is open: we want to bring in new participants, new voices, new members! If you were at the meeting and heard something that interested you, let us know! Send a message and let us link you up with others on the committee working in the areas that interested you. If you weren't here but are intrigued and want to learn more about what the committee is up to, let us know. And read on - below you will find more information about some of the content, discussions and work product from the meeting, as well as information about what is to come as we gear up for the Business Law Section's Spring Meeting in Las Vegas, and beyond.

Jonathan T. Rubens
Chair, Cyberspace Law Committee, Business Law Section
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Upcoming CLC Events

February 21 - Conference Call on International Trade Subcommittee Project

Co-Chairs John Gregory and Hal Burman of the International Trade Subcommittee are looking for volunteers to help keep a running update on e-commerce-related activities in international bodies. The subjects would include global bodies like the International Standards Organization (ISO), the UN Commission on Europe's Trade Facilitation Centre (UNE/CEFACT), and the UN Commission on Trade and Development (UNCTAD), as well as regional bodies like the Association of South East Asian Nations (ASEAN), Asia-Pacific Economic Cooperation (APEC), the Organization of American States (OAS), the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), which is the francophone African body, and the Southern Africa Development Community (SADC), which includes anglophone countries in that region. Once the information is assembled, items of interest may be analysed for implications for US lawyers or US policy. A survey article for The Business Lawyer about the projects might also be of interest.

**A conference call for volunteers will be held on February 21st at 2 p.m. EST.** Further information will be made available on the Subcommittee's mailing list and web page.

March 22-24 - Business Law Section Spring Meeting

The Cyberspace Law Committee will be very active at the Business Law Section Spring Meeting in Las Vegas. We are sponsoring four programs that you will want to attend:

- Avoiding the Privacy Cross-Hairs: Keeping Companies that Advertise on the Internet and App Providers Away from Privacy Regulators and the New Class Action Plaintiffs
- Deploying Tools to Build or Self-Sabotage the Enterprise: How Do We Square Legal Obligations for Cybersecurity with the Increasing Use of Technologies that Undermine It?
- Maps to the Social Media Minefield Part III: Getting Social and Going Mobile - Benefits and Risks of Employee Use of Mobile Devices and Social Media In and Out of the Workplace
- Tidying Up the Internet: Take Down of Unauthorized Content under Copyright, Trademark and Defamation Law

We hope to see you at the programs, our committee and subcommittee meetings, and our joint dinner with the Corporate Compliance, Corporate Counsel, and White Collar Crime Committees. **Pre-registration** is open through March 5.
Other Programs of Interest

February 9 - Old Media Meet New Media: What Lawyers and Clients Need to Know Before and During a Crisis

The program title says it all. You can attend this insightful program sponsored by the ABA's Administrative Law and Regulatory Practice Section either live in Washington DC or via teleconference. Find out more or register [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201202/).

February 14 - Should You Negotiate by Email? Insights Learned from Behavioral Science

This webinar/teleconference is sponsored by the ABA Section of Dispute Resolution. Northwestern University School of Law Professor Janice Nadler will share what behavioral research results suggest about when to use email, when to pick up the phone, and when to meet face to face. For more information, click [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201202/).

February 15 - Cyber on the Hill with Congressman Jim Langevin

Congressman Jim Langevin (Rhode Island), an expert in the House of Representatives on cybersecurity issues will speak at this program, in which you can participate live (in DC) or via teleconference. Securing our nation's technology infrastructure against cyber attacks is a top priority for Congressman Langevin. As the Co-Founder and Co-Chairman of the bipartisan House Cybersecurity Caucus, he has taken on a leadership role in raising awareness of cybersecurity issues in Congress and fostering dialogue and debate on the critical questions surrounding this topic. Congressman Langevin will discuss how the cyber threat affects our national and economic security, what steps need to be taken to protect national assets and promote cybersecurity, and why lawyers in both the public and private sector need to be closely involved in cybersecurity developments. The program is co-sponsored by the Section of Science & Technology Law (SciTech) Homeland Security Committee and the Public Contract Law (PCL) Section's Cybersecurity, Privacy, and Data Protection Committee. You can view the program flyer [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201202/)..

