Message from the Chair

Our children spend close to 7 hours a day looking at some kind of screen (television, mobile, computer) according to First Lady Michelle Obama in a recent NPR interview, and Facebook reports that dizzying number of registered users (a billion by the end of 2012?). It may seem like the majority of everyone’s waking life in many places now is lived online. Which may be why the Cyberspace Law Committee continues to plug away at efforts to understand legal rights and obligations in an online context… and many others are doing the same.

At this year's ABA Annual Meeting in August, we will once again look at how contracts are formed in an online context as we consider the latest developments and nuances in judicial treatment of disputes about "click-through" and "browse-wrap" agreements (or, more generally, the website terms of use we see everyday). This is an area the Cyberspace Law Committee first analyzed closely over ten years ago. But interest in the area seems to be as strong and diverse as ever, as it is in many cyberlaw issues.

We will present several CLE programs at Annual Meeting, some co-sponsored with other committees, both on issues we continue to study after many years and on new areas of interest. We will consider the effects of a cloud provider's bankruptcy on online assets, the developments in cyber-insurance policies and practices, the developing notion of a right to privacy in your internet "persona," and recent developments in mobile payments laws and regulations worldwide. Additionally, we will present a series of focused, topical presentations at the committee's long-format meeting timeslot, Friday from 2-5 pm: International Internet Governance and Regulation: A Report from Our Internet Governance Task Force, Data Wars: or How I Learned to Stop Worrying and Love Big Data; Criminal Liability and Copyright Infringement: The Latest from the Virtual Trenches; The Expanded Top Level Domain Rollout: Report on Developments; and Top 10 Internet & Cyberlaw Developments of 2012.

I look forward to seeing you there.

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

Upcoming CLCC Programs

ABA Annual Meeting - August 2012

This year's ABA Annual Meeting will be held August 2-5 in Chicago, and registration is now open. Here's the line-up:

Cyberspace Law Committee Programs

Friday, August 3, 2012 8:00-10:00 am
Insuring for Cyber Threats: Everything a Business Lawyer Wants to Know (But May Be Afraid to Ask)
Chair: Prof. Ed Morse

Friday, August 3, 2012 2:00-5:00 pm
Cyberspace Law Supersession, featuring:
1. Update on International Internet Governance and Regulation: A Report from Our Internet Governance Task Force (David Satola and Hank Judy)
2. Data Wars: or How I Learned to Stop Worrying and Love Big Data. (Ken Dreibach)
3. Criminal Liability and Copyright Infringement: The Latest from the Virtual Trenches (Jamie Clark and Cathy Geiss)
4. The Expanded Top Level Domain Rollout: Report on Developments (Paul McGrady)
5. Top 10 Internet & Cyberlaw Developments of 2012 . . . so far! From a stellar lineup of Cyberspace Law Panelists.

Friday, August 3, 2012 6:00-8:30 pm
CLC Dinner (see details below)

Saturday, August 4, 2012 8:00-9:00 am
Cyberspace Law Committee Meeting of Subcommittee and Working Group Chairs

Sunday, August 5, 2012 2:30-4:30 pm
Does Your Internet Persona Have a Right to Privacy? Attorneys and authors debate the effects of law, regulation, and profits on the rapidly evolving Internet Identity
Chair: Ted Claypoole

Co-sponsorships:

Saturday, August 4, 2012 10:30 am-12:30 pm
Understanding Mobile Payments and Banking - Regulatory Harmony and Discord
Consumer and Financial Services

Friday, August 3, 2012 10:30 am-12:30 pm
Clickwraps, Browserwraps and Why ESIGN Deserves a Burn Rap
Consumer and Financial Services AND Corporate Compliance

Sunday, August 5, 2012 10:30 am-12:30 pm
Thunderclouds on your Horizon? What Happens if Your Cloud Provider is Insolvent?
Primary Sponsor is Business Bankruptcy, but co-sponsored by many committees.

