Message from the Chair

The cyberspace committee is back in the midst of our annual extended writing project - the Survey of the Law of Cyberspace, which is published at the end of each year in the Business Section’s Law Review, The Business Lawyer. For the last few years, we have relied on a "taxonomy of cyberspace," a sort of abbreviated outline of the areas of law and cyberspace that we cover, or that we believe we might cover, in the Survey and through the work of our committee members. Take a look. Although writing is almost complete for this year, if you have any interest in contributing now or to next year’s Survey, please let us know.

While our committee’s work product and programming delve into many of the areas listed in the taxonomy, we don’t get to all of it. For that reason, we try to use this newsletter to point our members to other programs and publications that cover these areas and may be of interest. We try to include links to other events, mention of other publications, and cyberlaw goings-on elsewhere. We recognize that cyberspace law issues of import are all over the place these days, and other groups may be addressing them in an interesting or significant way. And many of our members and leaders work on these issues outside of the context of the committee - and we want to let each other know about that work. Think of the committee newsletter as a frequent report on the activities of this committee and also as a link to additional cyberlaw developments, events, and content. We hope it’s a useful tool for our members.

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

Upcoming CLCC Programs

ABA Annual Meeting - August 2012
Cyberspace Committee Winter Working Meeting - January 2013
ABA Business Law Section Spring Meeting - April 2013

Other Programs of Interest

CLE Programs
Invitation from ABA’s India Committee
SciTech LinkedIn Group

CLCC Projects

Consumer Protection Subcommittee Update
Updates from the Cybersecurity Subcommittee
Update from the Digital Media Subcommittees
Update from the International Trade Subcommittee
Update from the Mobile Commerce Subcommittee
Update from the Cloud Computing and IT Services Subcommittee
Other Publication Ideas Sought

Committee Responses to Blanket Authority Requests

Toward an Integrated European Market for Card, Internet, and Mobile Payments
Amendments to Internal Revenue Code
Model Rules of Professional Conduct

Cyber News You Can Use

FERC Adopts Version 4 “Critical Infrastructure Protection Reliability Standards”
Cyberattack on Iran’s Oil Industry
“Hot Topics” in E-Payments and Financial Services

ABA Annual Meeting - August 2012

This year’s ABA Annual Meeting will be held August 2-5 in Chicago, and registration is now open. The Cyberspace Law Committee will present or co-present several CLE programs. We will also have a meeting on Friday, August 3, 2-5 pm, which will include both committee business and several short substantive presentations on cyberlaw topics. We’ll have more details about these offerings in the June newsletter. In addition to some wonderful substantive programs, there will be many opportunities to socialize, including two events specific for Cyberspace Law Committee members: an informal, non-ABA sponsored get-together on Thursday, August 2, as well as an ABA-sponsored dinner on Friday, August 3. You can sign up for the latter when you register for the Annual Meeting. Look for more information in future emails.

Cyberspace Committee Winter Working Meeting - January 2013

Kristine Dorrain, CLCC Programming Director

Program submissions for the Annual Meeting are in and we’re moving on to planning for next year’s Winter Working Meeting. We are excited to bring you the 2013 Institute on the Law of Cyberspace and Winter Working Meeting, including at least four hours of CLE credit.

The 2013 Institute on the Law of Cyberspace and Winter Working Meeting will be held in Los Angeles near UCLA at the W Hotel in Westwood on the weekend of January
Recent Cases re Online Copyright or Trademark Infringement

Presentations and Papers of Interest
- New Dodd-Frank Rules on Record Keeping
- Defense Systems and Intellectual Property Rights
- Articles Related to Online Legal Issues
- Impact of Future EU Data Protection Reforms
- Online Dispute Resolution
- Legal Education and Technology
- Mobile Devices in the Law Firm
- Cloud Services Agreements
- Your Name Here

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ABA Business Law Section eNewsletter: Cyberspace Law Committee

24-26. Please plan to fly in Thursday night and fly out Sunday morning, so as to not miss any of the programming, working group meetings, and entertainment.

