Message from the Chair

As I write this, I'm worrying about my New York and New Jersey colleagues ... and hoping they are staying safe, relatively dry, and out of the way of Sandy's harm. Meanwhile, here in San Francisco we're all reveling in the joy of preparations for a parade (which will pass just below my window) to celebrate our world-champion Giants! What's the cyber-angle to all this, other than the fact that these days news travels more quickly via Twitter and the blogosphere than any other news outlets? It's also that the world is smaller (flatter) than ever: my colleagues not only in this committee but on a deal are just as likely to be in New York or Sidney or London or Sao Paulo as in San Jose, working with me in real-time, via our screens (when do we sleep, by the way?), to get a deal done, article written, contract negotiated. And the ways we share, save, store, survey, and send our data are more complex, and raise more issues, than ever before. Plus I'm seriously wondering about the hurricane's threat to part of the internet backbone, a failure of the grid, insufficient redundancy beyond the region for some of our cloud providers....

Here at Cyber-central, we are knee-deep in preparation for our upcoming 2013 cyberspace committee Institute on the Law of Cyberspace and Winter Working Meeting (Los Angeles, January 25-26), where we will dive into many of these issues. We will look further into some of the new ways businesses are trying to parse the world of Big Data (see the upcoming piece in our Business Law Today mini-theme on cyberspace law). We'll have a chunk of the agenda devoted to cybersecurity issues. And we will look into some of the most significant developments in digital media, online infringement, criminal liability from online commerce, and more. Plus, we will repeat our roundtables format from last year - moderated, small-group open discussions continuing some of the themes from the CLE presentations. We'll also have more than a full day devoted to break-out sessions for committee projects, which are always open to newcomers. Make sure you plan to stay for two full days - Friday and Saturday.

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

Upcoming CLCC Programs

Cyberspace Committee Winter Working Meeting - January 24-26, 2013
Kristine Dorrain, CLCC Programming Director

Winter Working Meeting planning is well underway. We are excited to bring you the 2013 Institute on the Law of Cyberspace and Winter Working Meeting, including a half-day CLE opportunity to kick off our WWM. It will be held in Los Angeles near UCLA at the W Hotel in Westwood. Please arrive on Thursday and plan to attend ALL DAY on both January 25 and 26 as the days will be packed with CLE, discussions, and work time, as well as chances to mingle and network.

If you are new to this meeting (and/or new to this newsletter), you should know that our annual Winter Working Meeting offers you one of the best ways to get involved with the work of our committee and the Business Law Section. And it is open to everyone - newcomers are highly encouraged to attend! Each of our subcommittee and task force leaders will come to the meeting prepared to work...
on a project (checklist, website, book, article, program, webinar, etc). All of these sessions will be open to all, so this is a great chance to get directly involved with the committee's projects.

CLE will feature a mini-theme having an in-depth look at cybersecurity (with multiple speakers, presentations, and modalities) and will also include presentations on:

- Rethinking the law of e-contracting
- Practical advice for dealing with "big data"
- Content management and evolving distribution models in the digital age
- Cybercrime
- A cyberspace litigation year-in-review

We also have several exciting roundtable options to choose from, all of which should segue into working group meetings where we will explore and plan new projects.

Watch for registration information in mid-November and plan to join us for two packed days of CLE, discussions, and work.

**Upcoming Cyberspace Webinars**

**Kristine Dorrain, CLCC Programming Director**

The Committee is proud to sponsor two upcoming webinars addressing the timely and relevant topic of cybersecurity.

Roland Trope, Charles Palmer, and Jaime Clark will be reprising their Spring Meeting CLE Program "Deploying Tools to Build or Self-Sabotage the Enterprise: How Do We Square Legal Obligations for Cyber Security With the Increasing Use of Technologies that Undermine It?" in a webinar on **December 4, 2012**.

On **December 11, 2012**, at 1:00-2:30 p.m. Eastern Time, Ed Morse, John Black, Erich Bublitz, Winston Krone, and Janice Hugener will follow up with their program, originally presented at the ABA's Annual Meeting, called "Insuring for Data Security Threats: Everything a Business Lawyer Wants to Know (But May Be Afraid To Ask)," also via webinar.

Please watch your email for more information on how to register for these committee-sponsored programs, which will qualify for CLE.

