Cyberspace Law Committee

December 2013

Message from the Chair

Register Now for the Cyberspace Law Institute and Winter Working Meeting, January 31-February 1 in Denver, Colorado. And if you are undecided, consider our Top Ten Reasons to come to the meeting:

1. Learn about the quickly evolving technologies that capture brain signals and use them to perform functions (aka "brain spray").
2. Enjoy luxurious accommodations at the Four Seasons Hotel Denver at an economy rate.
3. Find out what virtual currency you may soon need for online shopping.
4. Catch up with your current cyberspace friends and meet new colleagues over dinner on Friday, January 31.
5. Sit in on three - count them, three - different cybersecurity presentations and discussions!
6. Get involved in a subcommittee and contribute to a publishable project.
7. Earn up to five hours of CLE credit.
8. Contribute to roundtable discussions covering exciting cyberlaw topics, and take new ideas back to your colleagues.
9. Meet and hear from leaders at the Silicon Flatirons Center for Law, Technology, and Entrepreneurship.
10. Stay in Colorado for an extra day to enjoy the slopes or après-ski fun!

Stay tuned for an updated agenda for the meeting, announcements about social events and special lunch and dinner speakers, and new committee projects to get involved in.

I hope to see many of you in January in Colorado.

AND - don't miss the November issue of Business Law Today to learn more about the up-to-the-minute cyberlaw content we'll dive into at the meeting.

Jonathan T. Rubens
Chair, Cyberspace Law Committee, Business Law Section
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Upcoming CLCC Programs

Institute on the Law of Cyberspace and Winter Working Meeting
January 31 - February 1, 2014
Kristine Dorrain, Programming Director

We are excited to bring you the 2014 Institute on the Law of Cyberspace and Winter Working Meeting to be held in Denver at the Four Seasons Hotel. Please plan to attend ALL DAY on both January 31 and February 1 as the days will be packed with CLE, discussions, and work time, as well as chances to mingle and network. Registration is now open, and you can access it through the Institute/WWM webpage.

We will again be including a 1/2 day CLE opportunity to kick off our WWM. CLE programs include:

- "Metadata" - In the context of Fourth Amendment searches and seizures,

http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201312/
"Snooping, Spying, and Cyber Espionage: Civil Liberties vs. Theft of Trade Secrets" - The various cyber-security scandals of recent months involving former NSA contractor Edward Snowden, have prompted the media to focus on violations of civil liberties by governments seeking to counter terrorist threats. However, subsequent revelations about cyber-espionage attacks by China and Iran have shown that the theft of trade secrets and other electronic data from private industry may be the bigger threat. Indeed, the standards imposed by various governments upon telecommunications systems to assist law enforcement pose a major threat to the data networks of every industry: from defense and aerospace to health care companies and law firms. This presentation will look at the history of wiretapping by governments around the world and then assess the current technology protocols imposed by world governments for facilitating government eavesdropping, and how those protocols might be the very reason that rogue regimes so often bombard the Internet security walls of private industry.

"Brainspray and the Law" - Over the past ten years, scientists, technologists and businesses have begun to develop technology that can externally read and interpret brain signals, or "brainspray." Numerous experiments have demonstrated that the power of thought can be harnessed for replacing lost limbs or even training others without a word. Businesses have been founded to allow human/computer interaction based only on directed thoughts. The U.S. military is experimenting with ways to harness the direct brain power of its pilots, soldiers and sailors. Before the commercial use of brainspray becomes commonplace, lawyers should understand the implications for privacy and intellectual property. There are currently no rules restricting invasive use of the technology or protecting intellectual property from being drawn directly from the heads of others, but conflicts in these areas are coming. The presentation will show the scientific, technical and legal issues raised by the harvesting of brainspray for medical or commercial purposes, and will discuss what lawyers can do to direct the rules into the right direction.

"Bitcoins: Where They Came From and Where They Are Headed" - Here we will cover highlights in the evolution of bitcoin from an algorithm generated by a group of anonymous computer geeks to a digital currency that has captured international attention. Key developments include the rise of bitcoin exchanges, intensive competition in "mining" new bitcoins, increasing venture capital investment in all sorts of companies related to bitcoin, and the regulatory framework in which bitcoin operates. Then we examine the future of bitcoin, including the SEC filing for a bitcoin trust issuing ETFs backed by bitcoin and the developing alternative digital currencies such as Peer Coin and Litecoin.