The Institute will include 4 or 5 hours of CLE programming, with shorter presentations on topics of greater depth or more narrow focus than typically presented at the Business Law Section spring meeting or ABA annual meeting. We will also offer roundtables again, as a way to complement and serve as a springboard for subcommittee meetings and projects. Roundtables are the place where we meet to discuss a hot topic and engage in lively debate on important issues. We are looking for roundtable moderators who will present the topic and keep the discussion focused, but will not actually teach or lecture.

Here are a few particulars about the CLE:

1. CLE sessions will be about 30 minutes long; this means no more than 1-2 presenters per program.
2. This is really CLE, so original written materials, etc. are required and will need to be submitted by mid-December at the latest.
3. The audience will be pretty acquainted with the basic knowledge, so in-depth, concentrated sessions are welcomed.
4. If you're new to the committee, this is a great way for us to get to know you and your expertise!

If you're interested in presenting a CLE session or moderating a roundtable, please email Kristine Dorrain and provide a paragraph of 6-10 sentences describing your proposed topic and why you think it's on the cutting edge of the intersection of Cyberspace and Business Law. Thanks for your involvement and I look forward to seeing you in Chicago for the Annual Meeting, August 2-5.

ABA Business Law Section Spring Meeting - April 2013

The 2013 Business Law Section Spring Meeting will be held in Washington, DC, on April 4-6. Mark your calendars now.

Other Programs of Interest

CLE Programs

May 9, 2012: iPad for Lawyers
Format: Webinar/Teleconference

May 16, 2012: Non-competes in the Electronic Workplace: Solicitation in the Age of Social Media
Format: Webinar/Teleconference

Format: Webinar/Teleconference

Invitation from ABA’s India Committee

The India Committee of the ABA Section of International Law includes as its members lawyers in the U.S. and India who advise clients doing business in India or who are otherwise interested in promoting and improving commercial dealings between India and the United States. The India Committee’s activities include publication of a scholarly journal on U.S./India legal issues and organization of a conference annually in India for U.S. and Indian lawyers as well as officers of Indian companies and Indian Government officials. The India Committee also maintains an active listserv, holds a monthly conference call on committee matters, and organizes CLE programs and webinars. Sanjay Tailor and Priti Suri currently co-chair the Committee and invite members of the Cyberspace Law Committee to consider joining of the India Committee, or at least becoming familiar with its activities by participating in its listserv and monthly conference call. If you are interested, please contact Sanjay Tailor.

SciTech LinkedIn Group

The ABA SciTech Section has recently started to post articles and discussions on LinkedIn. If you are a LinkedIn member, you can check out its three groups: SciTech Social Networking Committee, ABA SciTech Special Committee on Homeland Security, and YLD SciTech. If you are not yet a LinkedIn member, you can join here.
CLCC Projects

Consumer Protection Subcommittee Update
Co-Chairs John Rothchild and James Nehf

The ABA developed the website www.safeshopping.org more than a decade ago, and the Consumer Law Subcommittee has done minor updates in recent years. It is time for a more substantial update, however, and we need several people to help out. This is a great opportunity to contribute to an important ABA initiative, and it is particularly well suited for young lawyers with an interest in e-commerce. The website is currently aimed primarily at consumers and is designed to help them shop for goods and services safely and productively online. It contains nine substantive sections, none of which is very long or detailed (only one page or two right now). We would like to update the site to reflect current laws and practices and expand and enhance it so it is not only helpful to consumers but also to attorneys who assist consumers and small businesses in Internet transactions. This would not necessarily include detailed advice on legal matters, but we would like to reference the most important laws addressing various issues and provide links to legal resources where people could go for more information.

The nine subject areas are:

1. Security (secure Internet connections, password protection, virus protection, etc.)
2. Privacy (privacy policies, cookies, spyware, anonymous browsing, etc.)
3. Payment (payment options, identity theft, etc.)
4. Seller (seller's reputation, avoiding scams, dealing with spam, assessing reliability, etc.)
5. Product (getting the best price, product authenticity, verifying orders, shipping costs, cancellation rights)
6. Terms (finding contract terms, their legal importance, return policies, warranties, arbitration clauses, forum selection clauses, etc.)
7. Delivery (delivery charges, FTC 30-day rule, etc.)
8. Records (keeping records of transactions and messages, changes to websites, etc.)
9. Complaints (bbbonline, attorney general offices, FTC complaints, dispute resolution options)

We are looking for a team of volunteers to head up the revision of each of the nine sections. Subcommittee co-chairs John Rothchild (Wayne State University) and James Nehf (Indiana University) will coordinate the work, and the ABA has web designers to take care of the production details. Contact John Rothchild or James Nehf for more information.