Subcommittee Activities - Get Involved

This month's newsletter takes a slightly different format given the plethora of valuable information shared at the Institute of Cyberspace Law and the CLC Winter Working Meeting in San Francisco. Please find below short summaries of cyber news shared in the roundtables along with project updates from the subcommittee meetings.

Cyberspace 4.0

*By Warren Agin*

The Cyberspace Law Committee doesn't just report on the most current cases and laws, we do cutting edge work that anticipates future developments and client needs. At the 2011 Working Meeting in Austin, we talked about changes in normative values and potential changes in underlying legal structures. This year we talked about how to identify specific areas for exploration that are, perhaps, not immediately obvious. What issues are on the horizon that lack ready answers? What questions are clients just starting to ask that cause practicing lawyers to shrug their shoulders and say "I don't really know?" In the near future the Committee will be reaching out to you, and possibly beyond the committee membership, to get your input. Please also review the ongoing work of the subcommittees, as outlined below, and contact a co-chair to get involved!
**Consumer Protection Subcommittee Update**

Co-Chairs John Rothchild and James Nehf

The Consumer Protection Subcommittee meeting has decided to work on two projects. First, we will revise and update the Safeshopping.org website. This site, which contains information for consumers about how to protect themselves when shopping online, was set up by the Committee some years ago and has been updated from time to time. We plan to do a more thorough revision of the site, which will include addressing new issues that are not currently covered. In addition, we will reorient the site so that it is more useful for lawyers who are advising consumer clients in addition to providing information aimed at consumers themselves. The second project is to propose a program for the ABA Annual Meeting on the subject of mobile commerce. Our hope is to collaborate with one or more other groups, such as the CLC’s mCommerce Subcommittee, the Business Law Section’s Intellectual Property Committee, or a subgroup of the Section of Science and Technology Law. A possible topic for our presentation would be consumer issues arising from in-app purchases, that is, purchases made via applications residing on mobile devices. For more information, please contact John Rothchild.

**Update from the Cybersecurity Subcommittee**

Co-Chairs Roland Trope and Tom Smedinghoff

The Cybersecurity Subcommittee is embarking on two projects. It plans to complete the written product of both projects by the CLC’s Winter Working Meeting next January. Project #1: A Guide to Cybersecurity Risks of Cloud Computing Services. Project #2: A Guide for Museums and Museum Registrars on Identifying and Responding to Cybersecurity Risks. If you are interested in working on either project, please contact Roland Trope or Tom Smedinghoff.

**Update from Identity Management Task Force**

Chair Tom Smedinghoff

The goals of the Identity Management Legal Task Force, which includes both CLC and non-CLC members, are to identify and analyze the legal issues relating to identity management, identify and evaluate appropriate legal models to address these issues, and develop model terms and contracts that can be used by the various parties in implementing identity systems. The task force has prepared an initial draft of its report which it hopes to complete by August 2012. That draft report, which is posted on the task force’s website, is set out in three parts:

1. Identity Management Fundamentals and Terminology.
2. Legal Regulation of and Barriers to Identity Management.

The draft report was the subject of extensive discussion at a two-day task force meeting in Washington, DC on January 12-13. At the CLC Winter Working Meeting, the task force reviewed the concept of identity management and discussed the draft report and the legal issues involved, including privacy, liability, and binding the right parties to the appropriate obligations. Moving forward, the task force intends to release a new draft of its report sometime later this spring and then hold another in-person meeting to review that new draft. For more information, contact Tom Smedinghoff.

**Book Task Force**

*By Juliet Moringiello*

The task force and contributors to second edition of *Internet Law for the Business Lawyer* continue to work on this book. It should be submitted to the ABA by the Business Law Section Spring Meeting for publishing.
Cloud Computing and IT Services Subcommittee
Co-Chairs William Denny and Phillip Schmandt

The Cloud Computing and IT Services Subcommittee's focus is 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.