In addition to these 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. The Friday dinner, which will begin with a reception on the restaurant's terrace overlooking the Chicago River, will be held at Maxwell's at the Club. You can sign up when you register for the Annual Meeting. Look for more information about the Thursday get-together 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 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

June 7, 2012: HIPAA and HITECH Act Fundamentals: What You Need to Know Now About the Privacy and Security Rules
Location: N/A
Format: Webinar/Teleconference

June 14, 2012: Rosetta Stone: Unlocking the Fourth Circuit's Keywords Advertising Decision and Previewing its Consequences
Location: N/A
Format: Webinar/Teleconference

June 19, 2012: Friends or Frenemies? The Increasingly Important Legal Battle Over Social Data Extraction Tools
Location: N/A
Format: Webinar/Teleconference

June 22, 2012: Identity Management: What Lawyers Need to Know About the Coming Revolution in Digital Transactions
Location: Chicago
Format: Live
The ABA's Section of Science & Technology Law and this committee are co-sponsoring this presentation by the committee's own Tom Smedinghoff. Savvy businesses are beginning to shift away from a business-specific user ID and password to a general-purpose identity credential (a federated identity management system) that can be used for any online transaction. While this shift makes sense, establishing the rules governing the issuance and use of these identity credentials, and the risks of participating, is new and uncharted territory. This session will explore this new approach to online transactions and the legal challenges that businesses must address to reap the benefits of federated identity, including:

- What is federated identity management, and why is it so important?
- What laws apply to identity management, and what contract-based rules are needed to make federated identity management work?
- How is the U.S. government's National Strategy for Trusted Identities in Cyberspace (NSTIC) program taking identity management to the next level?
- What are the privacy and liability risks of federated identity management?

The session is on Friday, June 22, noon till 1:30 p.m. It does not carry CLE credit. For more details and registration information, click on the link above.

June 26, 2012: Ethics, Electronic Discovery and Information Governance
Location: N/A
Format: Webinar/Teleconference

Looking to Get Even More Involved in the ABA Business Law Section?
Juliet M. Moringiello, Professor at Widener University School of Law
The Professional Responsibility Committee of the ABA Business Law Section has formed a new Subcommittee on Information Technology Issues in Ethics and Professional Responsibility. Professional Responsibility Committee Chair Charlie McCallum explains, "This new Subcommittee will deal with the ethical and professional responsibility issues arising from or affected by the rapid evolution of information technology, the increasingly pervasive deployment and use of that technology by lawyers in their practices, and the accelerating pace of development of communication and networking media and tools based on that technology. We would welcome participation by members of the Section's Cyberspace Law Committee and by other Section members interested in the interface between the practice of law and legal ethics and professional responsibility, on the one hand, and information technology and IT-based psycho-cultural-sociological phenomena (such as YouTube, Facebook, etc.), on the other hand."

I will chair this subcommittee, and I encourage you to join. Members of the Cyberspace Law Committee are uniquely qualified to identify and develop policies regarding the ethical issues raised by lawyers' use of technology. Jon Rubens, Chris Kunz, and I, with help from other Cyberspace Committee members, have already provided some comments on Ethics 20/20 proposals with respect to technology, and we found the experience to be professionally rewarding. I hope that many of you will join me on the subcommittee. To do so, go to the ABA web site and first join the Professional Responsibility Committee. Once you do that, you can join the subcommittee.

**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](https://www.linkedin.com).

**CLCC Projects**

**Get Recognition for Your Work**

Please remember that Kristine Dorrain and Sarah Jane Hughes need to report on all of the work that may find its way to print from the Cyberspace Law Committee. This includes books, peer-reviewed business articles (not survey pieces), *Business Law Today* submissions, model agreements, best-practices projects, and anything else. Presentations that might "rise" into written pieces or that the author(s) might share can be included. Content management and inventory appear to be taking a higher priority in the Business Section generally, and we want this prolific group to be represented in the inventory by the time of the ABA Annual Meeting. If you have any questions, please contact Kristine or Sarah Jane.