Updates from the Cybersecurity Subcommittee
Co-Chairs Roland Trope and Tom Smedinghoff

The subcommittee has started work on three projects:

- A lawyer's guide to cybersecurity issues for clients considering the adoption and use of cloud computing;
- A guide to cybersecurity for museums (co-chaired by Janice Hugener and Winston Krone); and
- A lawyer's guide to cybersecurity issues for clients preparing to adopt and deploy electrical "smart grid" technologies, or whose enterprise security and resilience will depend on "smart grid" cybersecurity.

Please contact Roland Trope or Tom Smedinghoff if you would like to get involved or have any questions.

Update from the Digital Media Subcommittees
Co-Chairs Jon Garon and Susan Stephan

The Digital Media subcommittee plans to work on ePublishing issues. The Department of Justice has accused Apple and five publishers of violating antitrust laws in the pricing of ebooks, and the Google Book Search settlement was not approved by the South District of New York over similar issues. Publishers, in turn, have accused Amazon.com of using its market power to unfairly adjust prices and threaten physical sales and the traditional retail marketplace.
Moreover, exclusivity provisions in eBook Publishing agreements are requiring authors to sometimes select one digital platform or another, barring the sale of a book on both Amazon and Apple. Given the importance of book publishing to public discourse, the subcommittee will be developing materials to address the legal, economic, and societal impacts of this phenomenon. If you wish to get involved in these efforts, please contact Jon Garon or Susan Stephan.

Update from the International Trade Subcommittee
Co-Chairs John Gregory and Hal Burman

The International Trade Subcommittee continues its analysis of the UNCITRAL working group on online dispute resolution, following up on its meeting in Las Vegas (reported here). It held a conference call April 26 and has another one planned for May 9, both kindly provided by the State Department, to discuss the working papers that will be before the working group's meeting in late May. Call-in information can be obtained from either co-chair: John Gregory or Hal Burman. For more information on the subcommittee's activities and work product, visit the subcommittee's web page.

Update from the Mobile Commerce Subcommittee
mCommerce Subcommittee Chairs Richard Balough and Ted Claypoole

The mCommerce Subcommittee is seeking volunteers to assist with two projects. The first involves developing materials to help business lawyers advise mobile application developers. This project will include preparation of a checklist to use when negotiating and drafting app contracts. The checklist will address issues such as copyrights, trademarks, privacy, data sharing, mobile payments, open source software, and FTC compliance. The second project concerns issues that arise when mobile devices are used in the workplace, such as employee use of their own devices, electronic publishing for the mobile market, and use of the automobile as a mobile device. These projects will be divided into discrete tasks for individual volunteers. Please contact either Richard Balough or Ted Claypoole for further information or to volunteer.

Update from the Cloud Computing and IT Services Subcommittee
Co-Chairs William Denny and Phillip Schmandt

At our Vegas meeting, attendees heard a fascinating presentation by Robert Campbell, a Dallas-based FDIC lawyer. He spoke about "data hostage" clauses in cloud services contracts, which can be traps for the unwary. These clauses may erect substantial barriers to users looking to switch to a different service provider. While the literature often discusses other technically related vendor lock-in mechanisms, users pay little upfront attention to how their cloud service agreements may constrain their exit options. Bob showed examples of such clauses and spoke about alternatives.

Also at the meeting, the subcommittee discussed its project to create a model cloud services agreement to assist businesses in contracting for cloud services. We are interested in getting more volunteers to participate in producing model clauses, to be included in a CLE presentation at a future meeting on cloud contracting practices. To get involved, contact Bill Denny or Phillip Schmandt.

Other Publication Ideas Sought
Kristine Dorrain and Sarah Jane Hughes, Content Directors

If you or your subcommittee has an idea for an article in Business Law Today, a non-Survey piece for The Business Lawyer, an article for another journal, or a book or model contract/form project that the Business Section might publish, please let Sarah Jane Hughes know as soon as possible.