One subcommittee project is the creation of a Model Cloud Services Agreement. This model will provide a reasonable default set of terms to assist businesses in evaluating and negotiating cloud provider agreements. While public cloud contracts are largely non-negotiable, private cloud agreements are generally subject to some negotiation. The subcommittee is gathering negotiated cloud services agreements from members, collecting information about certain vendor negotiation practices, and producing the model agreement. We will be looking for volunteers to draft or review the key clauses.

A second project underway focuses on IT Issues in Mergers and Acquisitions. The project team is developing a checklist that includes commentary on IT issues arising in corporate acquisitions and divestitures, from due diligence through final agreements, and provides practical guidance to business lawyers and in-house counsel. The subcommittee has also developed a list of possible subjects for additional projects, including:

- IT issues in facilitating online transactions and e-commerce
- B-to-B information e-commerce portals and aggregation of economic and HS&E data
- Best practices in managing open source software
- Educating website developers about copyright laws and what they need to do
- Data breach best practices

If you are interested in learning more about, or helping with, the Model Cloud Services Agreement project or another project listed above, please contact co-chair Bill Denny.

Update from Combined Meeting of Digital Media and Advertising and Marketing Subcommittees
Jon Garon and Susan Stephan, Co-Chairs of Digital Media Subcommittee
Erik Pelton, Chair of Marketing and Advertising Subcommittee

At the Winter Working Meeting, the Digital Media and Advertising and Marketing Subcommittees had a combined meeting to discuss issues of mutual concern and possible new projects. Topics explored included the recent Golan v. Holder case confirming that Congress may remove works from public domain to comply with the Berne Convention; the burgeoning area of “sentiment analysis,” a/k/a opinion mining, where software crawls real-time data related to online postings/communications and allows those monitoring to pop into communications and engage with participants; social media account ownership and what happens when a business account is controlled by a disgruntled or departed employee; and issues related to epublishing and the control of publishers over re-publication rights.

Proposals for new projects include:

- Addressing the realm of sentiment analysis and real-time engagement within the social media sphere
- Compiling a handbook, white paper or mixed media webinar on “Drafting and Negotiating Digital Media Transactions"
- Addressing new issues in epublishing by perhaps drafting a white paper, or even drafting a model “ebook protection act”
- Monitoring and analyzing the Megaupload litigation for possible issues as they relate to civil vs. criminal ramifications of alleged IP violations online
- A white paper or CLE program exploring differences between US and E.U. law for online advertisers related to keywords, cookies, domain names, user-generated content, and the like
Electronic Financial Services and Payments Subcommittee  
Co-Chairs Ed Morse and Stephen Middlebrook

Subcommittee co-chair Ed Morse led a spirited discussion at the Winter Working Meeting on insurance coverage for cyber-incidents, which led to a proposal for a CLE program at the ABA Annual Meeting in Chicago. The group discussed the emerging legal landscape involving damages for security breach incidents, including recent case law in that area from the First Circuit (Anderson v. Hannaford Bros. Co); a recent case filed in Utah (Elavon Inc. vs. Cisero's Inc. and Thodora McComb), which involved a challenge to payment card network fines passed on to a restaurant by its acquiring bank; and coverage issues presented in New York state court in Zurich Am. Ins. Co. v. Sony Corp.

The group agreed that insurance products for data security breaches and related cyber risks, such as those that emerge from blogging, potentially provide valuable benefits not only in the form of substantive liability coverage, but also in bearing costs for mitigating customer harms and defending against claims, which can be considerable. Those with experience in both underwriting and claims identified some important issues that need to be understood, including the scope of coverage, types of coverage available and appropriate for different businesses, conformity issues, and notification issues. These issues affect business firms of all sizes, and as these risks become better understood, insurance is likely to have a place in the risk management toolkit. Lawyers seeking to counsel clients in procuring and designing appropriate coverage need to be informed in order to do so effectively.

The group began developing a proposal for a CLE program, preferably at the Annual Meeting, which would provide an opportunity for business lawyers to become more familiar with the issues presented by various forms of cyberspace insurance. The program would include a panel with representatives from law firms who represent both claimants and underwriters, corporate counsel, and consultants familiar with technical issues involving data security breaches for this purpose. Anyone interested in this topic can contact Ed Morse for more information.

