Message from the Chair

I am returning to San Francisco after an action-packed three full days of programs and meetings at the ABA's Annual Meeting in Chicago. Read on for a recap of the Cyberspace Law Committee's programming and meeting agendas and an update on our plans for the next few months. We are working on some in-between meeting programs, we will publish a set of articles on cyberlaw topics, and we are preparing for our stand-alone meeting, the Cyberspace Law Committee's Winter Working Meeting & Institute on the Law of Cyberspace, in January 2013.

Recap of CLE Programming at the Annual Meeting

Cyber-Insurance - What coverage are insurers offering? How should you shop for it?

The Cyberspace Law Committee presented two very solid and very well-received programs at the Chicago meeting. Professor Ed Morse moderated a panel on current developments in cyber-insurance. The panelists included Erich Bublitz of Admiral Insurance in Philadelphia, who offered a somewhat irreverent and wonderfully helpful take on how to work with agents as they quote this still-new type of insurance and how to help your clients get the right kind of coverage for what they really need. Winston Krone of Kivu Consulting in San Francisco offered a sometimes terrifying update on what's happening in the world of data breaches right now, along with a more tempered and realistic view of what lawyers and their clients actually need to do in the event of a breach and how to assess the real costs and economic risk despite media exaggerations. San Francisco practitioner Janice Hugener offered her take on how to work with private companies and nonprofits in assessing the risk of breach and taking steps to prepare. Look for more information from the Committee in the near future on how these policies are written and how the marketplace is evolving.

Online Privacy - Does Your Internet Persona Have a Right to Privacy?

Our second panel, organized and moderated by Richard Balough of Balough Law Offices in Chicago, was entitled "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." Richard was joined by his mCommerce Subcommittee co-chair Ted Claypoole, of Womble Carlyle in Charlotte, NC, and two local academics and authors, Professors Lori Andrews and Richard Warner of Chicago-Kent College of Law. The panelists offered a provocative discussion of the erosions of privacy protections online, or the absence of privacy online to begin with. If we have an internet "persona," does our online identity get any real privacy protection? What does US law currently protect? Might we see more legislation to try to give us more protection in our online selves? The panel also discussed some strategies we can all take to keep tabs on what happens to our online personas. In the wake of US v. Jones from earlier this year and the clear view of certain Supreme Court Justices that we may not really have a right to privacy at all, we will need to closely follow the courts as they continue to grapple with how online personas are tracked, monitored, and augmented - often without knowledge or consent.

Click-Throughs and Browse-Wraps Again - What's current, how do companies write their online terms in compliance with ESIGN, and do we need to revisit consumer protection issues?

The Committee also co-sponsored a rich set of programming. Picking up on our Committee's hefty body of work on click-through and browse-wrap...
contracts, the Consumer Financial Services Committee offered up a program on the latest developments in the law of these online agreements, and how ESIGN applies to them. Moderator Veronica McGregor of Jones Day, along with panelists Christine Poulon of PayPal, Mark Furletti of Ballard Spahr (Philadelphia), and Professor Nancy Kim of California Western Law School in San Diego, reviewed the cases, highlighted some recent developments, and discussed how businesses make an effort to comply with ESIGN in their online contracting. Christine Poulon walked us through PayPal’s treatment of its online credit agreements, including for purposes of ESIGN compliance, as well as its non-credit online agreements. Mark Furletti considered some of the unintended consequences of ESIGN and how website design and online terms and conditions might be improved to conform with anticipated FTC and CFPB scrutiny. Professor Kim offered a provocative inquiry into whether our view of online contracting has veered drastically away from what consumers really need. At the end of the program, many of us were left wondering if there is more to explore in terms of consumer protection in online contracts and whether a non-contract law approach might be needed for web-based commerce.

Understanding Mobile Payments and Banking: Global Harmony and Discord

Partnering with the Consumer Financial Services Committee as in the past, as well as Credit Unions and Corporate Compliance, our Committee helped structure and present a program on international mobile payments law to a packed room of more than 70. The moderator was Colin Richards of Gibson Dunn (DC). Presenters included Roberta Torian of Reed Smith (Philadelphia), Tom Brown of Paul Hastings (San Francisco), Mark Lipton (mobile advisor to the government of Afghanistan), and our Committee’s Sarah Jane Hughes (Maurer School of Law, Indiana University).