**Consumer Protection Subcommittee Update**

*Co-Chairs John Rothchild and James Nehf*

The Consumer Protection Subcommittee is still looking for volunteers to help with the revision of the ABA's safeshopping.org website. The subcommittee invites you to either participate or pass the word along to people who might have an interest in working on the project. The ABA developed the website, [www.safeshopping.org](http://www.safeshopping.org), more than a decade ago to assist consumers when they purchase goods and services online, but the website now needs updating. 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 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)

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.

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

The International Affairs Subcommittee held two conference calls on the work of UNCITRAL’s project on Online Dispute Resolution (ODR). A number of topics of interest to the UN Working Group were canvassed. That Working Group met in New York in the week of May 21. The Subcommittee will report on its progress at the Annual Meeting in August.

Speaking of ODR, the government of British Columbia has recently announced a project to resolve small claims and condominium disputes through ODR. The process would be voluntary for small claims, not for some of the disputes about condos (which BC calls 'strata corporations'). Lawyers would not be welcome. A report on the initiative and some of the response is here.

Meanwhile, work continues on an inventory of projects being carried out by various international organizations, including standard-setting bodies, relating to electronic communications. Some volunteers from the Section of Science and Technology are assisting us. Anyone else with information about international initiatives or an interest in learning about them, and who would like to help the subcommittee in evaluating whether Cyberspace should consider action on any of the initiatives, should contact either or both of the subcommittee co-chairs: Hal Burman and John Gregory. 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 has organized a presentation for the ABA Annual Meeting in Chicago that will explore privacy on the Internet and mobile devices. The event, sponsored by the Cyberspace Law Committee, is entitled "Does Your Internet Persona Have a Right to Privacy?" The presenters are Theodore F. Claypoole, co-chair of the mCommerce Subcommittee, and Lori B. Andrews, director of the Institute for Science, Law and Technology at Chicago-Kent College of Law. Both have recently written books on the subject. Mr. Claypoole's book is "Protecting Your Internet Identity. Are you Naked on the Internet?" Ms. Andrews' book is "I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy." Their panel discussion is scheduled for Sunday, August 5, from 2:30 to 4:30 p.m.

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

The Cloud Computing and IT Services Subcommittee is working on collecting samples of different kinds of cloud computing contracts. Our specific focus is on negotiated agreements for services in the "private cloud." If you have any such negotiated agreements that you could share, please forward them to Bill Denny or Phillip Schmandt. We are at the early stages of compiling a model contract or checklist for private cloud services.

Bill Denny and Warren Agin will be panelists for a program at the ABA Annual Meeting entitled "Thunderclouds on Your Horizon? What Happens If Your Cloud Provider Is Insolvent?" This program, sponsored by the Business Bankruptcy Committee, will look at what could happen to a company's (or individual's) data, records, emails, and business operations if its cloud provider becomes insolvent. How could that insolvency affect access to business and personal records, emails, and other information? Is the answer different if the cloud provider is outside the US? Or if the user is outside the US? Come and hear what the implications could be for your business. The program is scheduled for Sunday, August 5, at 10:30 am.
Update from the Financial Services and Payments Subcommittee
*Co-chairs Ed Morse and Stephen Middlebrook*

Members of our subcommittee, including Janice Hugener, Winston Krone, John Black, and Ed Morse, are scheduled to provide a CLE program at the ABA Annual Meeting from 8:00 to 10:00 a.m. on Friday, August 3, on the topic: "Everything Business Lawyers Wanted to Know about Cyberinsurance (But May Be Afraid to Ask)." The panel will include both practitioners and representatives from the insurance industry familiar with insurance products that address various aspects of data security and/or privacy breaches occurring within the business environment.

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 Sara Jane Hughes know.