"When Past Performance May Be Indicative of Future Results - Legal Implications of Using Location-Based Services Data to Predict Future Behavior" - Location-based services (LBS) such as navigation and "check-in" apps- particularly those delivered through smart phones - are increasingly becoming a part of everyday life. The ability to know specifically where a person is located is a powerful asset for businesses. That information can be used to help deliver relevant services such as traffic and weather reports and even advertising for nearby businesses. Even more powerful, though, is the ability to use current location data
combined with historical location data to make predictions about a person's future behavior and deliver services that are relevant to what the person will be doing. This use of LBS technology and data, however, raises critical issues, including data and privacy protection. Join a lawyer from MapQuest/AOL to discuss the implications of these services.

- "Copyrightability of APIs" - The copyrightability of software has always been a contentious issue, both in legal circles and among developers. As developers realized that their creations were artistic and elegant (and highly valuable) they sought to protect them, often through copyright protection. One particularly thorny issue has always been the copyrightability of APIs (or application programming interfaces) which allow software programs to communicate with one another. In Google v. Oracle, the District Court for the Northern District of California held that APIs were not copyrightable and thereby invalidated several Oracle copyrights. This decision is currently on appeal to the Federal Circuit. This CLE will review the District Court's opinion, the arguments on appeal, practical implications for software companies seeking to protect their software, and if an opinion has been rendered, the Federal Circuit's opinion.

The WWM will offer several "roundtables" following the CLE programs with each roundtable focused on an established or planned work product. The roundtables will be a great chance to review new cases, unresolved issues, and emerging theories with a small but interested group. We will then segue from the discussion portion (roundtable) to the working portion (breakouts) of the meeting, where we return to the actual work of the committee. See the subcommittee updates below for more information about the work that will take place in the breakout meetings.

If you are new to this meeting (or new to this mailing list), 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 and get directly involved with the committee's projects. Of course, we also look forward to catching up with colleagues and getting to know new members (or newly involved members) at the ticketed lunch and dinner.

For more information or to sponsor portions of the meeting, please contact Kristine Dorrain or Jon Rubens. If you have not yet registered or made your lunch or dinner reservation, sign up here.

Other Programs of Interest


January 23, 2014  
Location: N/A  
Format: Webinar/Teleconference

This webinar is sponsored by various ABA sections, including the Section of Intellectual Property Law.

**ITechLaw Annual India Conference**

January 30-31, 2014  
Location: Bangalore, India  
Format: Live

Should you happen to find yourself in or near India at the end of January - instead of in Denver at the Cyberlaw Institute and Winter Working Meeting - consider attending the ITechLaw Annual India Conference. The conference focuses on the latest regulatory, commercial and technology law issues faced by emerging and growth industries in India and Asia.

**US/India Commerce and Investment - Converging Interests in Converging**
Markets
February 13-15, 2014
Location: New Delhi, India
Format: Live

Come join your colleagues from the United States and India, ABA Section of International Law Leadership, ABA Leadership, and Leadership from Major Indian Bar Associations, government officials, and prominent Indian business personalities at a jointly sponsored conference of the American Bar Association Section of International Law India Committee, Society of Indian Law Firms, and the Bar Association of India, as well as the Indian Services Export Promotion Council to be held in New Delhi, India. MCLE credit will be requested. For more information, including information about speaking possibilities, contact James Duffy (jpduffy@bergduffy.com) or Sajai Singh (sajai@jsalaw.com).

Third Annual Law + Informatics Symposium
February 28, 2014
Location: NKU Griffin Hall, Highland Heights KY, #cybersecurity
Format: Live

The Northern Kentucky Law Review and NKU Chase College of Law will host the third annual Law + Informatics Symposium focusing on cyber defense strategies and responsibilities for business and industry. An interdisciplinary line-up of academics and legal professionals will review the challenges of providing critical infrastructure, responding to cyber threats from foreign governments and terrorists, and combating corporate espionage. The program includes three active members of the Cyberspace Committee: Roland Trope, Sarah Jane Hughes, and Jon Garon. Learn more.