Presentations covered the matrix of state, federal, and cross-border legal issues, including privacy, consumer protection, and competition.

What Happens When a Cloud Services Provider Becomes Insolvent?

The committee teamed up with the International Coordinating and Business Bankruptcy committees in the program "Thunderclouds on the Horizon: What Happens When Your Cloud Services Provider Files for Bankruptcy Protection?" Moderator and International Coordinating Committee Chair Leianne Crittenden of Oracle was joined by business bankruptcy and IT lawyer Warren Agin of Swiggert & Agin (Boston), Bankruptcy Judge Elizabeth Stong of the Eastern District of NY, Professor Sharon Sandeen of Hamline University School of Law (Minnesota), and Peter McLaughlin of Foley & Lardner (Boston) to give us something of a primer on how bankruptcy laws and practice will apply to the situation one of our clients will face sooner or later when its cloud provider files for bankruptcy protection. After a refresher on creditor rights and debtor protections under Chapter 11 and Chapter 13, we learned a bit about international and multi-jurisdictional bankruptcies as well as some of the key factors a cloud provider’s creditor will need to consider as it determines how to protect and potentially retrieve data that was stored in the cloud. The picture wasn’t pretty, but it was clear there are potentially troubling and complex new questions posed by the potential insolvencies of cloud-based IT service providers storing data in multiple jurisdictions and providing services on non-negotiated terms of use-type agreements.

Committee Meeting Presentations

The Committee met for 3 hours on Friday, August 3, with a slate of speakers.

- Our Internet Governance Task Force co-chairs David Satola and Hank Judy presented on current developments in Internet governance, including recent developments in the Obama Administration’s efforts to make sense of global Internet policy, the push from several countries to have the UN move away from the ICANN multi-stakeholder model of governance, and potentially disturbing consequences. See their presentation here, and stay tuned for more news about the Cyberspace Law Committee’s efforts to have the Business Law Section participate in this evolving global debate.
• Cathy Gellis led us in a consideration of some recent trends in escalating criminal prosecution involving internet activities and domains, including recent high-level domain seizures, extradition efforts involving allegations of copyright infringement, and criminal copyright infringement enforcement. First Amendment and Fourth Amendment considerations were apparent, and there is certainly more to come in these kinds of proceedings. Stay tuned for more on what the Committee may do to track these developments and to consider the related developments in the law.

• Ted Claypoole and Lois Mermelstein led us in a discussion of Big Data - benign buzzword or defining development of the moment? We considered the proliferation of Big Data problems, strategies being developed by businesses to harness value out of Big Data systems, and related legal implications. See their presentation here. There will certainly be more to discuss and a potential Committee project, looking at the privacy, security, and other legal implications of new business models focusing on Big Data.

• Paul McGrady, of Winstron & Strawn in Chicago, gave us a recap and update on the advent of the new Top Level Domains. We heard about some of the most recent ICANN missteps as the program has been rolled out, and we learned about some of the new issues being raised from the first round of applications. See his presentation here. There will be more to report as we start to hear about conflicts and objections to the new TLD applications.

• Finally, we considered a quick Top 10 List from the Committee chair - significant cyberlaw cases of the year so far. See the list below - and send us your updates, corrections, or objections to the list!

Winter Working Meeting News

We discussed some of the initial plans for our next meeting, the Cyberspace Law Committee's Winter Working Meeting and Institute on the Law of Cyberspace, which will be held January 24-26, 2013 at the W Hotel in the Westwood neighborhood of Los Angeles (right down the street from UCLA School of Law). This meeting will run for two full days, starting with 4 hours of CLE on up-to-date cyberspace law topics, with an emphasis on topics that may be more focused or more advanced than typically presented at an Annual or Spring Meeting. The CLE will be in 30 or 40-minute bites, allowing us to offer a large variety of topics. The meeting will also include a segment of moderated roundtable discussions and more than a full day of the Committee’s traditional break-outs, the working sessions when we get down to the nuts-and-bolts of developing programming, working on articles and book chapters, and brainstorming new projects. See the info below from Kristine Dornain about presenter and moderator opportunities, and look for more details over the coming months.