Committee Responses to Blanket Authority Requests

Update from the Identity Management Task Force
*Chair Tom Smedinghoffer*

Pursuant to the ABA Blanket Authority process, the Identity Management Legal Task Force recently submitted a paper about identity management to the United Nations Commission on International Trade Law (UNCITRAL) for use at its June 2012 meeting. The paper provides an overview of digital identity management, its role in e-commerce, the legal issues it raises, and the legal barriers it presents. This paper focuses on commercial identity management systems intended for use in a business context, including business-to-business (B2B), business-to-government (B2G), and business-to-consumer (B2C) communications. It is based on the ongoing work of the Identity Management Legal Task Force, and is submitted as background to inform the Commission's discussions regarding the topics currently under consideration for the work of Working Group IV (Electronic Commerce). A copy of the submission is posted on the Task Force website.

Cyber News You Can Use

Cloud Computing Articles of Interest
*Bill Denny and Phillip Schmandt, Co-chairs of Cloud Computing and IT Services Subcommittee*

The European Committee for Standardization has published a "Model Interoperability Agreement for Transmission and Processing of Electronic Invoices and Other Business Documents," which addresses network-to-network interoperability using xml documents transmitted via the cloud. It complements (and evolves from) the Model Trading Partner Agreement for EDI approved by the ABA and the European Commission in 1995. Also published by the European Committee for Standardization was a "Code of Practice for Electronic Invoicing in the European Union." Those documents are available here. Committee member Phillip Schmandt was a contributing author to both documents.

A Uniform Law on "Digital Death" Issues?
*Christina Kunz, Professor at William Mitchell College of Law*

The Uniform Law Commission (ULC) (also known as NCCUSL) has appointed a Study Committee to consider whether to appoint a Drafting Committee to write a uniform law on the "digital death" issues that we heard about at the January 2012 Winter Working Meeting of the Cyberspace Law Committee. These issues include the right of an executor or administrator of an estate to access the decedent's online accounts-banking, photos, social networks like Facebook, email, online games like Farmville and World of Warcraft, etc. Members of the Study Committee include Jim Lamm (one of our speakers at the January meeting) and myself (as a representative from the Cyberspace Law Committee and ABA advisor from the Business Law Section).
The Study Committee plans to finish its work by the end of June and make a recommendation at the ULC annual meeting, so the project is moving briskly with conference calls every two weeks, rather than in-person meetings. Here are the highlights from the first two meetings:

- The Study Committee includes 7 ULC commissioners, 5 ABA section advisors (2 from SciTech, 1 from General Practice, 1 from Trusts & Estates, 1 from Business Law), 8 ULC ex officio & staff, and 8 observers (Jim Lamm, ULC Canada observer, 3 professors, and two more).
- So far, five states have enacted legislation addressing the issues that executors, administrators, and conservators have in dealing with electronic assets of persons who are deceased, incompetent, or otherwise under guardianship. Six more states are considering such legislation. This pressure is causing the ULC Study Committee to move quickly to prepare a report and recommendation for the ULC annual meeting in July 2012. We of course are looking closely at those acts, bills, and other sources of ideas.
- The proposed act could be free-standing, or it could be a separately enactable part of the Uniform Probate Code (UPC), as are several laws on guardianship and protective proceedings, durable powers of attorney, and nonprobate transfers on death. Within the ULC, there is a Joint Editorial Board on Uniform Trusts and Estates Acts (JEB-UTEA), which will be a key player in this decision.
- The Study Committee leadership is reaching out to affected and interested stakeholders, including industry groups, to provide input to the Study Committee and to start building a stakeholder group for a Drafting Committee, if that is what we recommend and the ULC approves.
- The Study Committee will also consider the potential interaction of the proposed act with other state and federal laws, including the UPC (and its parts listed above), the Uniform Trust Code, state laws prohibiting hacking and unauthorized access to computer/e-mail, ESIGN, UETA, etc.
- The Study Committee's initial charge was to cover both post-mortem and "pre-mortem" fiduciaries.
- Jim Lamm drew a distinction between electronically stored information that is held on a device, such as a laptop or smart phone, and electronic information that is held and stored by a third party, such as an employer or online account. He also distinguished between the fiduciary's right to get a copy of the information and the right to gain full access to the account (even if it conflicts with terms of service and thereby triggers state/federal criminal statutes for unauthorized access to accounts).
- The Study Committee, in its last conference call, "roughed in" the following "working" scope provisions:
  1. Fiduciary powers to achieve the proper investment, management, and distribution of any type of computer or computing device, electronic storage device or medium, or electronically stored information in the principal's/fiduciary's possession;
  2. Fiduciary power to copy (delete, or terminate) the principal's electronically stored information from any person or entity that stores that information (e.g., from a provider of online services or network access);
  3. Fiduciary authority to access the principal's electronically stored information that may be considered personal, private, or protected under any applicable law;
  4. Fiduciary authority to decrypt any of the principal's encrypted electronically stored information and fiduciary authority to bypass, reset, or recover any password or other kind of authentication or authorization so the fiduciary can access the principal's devices and electronically stored information;
  5. Principal's authority to limit fiduciary access to an account; and
  6. Attempt to better define electronic accounts and assets and do so in a way that can correspond to existing law but also be useful in a stand-alone context.