Business Law Section Spring Meeting 2014
April 10-12, 2014
Location: Los Angeles, CA
Format: Live

For the BLS Spring Meeting, the Cyberspace Law Committee is proposing three CLE programs, which will focus on (1) cybersecurity compliance for directors; (2) risk management and the "Internet of things"; and (3) public policy enforcement and payment systems issues. We will also co-sponsor a Consumer Financial Services Committee program and a Banking Committee program. Each Subcommittee and Task Force will have a meeting slot at this meeting. As in prior years, we need to have at least one of each of the subcommittee or task force co-chairs present in person to run these meetings, so please plan accordingly. There will also be a full Cyberspace Law Committee meeting at Spring Meeting, as well as a committee dinner.

CLCC Publications

Cyberlaw Mini-Theme in Business Law Today
The November issue of Business Law Today, a monthly publication of the ABA's Business Law Section, featured a mini-theme about cyberlaw. Jonathan Rubens introduced the mini-theme with an article entitled "Cyber-Crime, Cars, and Coins: Hot Topics in Cyberlaw. The articles written by our own Cyberspace Law Committee members include:

- "From Victim to Victor: Corporate Crime in the Internet Era" by Mark Mermelstein and Mona S. Amer
- "Cyberterrorism on Wheels: Are Today's Vehicles Vulnerable to Attack" by Cheryl Dancey Balough and Richard C. Balough
- "Big Data and Consumer Financial Information" by Veronica K. McGregor, Sophia Helena Calderón, Roberta D. Tonelli
- "The Past and Future of Bitcoins in Worldwide Commerce" by Denis T.
Rice
- "Regulating the Brainspray Revolution" by Theodore F. Claypoole
- "Revisiting the Public Performance Right in the Battle over Broadcast" by Jon M. Garon

If you don’t remember receiving the issue via email, you can access it [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201312/5/8).

### CLCC Projects

#### Cloud and IT Services Subcommittee Checklist Project

*Co-Chairs William Denny and Phillip Schmandt*

The Cloud and IT Services Subcommittee is preparing a Cloud Computing Checklist, intended to aid practitioners when reviewing and negotiating cloud computing contracts or explaining them to clients. This is not, however, a typical "checklist." Typically, the purpose of a checklist is to lead the reader through a list of all of the issues or questions that should be considered for the particular transaction. We did not feel this would be possible for a cloud computing checklist due to the multiple different types and purposes of cloud computing contracts. The purpose of this checklist is not to be all-encompassing. Instead, its purpose is to stimulate the reader to ask what other questions may be applicable to the commercial transaction at hand that is being contemplated for the cloud. The checklist will provide direction as to where to find resources and will in some cases provide sample clauses. We are inviting subcommittee members to assist in developing the checklist and to prepare thematically-linked short written pieces that can be packaged together to provide commentary to the checklist. If you would like to get involved, plan to attend the breakout session at the Winter Working Meeting, or contact one of the project leaders, Phillip Schmandt and William Denny.

#### When the CFAA and the SCA Cause "Digital Death"...

*Chris Kunz, Professor Emeritus, William Mitchell College of Law*

When a natural person or decedent is represented by a conservator, POA, or personal representative (a "fiduciary"), the fiduciary's attempts to access the online accounts of the represented person or decedent are within the definition of "unauthorized access" (essentially hacking) under the Computer Fraud and Abuse Act (CFAA). In addition, the Stored Communications Act (SCA) forbids many (but not all) online service providers from disclosing the account content or allowing account access to fiduciaries. To address some of these concerns, the Uniform Law Commission is drafting a uniform law on Fiduciary Access to Digital Assets. The current draft proposes some interesting state law provisions that try to work around or avoid the federal statutory obstacles. At the upcoming Winter Working Meeting, Chris Kunz, the ABA Business Law Section Advisor to the drafting committee, will lead a discussion focused on the internet law issues and solutions being considered by the drafting committee. You can access the most recent draft [here](http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201312/5/8). Don’t avoid this discussion just because you can’t remember anything about wills and trust law—it won’t matter!