**Other Programs of Interest**

**How the Smartphone Wars Are Changing the IP Landscape**
November 5, 2012
Location: N/A
Format: Webinar/Teleconference

**Mobile Payments: How Laws in the United States Are Affecting the Mobile Market**
November 14, 2012
Location: N/A
Format: Webinar/Teleconference

**Federal Trade Commission Workshop to Explore Practices and Privacy Implications of Comprehensive Collection of Internet Users' Data**
December 6, 2012
Location: Washington, DC
Format: Live

**ABA Business Law Section Spring Meeting - April 4-6, 2013**

The 2013 Business Law Section Spring Meeting will be held in Washington, DC, on April 4-6. Registration will open in November.

**CLCC Projects**

**Updates from the International Trade Subcommittee**

Co-Chairs John Gregory and Hal Burman
The United Nations Commission on International Trade Law (UNCITRAL) has had since 2010 a working group on Online Dispute Resolution (ODR) developing procedural rules, standards for dispute resolution service providers, and even some suggestions for a simplified substantive legal regime for ODR.

That working group met in Vienna in the first week of November to adopt procedural rules. The documents it worked from are here.

UNCITRAL also has a working group on e-documentation which met October 29 to consider electronic transferable records (ETR) and identity management used in cross-border transactions, export-import, and for financing. A report will be posted soon.

At our Winter Working Meeting in January, our subcommittee will review the progress made and any outstanding issues from both working groups. Committee members may be aware that the ABA established a Task Force on ODR at its August 2012 meeting, in which a couple of individual members of the subcommittee are to be active. It will be useful to review in L.A. the work to date of that task force in the light of UNCITRAL and other international developments. Task force details are here. That group’s first public meeting takes place at the same time as our Winter Working meeting, but in New York.

At WWM, our subcommittee also plans to review developments from the United Nations Economic Commission for Europe (UNECE) Center for Facilitation of Commerce and Trade (CEFACT) projects on e-signatures, authentication, and single window systems. Additional documentation on those projects will be posted.

Update from the Identity Management Legal Task Force
Chair Tom Smedinghoff

The Identity Management Legal Task Force will be holding an in-person meeting in London on December 10-11, 2012. The meeting will focus on the legal issues surrounding identity systems, with a particular emphasis on identity management, understanding and comparing the differences in the EU and U.S. legal perspectives, and considering how we can address the legal issues that arise in cross-border identity transactions.

A tentative agenda is available on the Task Force webpage. Because space is limited, please RSVP to Tom Smedinghoff if you would like to attend.

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

At the 2013 Winter Working Meeting, the Digital Media Subcommittee plans to look into two key areas of digital media business: digital publishing and app development for media and entertainment.

Digital publishing continues to be a rapidly evolving area. The HathiTrust digital repository, a result of the Google book digitization project, boasts 5.6 million book titles comprising 3.7 billion pages of text. Litigation regarding the fair use of this resource and the ability to identify orphan works continues. So do the fair use issues involving university digitization of materials for course-packs. An upcoming appeal of the sweeping 350-page district court opinion in Cambridge University Press v. Becker (a.k.a. “the Georgia State Copyright case”) will potentially reshape secondary liability rules for digital excerpts. Complicating the commercial side of digital book publishing, the scheduled antitrust action against Apple and publishers MacMillan and Penguin is proceeding, while the publishing defendants Hachette Book Group, HarperCollins Publishers, and Simon & Schuster have settled identical charges. The subcommittee will explore these topics and determine what interest there might be for programs or projects related to digital publishing.

There are many legal issues involved in the life-cycle of creating an app for an iPad, Android, Windows, or Blackberry device. The subcommittee will discuss the various steps and explore the potential to create programming or publications (or even our own app!) on the topic. Elements include:

- Underlying content rights acquisition: story, design, artwork, publicity rights, music.
- Tie-in agreements (if any) to real-world goods or services.
- Privacy: privacy by design, COPPA, industry guidelines.
- Data Security: data practices, data storage agreements, etc.
- Payment systems: in-game purchases (particularly for platforms other than iOS).
- Terms of service for app users.
- And more.

The subcommittee will seek input from the mCommerce and other subcommittees to develop this as a multi-year platform for addressing legal and practice needs in the mobile side of cyberspace content. Projects may include newsletter or scholarly articles, live or webinar presentations, and potentially a book, depending on interest.