Meeting of the Cybersecurity Subcommittee

Our Cybersecurity Subcommittee, chaired by Roland Trope and Tom Smedinghoff, met on Saturday, August 4. The subcommittee is working on a writing project addressing key issues in cloud computing - contact Roland or Tom for more information.

Upcoming for the Fall

Stay tuned as you see announcements about cyberspace law programming for the Fall - webinars, a special series of cyberspace articles, and more.

Our Cyberspace Law Excellence Award Winner: Hank Judy

At our Committee dinner Friday night, August 3, we presented the Cyberspace Law Excellence Award to longtime committee contributor, mentor, colleague and Internet Governance Task Force co-chair, Hank Judy. Congratulations, Hank! Hank is retiring from practice at the law firm K&L Gates and is stepping down from his task force co-chair position. We wish him all the best and thank him for his many contributions. See article below for Hank's comments, along with a couple of photos from the evening.

Best regards,
Jonathan T. Rubens
Cyberspace Committee Winter Working Meeting - January 2013

Now that the Annual Meeting is finished, we have redoubled planning efforts for next year's Institute on the Law of Cyberspace and Winter Working Meeting. It 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.

We are looking for CLE presenters, as well as roundtable moderators who will present a 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 with no more than 1-2 presenters per program.
2. This is really CLE, so original written materials are required and will need to be submitted by mid-December at the latest.
3. The audience will be fairly 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.

Cyber News You Can Use

Top 10 Cyberlaw Cases of the Year... So Far

1. **U.S v. Jones** 10-1259 (US Supreme Court, Jan 23, 2012): attaching a GPS device to a car constitutes a trespass, which requires a warrant; court did not reach issue of whether using GPS to monitor car's movements constitutes a Fourth Amendment search.
2. **Fleija v. Facebook, Inc.**, 2012 WL 183986 (S.D.N.Y. Jan. 24, 2012), enforcing clickwrap terms. Facebook removed from NY state court to federal court this case about an alleged wrongful termination of account; Facebook then moved to transfer to Northern District of California per forum selection cause. Motion granted: reasonable communication of terms despite user having to click hyperlink to get to TOU.
5. Not cases but let's note: Dajaz1 seizure... domain seizures under 2088 Pro-IP Act and RIAA wreckage redux - the FTC's proposed new COPPA regulations (PII includes location and a "like" button); French Supreme Court on Google search results with file-sharing sites as results; MasterCard, Inc. v. European Comm'n, May 24, 2012 (upholding EC 2007 ban on certain credit card interchange fees).
as ADA "place of public accommodation" because Netflix does not provide closed captioning on most streaming.


Thoughts from Cyberspace Law Excellence Award Winner Hank Judy

On Friday, August 3, Hank Judy, long-time contributor to the Cyberspace Law Committee, received the Cyberspace Law Excellence Award. David Satola, his co-chair of the Internet Governance Task Force, spoke eloquently about how he and the Committee have benefitted from working with Hank. Consistent with his commitment to the Committee's success, Hank then shared with those present his five suggestions to help ensure the Committee's continued success:

1. Educate. Don't advocate.
2. Internationalize.
3. Look over the horizon to the future.
4. Connect whatever you are doing to the needs of business.
5. Collaborate laterally.

Hank also emphasized that human rights are an ever more fundamental matter given "our essence as radically free human beings." Thank you, Hank!

---

**Presentations and Papers of Interest**

**BYOD Policies**

Committee members Kathy Porter, Lois Mermelstein, and Jon Rubens all spoke at separate sessions of NetworkWorld's conference "BYOD and Mobile Device Management: Taking Charge with Apps, Policy, Security, and More." All discussed "Corporate Policies on Mobile Devices: A Legal Perspective."

**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 and Lois Mermelstein. Newsletter deadlines are the 20th of the previous month.
You can access the Cyberspace Law Committee website [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201208/). 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.

---

American Bar Association: 321 N Clark | Chicago, IL 60654 | 800-285-2221

Business Law Section: 312-988-5588 | [Section Staff](mailto:businesslaw@americanbar.org) | [www.ababusinesslaw.org](http://www.ababusinesslaw.org)

Copyright © 2012