Committee Responses to Blanket Authority Requests

Toward an Integrated European Market for Card, Internet, and Mobile Payments
Ed Morse and Sarah Jane Hughes

The Cyberspace Law Committee recently responded to comments from the Antitrust and International Law Sections on the EU Green Paper "Towards an integrated European market for card, internet, and mobile payments," which were proposed for submission to the European Commission. The Antitrust and International Law comments included topics that relate to the mission of the Cyberspace Law Committee, including privacy and security issues associated

http://apps.americanbar.org/buslaw/committees/CL320000pubnewsletter/201205/
with payment methods that utilize bank authorization. Our committee's comments pointed out the need for clarification about the relationship between trust and the technology environment, as well as the need to address the source of fraud protection (i.e., that coming from technology and from legal arrangements designed to protect consumers, which are common in the U.S.). Our comments also raised a cautionary flag with regard to solutions that are based on additional disclosure and consent from consumers, who may well be overloaded with such obligations in the current privacy protection regime. CLCC Committee members Ed Morse and Sarah Jane Hughes worked on these comments.

Amendments to Internal Revenue Code
The Cyberspace Law Committee recently responded to a request about the ABA Tax Section's proposal regarding amendments to the Internal Revenue Code and how the IRS should deal with information disclosure in the context of possible identity theft of taxpayer ID numbers. We commented on some of the concerns that have been raised in the past about security issues at the IRS.

Model Rules of Professional Conduct
The Cyberspace Law Committee also provided input on the Professional Responsibility Committee's guidance to the BLS Leadership on Ethics 20/20's proposed amendments to the Model Rules of Professional Conduct.

Cyber News You Can Use

**FERC Adopts Version 4 "Critical Infrastructure Protection Reliability Standards"**
*Cybersecurity Subcommittee Co-Chairs Roland Trope and Tom Smedinghoff*

The Federal Energy Regulatory Commission (FERC), among other duties, regulates rates for wholesale electricity sales and transmission of electricity in interstate commerce. This includes deciding whether to allow utilities to recover the costs of investments they make to the transmission system, such as smart grid investments. FERC is also responsible for reviewing and approving mandatory and enforceable reliability standards to protect cyber-critical assets, and FERC recently adopted a new version of such standards. For more information, see the [Cybersecurity Subcommittee webpage](http://www.americanbar.org/about/offices/communications/busserv/committees/c1800000pub/).[1]

**Cyberattack on Iran's Oil Industry**
*Cybersecurity Subcommittee Co-Chairs Roland Trope and Tom Smedinghoff*

A malware attack on the internal computer systems at Iran's Oil Ministry and Iran's key oil plants forced their disconnection from the Internet. An Iranian oil ministry spokesperson reportedly confirmed that data about website users had been stolen as a result of the attack. See [BBC News report](http://www.bbc.com/).  

**"Hot Topics" in e-Payments and Financial Services**
*Sarah Jane Hughes, Former Co-Chair, Financial Services and Payments Subcommittee*

This article follows up on a presentation made to the Financial Services and Payments Subcommittee at its March 22, 2012, meeting on Electronic Payments and Financial Services. The first five topics highlight the range of e-payment providers, the terms and conditions on which they offer their services to users, issues that may arise when payment systems lack defined mechanisms for dispute resolution, and growing interest in identity theft - at least, among the members of one Senate committee. Three involve lawsuits filed against payment providers, one a Senate hearing on tax fraud and identity theft, and the last the terms and conditions of PayPal's user accounts. In the June issue of this newsletter, I will cover the remaining topics.

1. *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation* (MDL No. 09-2046, Civil Action No. H-10-171, Mar. 14, 2012). 2012 WL 896256 (S.D. Tex.). This decision relates only to the portion of the overall case that deals with the Financial Institution Track Litigation: Lone Star National Bank, N.A. et al., Plaintiffs v. Heartland Bank and KeyBank, N.A., Defendants. The court granted KeyBank's motion to dismiss and dismissed with prejudice the class action filed against Heartland Bank and KeyBank, N.A. by five issuer banks, including Lone Star Bank, PBC Credit Union, O Bee Credit Union, Seaboard Federal Credit Union, and Pennsylvania State Employees Credit Union. The court ruled that the plaintiffs had failed to cure...
the deficiencies identified in KeyBank's motion to dismiss for failure to state a claim. The court had previously granted Heartland Bank's motion to dismiss for lack of personal jurisdiction. In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation ("Heartland II"), -- F. Supp. 2d --, 2011 WL 6012598 (S. D. Texas, 2011). This ruling effectively ends the Financial Institution Track Litigation.