For further information, contact Christina Kunz.

**Presentations and Papers of Interest**

**Mobile Payments**
Sarah Jane Hughes, University Scholar and Fellow at Maurer School of Law at Indiana University, recently participated in two workshops on mobile payments. The first was a workshop organized by the Federal Reserve Bank of Kansas City on March 29-30 in Kansas City. Sarah Jane participated on a panel looking at data security and fraud mitigation issues in mobile payments, responding with Professor Allesandro Alquisti of Carnegie Mellon University, a behavioral economist, to a paper by Professor Ross Anderson of the University of Cambridge, a security engineer. Her presentation, transformed into a short paper, will soon be available on the Bank's website. The second was the Federal Trade Commission's April 26 workshop on mobile payments. Once again, Sarah Jane's remarks focused on data security and the nagging question of whether mobile payments are safer than credit cards. The materials for the FTC's workshop and some video-feed from the day's panels are available on the FTC website. Both workshops were well attended.

Disruptive Changes to the Practice of Law

Jon Garon, co-chair of the Digital Media Subcommittee and Professor at Chase College of Law at Northern Kentucky University, will be presenting at the 2012 American Bar Association, Section of Legal Education, Associate Dean's Conference - Boot Camp for Associate Deans: "Corps" Principles. His presentation, part of the plenary on student deployment, is based on his forthcoming article, "Legal Education in Disruption: The Headwinds and Tailwinds of Technology," available here. The article focuses on the implications of profound disruptive changes to the practice of law, such as self-help legal manuals, predictive coding, socially mediated portals, and virtual law firms. The conference runs June 21-24, 2012, in Las Vegas. More details are available.

Intermediary Liability

On May 23rd Cathy Gellis presented "Shooting the Messenger: the State of the Law on Intermediary Liability" as a telephonic CLE program for the California State Bar IP Law Section. Topics covered included 47 USC Section 230, which insulates web hosts for most types of liability that might be found in the content they generate, and 47 USC 512, the part of the Digital Millennium Copyright Act that provides Internet service providers safe harbors for copyright liability in content it stores on its systems at the direction of its users. The presentation covered how these statutes function generally, how they interact with each other, and where ambiguities remain in their reach and operation. A recording of the presentation should eventually be archived on the Section's website as an online CLE.

Payment Card Security

Ed Morse, co-chair of the Financial Services and Payments Subcommittee and professor at Creighton University School of Law, just had an article published entitled "Private Ordering in Light of the Law: Achieving Consumer Protection Through Payment Card Security Measures." The article explores the effects of legal intervention on the private ordering regime underlying payment card data security standards, and posits various critiques affecting policy development in this area. It is available at 10 DePaul Business & Commercial Law Journal 213-65 (2012). If you would like to link to the article, please contact Ed Morse.

Online Dispute Resolution

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 and Lois Mermelstein.

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