Do you want to get involved or have an idea for a project? We're also very open to other ideas and project suggestions. Let us know by contacting Jon Garon or Susan Stephan.

**Update from the Cloud Computing and IT Services Subcommittee**

*Co-Chairs Bill Denny and Philip Schmandt*

The subcommittee is developing a checklist of issues for different kinds of cloud contracts, focusing principally on B2B private cloud SaaS and on B2B and B2C public cloud SaaS. Once these are well underway, we hope to expand to other categories of cloud services. Our vision is that practitioners can go to a matrix, click on the type of cloud service they are considering, and pull up a checklist of issues, behind which will be detailed commentary and sample contract provisions. We are also developing a decision tree for the business practitioner that would assist in counseling the client on going into the cloud and selecting a cloud provider.

For those of you who want a preview of our working definitions, **public cloud** is a service, based on the standard cloud computing model, in which a service provider makes resources, such as applications and storage, available to the general public over the Internet. Examples of public clouds include Amazon Elastic Compute Cloud (EC2), IBM's Blue Cloud, Sun Cloud, Google AppEngine, and Windows Azure Services Platform. **Private cloud** is a proprietary computing architecture that uses cloud computing technologies, such as virtualization, to provide hosted services to a limited number of people behind a firewall. It is designed to appeal to an organization that needs or wants more control over its data than it can get by using a third-party hosted service. **SaaS** (software as a service) is a software delivery model in which software and associated data are centrally hosted on the cloud. Users typically access SaaS via a web browser. One of the biggest selling points is the potential to reduce IT support costs by outsourcing hardware and software maintenance and support to the SaaS provider.

Future iterations of the matrix will get into hybrid cloud, community cloud, PaaS, and IaaS.

We plan to solicit volunteers soon to supplement our growing issues list and to draft commentary and sample provisions to go behind these issues. The project is designed for an online format, similar to safeselling.org. The contributors will be listed as the authors of their respective commentaries, so everyone will know where to find expertise when the actual issues arise. If you're interested in participating, please contact Bill Denny or Phillip Schmandt.

**Cyber News You Can Use**

**Privacy and Mobile Devices**

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

The Federal Trade Commission (FTC) has issued a pamphlet on Best Practices for Common Uses of Facial Recognition Technologies. It is available on the FTC website. In issuing the guidelines, the FTC stated that facial recognition "is quickly moving out of the realm of science fiction and into the commercial marketplace." The FTC encourages facial recognition software designers to incorporate "privacy by design" at every stage of development, and it uses three scenarios to describe what it believes are the best practices to employ.
Federal law enforcement monitoring of electronic communications has increased dramatically since 2009, a report by the American Civil Liberties Union found. The ACLU's conclusions are based on documents produced by the Justice Department, which show requests for both "pen register" and "trap and trace" surveillance requests by federal law enforcement officials. From 2009 to 2011, the number of pen register and trap and trace requests for mobile phones increased by 60 percent from 23,535 in 2009 to 37,616 in 2011. In addition, the number of authorizations for using these methods on individuals' email and network data rose 361 percent between 2009 and 2011.

**Cyberlaw Gigs**

**Call for adjuncts in NKU Chase Law + Informatics courses**

Of interest to cyberspace practitioners, the Northern Kentucky University Salmon P. Chase College of Law seeks applications from exceptional individuals to teach as adjuncts for spring 2013 and in subsequent academic years. As the curriculum involving intellectual property and informatics subjects continues to expand, we are seeking to identify a group of individuals who have sufficient knowledge and experience to participate in the development of the program.

Program Needs: Based upon our curricular needs, it is anticipated that we will hire one adjunct for Trademark Law and Unfair Competition in the spring 2013 semester (tentatively scheduled for Wednesday evenings) and 3-5 adjuncts for the following academic years. I have attached a memo listing the courses and additional information. Many of these courses will be taught online, enabling Chase to hire without geographic restrictions. More information is available here.

NKU is an affirmative action/Equal Opportunity Employer. We strongly encourage applications from women, minorities, persons with disabilities, and veterans. To learn more, please contact Professor Jon M. Garon, director of the NKU Chase Law + Informatics Institute at garonj1@nklu.edu.

*This new section of the Cyberspace Law Committee Newsletter will include job postings for or by committee members. Please send all postings to Communications Co-Directors Cheryl Balough and Lois Mermelstein by the 20th of one month for posting in the following month's newsletter.*