2. Judge Certifies Class-Action Status for Abercrombie & Fitch Gift Card Lawsuit

Mar. 15, 2012. This class action involves $25 gift cards handed out in December 2009 to customers who purchased at least $100 in merchandise. Plaintiffs allege that the gift cards did not have expiration dates. Plaintiffs contend that they tried to redeem the cards in April 2010 - just months later - and were told the cards had expired in January 2010. Abercrombie has argued that the sleeves in which it delivered the cards noted an expiration date of January 30, 2010. The Electronic Fund Transfer Act (EFTA), as amended by the CARD Act of 2009, and amendments to Regulation E implementing the statutory amendments, govern the issuance of gift cards and impose restrictions on expiration of the funds underlying gift cards, with exceptions. Many state laws that govern gift cards also address the subject of expiration dates and require disclosures of expiration dates. This is the first certification of a class action under the CARD Act amendments to the EFTA of which I am aware.

3. The United States Senate Committee on Finance held its second hearing on Tax Fraud by Identity Theft on March 20, 2012. The Committee focused on Status, Progress, and Potential Solutions to this source of tax fraud. The roster of witnesses and summaries of prepared testimony and the Committee’s questions appear here. With so much focus on identity theft and data security, this hearing provides a glimpse into the Senate Committee on Finance’s take on these subjects and may assist CLC members representing entities interested in these subjects in alerting clients to new concerns.

4. PayPal and Office Pools. As the NCAA basketball tournament got underway before the Business Section's Spring Meeting in Las Vegas, apparently a jumping place for Dance betting, Phil Villareal's article at Consumerist.com and Bloomberg Businessweek both report on the provision in PayPal's user agreement that prohibits PayPal members from sending or receiving money for contests with entry fees and prizes. As the Bloomberg Businessweek article observed, "office pool masetors" may have been forced to resort to the "old-fashioned money jar." This story is a reminder to read the terms and conditions of electronic payments accounts before fashioning the traditional office pool in reliance on the use of new technologies for making and receiving payments.

5. Bitcon Lawsuit Alleges that Dwolla Put a Bitcoin Exchange out of Business: TradeHill, which operates a Bitcoin exchange that shut down in February 2012, filed suit in the Northern District of California charging that Dwolla advertised a no-charge-back policy but then charged back $100,000 in credits and also "unjustifiably blocked" TradeHill from transferring $70,000 of funds from Dwolla's control. The loss of these funds, the complaint charges, rendered TradeHill unable to pay staff and caused its shutdown. TradeHill also charges Dwolla with racketeering and bank and wire frauds. According to a March 6, 2012, article by Jeremy Quittner in Bank Technology News, Dwolla's chief executive Jordan Lampe refused comment in February after TradeHill's suit was filed. Quittner's article noted that the lack of defined dispute-settlement mechanisms for some new payments services is one of the challenges being faced.

Recent Cases on Online Copyright or Trademark Infringement

Erik Pelton and Peter McLaughlin, Co-Chairs of Marketing and Advertising Subcommittee

Viacom International, Inc. v. YouTube, Inc., 10-3270-cv, 2012 WL 1130851 (2d Cir. April 5, 2012). Viacom won an appellate decision; which overturned the district court finding that YouTube was protected under the DMCA, thus reviving this litigation. The practical results are somewhat moot: the case began five years ago, and copyright owners now have access to the "Content ID" system. The opinion opens some potential holes in DMCA §512(c) safe harbors, which the court said would protect YouTube from both direct and secondary infringement. While the court found that YouTube satisfied most of the 512(c) safe harbor elements, if it is found to have failed on just one of the elements, the defense fails.