Update from the mCommerce Subcommittee  
Co-Chairs Ted Claypoole and Richard Balough

We held the first meeting of the Mobile Commerce subcommittee at the Winter Working Meeting in San Francisco, where we discussed recent legal and regulatory changes regarding mobile business models, apps, and products that serve the mobile market. We also discussed topics for speaking and writing projects over the next year. Topics of interest include:

- Aggregation and use of data collected from mobile devices. Who owns the data? (work with Consumer Protection Subcommittee)
- Monitoring of driving habits by car companies, insurance providers, law enforcement, and other third parties
- Collecting data on third parties and environments via mobile phones, including WiFi mapping
- Use of biometrics in mCommerce
- Contracting for mobile transactions: click-through agreements, terms of service, and consumer protection
- Regulating the expanding universe of mobile payment methods

Please contact Richard Balough or Ted Claypoole if you want to help explore any of these topics.

Update on UNCITRAL: E-transferable Records and Online Dispute Resolution  
Co-Chairs of International Trade Subcommittee, John Gregory and Hal Burman

The International Trade Subcommittee discussed the work of the UNCITRAL Working Group on Electronic Commerce, which met for the first time in
October 2011 to discuss electronic transferable records (ETR). Much of the discussion focused on the need for such records at all. Some participants thought that the only reason to worry about ETR was if they needed to be negotiable, i.e. if their use cut off certain defences to collection otherwise available to the parties to such records. Without negotiability, finding an electronic equivalent would be easier. However, if negotiability were still important in international trade, it would make more sense to analyse its elements and devise an electronic functional equivalent to them, rather than to assume that the paper world’s solution to these functions - a document that represented the value of the characteristics to be obtained - should be transposed somehow into the electronic world. A conference call to pursue the discussion will be held on March 15th at 2 p.m. EDT. Further information will be made available on the Subcommittee’s mailing list and web page.

The Subcommittee also discussed UNCITRAL’s work on Online Dispute Resolution in light of the last meeting of the Working Group in November 2011. The project aims to establish a system and supporting legal rules for low-value, high-volume disputes, for both business-to-business disputes and business-to-consumer disputes. A debate was growing within the US and elsewhere as to whether it was appropriate to include B2C disputes or, in any event, to support a legal regime that might require consumers to agree to arbitrate a dispute before the dispute had arisen. Such arbitration agreements have been used in some countries to prevent consumers from asserting legal rights by other potentially effective means, notably class actions. This topic will be the principal focus of discussion at the Subcommittee’s meeting at the Spring meeting of the Business Law Section in Las Vegas on Friday, March 23, at 11 a.m.

Roundtable Roundups

**Roundtable: Property Rights in IPv4 Numbers**

*By Ernesto Rubi*

The Internet has a finite supply of numbers that allow the connection of workstations and mobile devices to each other ("IPv4 Numbers"). Approximately 45 percent of these IPv4 numbers (so-called "Legacy Numbers") were assigned before the creation of Regional Internet Registries (RIRs). The proposition that property rights exist in Legacy IPv4 numbers is supported by a recent bankruptcy case, *In re Nortel* originating in the US District Court in Delaware, which approved the sale of IPv4 numbers outside of RIR oversight. The roundtable discussed whether ownership rights exist in Legacy Numbers, the increasing monetary value of these scarce Legacy Numbers as an asset to enterprises and Internet Service Providers, as well as how to counsel clients confronted with zealous RIRs who try to compel the voluntary relinquishment of any property rights current holders may have in their Legacy and non-Legacy IPv4 numbers.

**Roundtable: Did the Viacom Court Get It Right?**

*Moderator: John Ottaviani*

This roundtable focused on the Digital Millennium Copyright Act, and the safe harbors from copyright infringement claims in section 512(c). There are six 512(c) factors. The claim in *Viacom v. YouTube* was "you know there is infringing content and you’re ignoring it." In this case, the SNDY court said "there is no general duty to find infringing content," which puts the duty on the copyright owners to notify of infringing work, with specificity. Question: If there is a takedown for a specific instance of a work, is there a duty for the ISP to ferret out other postings of the same work? For instance, if a song posted on YouTube is identified as infringing, how far must YouTube go in finding all instances of that song? Viacom is appealing, arguing that YouTube is not protected by the safe harbor provision because it has actual knowledge of infringement.