Rosetta Stone Ltd. v. Google, Inc., No. 10-2007 (4th Cir. April 9, 2012). The appeals court overturned denial of Rosetta Stone's claims of direct trademark infringement,
contributory infringement, and dilution, and remanded to the district court for further proceedings regarding these claims. The decision is likely to create a new wave of actions against Google, although many experts still believe it is very unlikely that Google will be found liable for trademark infringement. A key question in this case on remand, as in many keyword cases, is whether the use of trademarks in keyword advertising is a "use in commerce".

Presentations and Papers of Interest

New Dodd-Frank Rules on Record Keeping
Committee member John Isaza, an attorney who focuses on record-keeping compliance, was recently quoted in a Wall Street Journal article on new record-keeping rules for non-financial companies involved in swap transactions. When the rules go into effect, such companies will have to record every phone call, instant message, and voicemail relevant to the deals. "This thing has tentacles that reach way beyond those major financial institutions, reach into anyone that is involved in swap activities," Isaza was quoted as saying. You can access the full article here.

Defense Systems and Intellectual Property Rights
On May 3, 2012, Roland Trope, partner in Trope and Schramm LLP and adjunct professor at the US Military Academy, chaired and spoke as part of a panel at the Triennial Congress of the International Society on Military Law and the Law of War at Québec City, under the sponsorship of the Norwegian Group of the Society. The panel, consisting of US and Canadian legal counsel, addressed issues of defense procurement, intellectual property, and cybersecurity. The three-hour session was entitled Security on Steep Ground: Averting Unnecessary Risks in Acquisitions of Major Defence Systems and the Related Intellectual Property Rights. Other presenters included George O. Winborne, Office of Command Counsel, U.S. Army Materiel Command Headquarters, Redstone Arsenal; Peter S. Martin, Counsel, Montreal offices of McCarthy Tetrault; and Alan MacDonald, Office of the General Counsel & Deputy Legal Advisor Commercial Law Advisory Services, Department of Justice - National Defence, Canada. For more information, please contact Roland.

Articles Related to Online Legal Issues
Cyberspace Law Committee member John Ottaviani, partner at Edwards Wildman, recently wrote two articles of interest to other committee members: "Second Circuit Vacates and Remands YouTube Summary Judgment Under the Digital Millennium Copyright Act" and "Courts Struggle With Online Contracting Practices."

Impact of Future EU Data Protection Reforms
Lisa Lifshitz, partner at Gowling WLG Henderson LLP, spoke recently on the Canadian perspective on the Global Impact of Future EU Data Protection/Privacy Reforms on Private Funds and Other Financial Firms. Her presentation was part of a global webcast roundtable (including members from South America, the US, Asia, and Europe) hosted by the Cross-Border Group. For more information, please contact Lisa.

Online Dispute Resolution
John Gregory, General Counsel, Justice Policy Development Branch of Ontario’s Ministry of the Attorney General, recently published an overview of the issues being considered by the UNCITRAL working group, with a brief analysis of each of its documents.

Legal Education and Technology
Jon Garon, professor at NKU Chase College of Law, has released a draft paper entitled "Legal Education in Disruption: The Headwinds and Tailwinds of Technology," available here. The paper focuses on technology's profound disruptive change to law practice. It addresses the expectations the legal market may place on future lawyers and by extension the training necessary for lawyers entering the practice of law, highlighting suggested curriculum and programmatic redesigns for law schools.

Mobile Devices in the Law Firm
On April 12, Kathy Porter did a webinar presentation for the International Legal Technology Association (ILTA) on "Using Mobile Devices in the Law Firm Workplace." For more information, contact Kathy directly.

Cloud Services Agreements

John Pavalotsky recently gave a seminar on the nuts-and-bolts of preparing and negotiating cloud services agreements, focusing on licensing in the cloud, SLAs, security, business continuity, and creating cloud services offerings. The program was recorded, and is accessible here.

Your Name Here

We are always looking for fresh and relevant content for the CLCC newsletter. Have you written or presented on something your fellow committee members would be interested in? Let them know! Email your contribution to committee Communications Co-Directors Cheryl Balough (cbalough@balough.com) and Lois Mermelstein (lois@loismermelstein.com).

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