Participants also discussed some related topics. The person who gives notice under the DMCA is responsible for determining if fair use applies. As
well, a defective notice is not a notice of copyright infringement under the DMCA, although many ISPs will offer a chance to correct. There may also be a monetization opportunity: it's possible that YouTube might be offering cash from advertising to content owners who agree not to have the material taken down.

Other DMCA-related cases discussed included UMG v. Shelter Capitol Partners (9th Cir), where the court found that 512(c) applies to direct and vicarious liability and that the host did nothing voluntarily. In Capitol Records v. MP3Tunes.com, a music locker case, the court found that generalized knowledge of infringement isn't enough. Perhaps it made a difference that MP3Tunes.com didn't charge by work or volume, but on a flat fee basis. Another case, Wolk v. Kodak (SDNY, Jan 2012), involved an amateur photographer vs Photobucket. Participants also discussed Megaupload.com, which had been shut down that morning.

Roundtable: The SEC's Cyber Disclosure Guidance
Moderators: Roland Trope and Charles Palmer

This roundtable focused on the SEC's Cyber Disclosure Guidance, based on the SEC's interpretation of existing rules on registrants. Participants questioned how to meet the disclosure requirements, if disclosure is necessary. While the Guidance admonishes use of boilerplate language, some attendees surmised that any such disclosures may devolve into boilerplate anyway. Participants discussed data breaches and cybersecurity, including the Stratfor data security breach. Some were concerned that the Guidance may require registrants to provide a roadmap to their adversaries in terms of cybersecurity vulnerabilities. Participants also explored the level and type of technical details that would need to be disclosed and what might be required if the registrant was using cloud services arrangements. Some questioned whether the SEC's interest was primarily in technical details likely to impact the stock price of a registrant, or if the interest was broader. In addition, participants discussed other recent initiatives, including ESF, to develop standards relating to information sharing and cybersecurity generally.

Roundtable: Digital Death
Moderator: Christina Kunz

This roundtable was a followup to the Digital Death CLE session held earlier in the day. One concern raised involved e-discovery. One often needs to open probate just to get access to a Yahoo! account. Facebook's data use policy says it may share data in response to a court order. While in discovery one must disclose everything wherever it is, and privacy is a countervailing concern.

The applications of community property law were also discussed. Some mentioned analogies to copyright law. One participant suggested looking to state law on joint ownership, which prompted a side question: Do married couples really jointly own joint Facebook accounts? In many cases, there are procedures to get the contents of an account, but not the account itself. Yahoo! and Google will turn over contents but not passwords. This prompted an analogy to a bank account - is there a difference in that context between and account and its contents? The difference is that Yahoo!, Facebook, and the like make their money by selling their customers' information, while banks make money by serving their customers.

Participants also discussed a uniform law project, geared to allowing executors to gain access to contents of e-mail and other accounts. Should such a uniform law expressly trump terms of use? Should account termination on death be void as a matter of public policy? However, a provision for continuation of accounts after death is important so an executor can get the content out of the account, which becomes important when there is a challenge to a will's validity. Expiration of e-mail accounts was another concern raised. Small businesseses present other considerations. For instance, a Twitter account cannot be held by an entity. What happens to a small business with millions of followers and a lot of goodwill when the original tweeter is no longer available?
Participants also raised analogies to covenants, life estates, and permissible forms of ownership. How much can terms of service limit the rights of an account holder? What if an account can only be accessed by biometric data? What happens if the decedent is a potential defendant in a copyright infringement lawsuit? Can the executor destroy the copyrighted information, or would that be spoliation? On a related note, what if the account contained child pornography? The executor in such a case would have to report it, but not destroy it.

The group concluded with some practical advice. When estate planning, ask the question - do you have any digital assets?

**Note from the Editors**

The newsletter will resume regular formatting next month. As always, we welcome your contributions. 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, Cheryl Balough (cbalough@balough.com) and Lois Mermelstein (lois@loismermelstein.com).