#### Digital Media Subcommittee

*Co-Chair Jon Garon*

For the Winter Working Meeting, the Digital Media Subcommittee will be updating the working group on the status of the Goodlatte Comprehensive Copyright Reform process and discussing whether the committee would like to prepare any written materials for the hearings. Second, the committee will discuss the Department of Commerce’s Internet Policy Task Force Green Paper on “Copyright Policy, Creativity, and Innovation in the Digital Economy” released on July 31, 2013. Third, the committee will look into publishing a paper or developing a CLE on the future of TV/video, particularly in light of the split whether micro-antennae constitute public transmission. Of course, there will also be an opportunity to entertain any other projects suggested by participants.

#### Task Force on Professional Responsibility and Technology

*Co-chairs Lois Mermelstein and Juliet Moringiello*
The Task Force on Professional Responsibility and Technology will meet at the Winter Working Meeting in Denver to discuss some "clean up" work involving the Ethics 20/20 amendments related to technology. Some of you provided comments to the Ethics 20/20 Commission regarding these changes, and you may remember that not all of them were adopted. Charlie McCallum, the chair of the Business Law Section’s Professional Responsibility Committee has asked for our help in explaining to the Standing Committee on Ethics and Professional Responsibility why some of the technology related amendments were not handled appropriately and in suggesting other technology-related areas in which a formal opinion from the Standing Committee might be helpful.

**International Trade Subcommittee Report**

*Co-Chairs Hal Burman and John Gregory*

The International Trade Subcommittee is working on several projects as discussed below. Plan to join the subcommittee at its Winter Working Meeting breakout sessions to get involved.

1. **Top item and short turn-around time after the WWM will be recommendations on the latest draft "Framework Agreement on E-Commerce" of the UN Economic and Social Commission for Asia and the Pacific.** This is a tight time squeeze, but an opportunity for Cyberspace folks to continue to have a meaningful impact on this process in the Asian-Pacific area. There will be a new draft just out and likely a final UNESCAP working meeting late February, which means we can get WWM comments and proposed changes onto that table but will not have much turnaround time after the WWM. By the time it reaches their plenary meeting, if it does in May 2014, there won't be as much room to get changes made, so the push would be now and the WWM is situated date-wise to do that. The latest draft will be available online (link will be sent out) or through co-chairs John Gregory and Hal Burman.

2. **Proposals for online dispute proceedings for cross border e-commerce and whether that can cover both B2B and B2C.** Recommendations can be made in time for the next meeting of UNCITRAL’s Working Group III in mid-March at New York (possible subcommittee coverage of that and the Working Group IV meetings can be discussed). The concepts of how to create meaningful access to enforcement for small and medium-size businesses and smaller claims, which constitute a much larger volume of e-commerce, are potentially more difficult than coming to agreement on draft rules for handling online disputes. Whether that should also cover B2C claims is controversial so input on that would be timely.

3. **The status of draft standards on signature authentication, cross-border use of e-documents, etc. at the UN Economic Commission for Europe (UNECE) Centre for Trade Facilitation and Electronic Business (CEFACT), and the draft standards on cross-border transfer of interests in goods at UNCITRAL’s Working Group IV, plus the time table for comments and recommendations.**

4. **Time permitting, current e-commerce projects underway or to be proposed at several international bodies will be considered to see if tracking these and possibly adding some to the subcommittee’s action items would be appropriate.** These include the International Telecommunications Union (ITU), and two African regional bodies, OHADA (Organization for the Harmonization of Business Law in Africa) and SADC (Southern African Development Community).

**Mobile Commerce Subcommittee**

*Co-Chairs Richard Balough and Ted Claypoole*

Join the mCommerce Subcommittee at the Winter Working Meeting to discuss our upcoming panel presentation on "the Internet of Things" and help decide what topics and speakers should be featured. We will continue discussing our Bring-Your-Own-Device white paper and seek ideas and writers for that project. Time permitting, we will update the team on the latest in mobile tracking technology law, mobile app licensing, and take suggestions for upcoming presentations and projects.

**Internet Governance Task Force**
Co-Chairs Mike Kelly and David Satola

At the WWM, the Internet Governance Task Force will report on the proceedings of the recent Internet Governance Forum held in Bali, Indonesia, in October 2013. In this working session, the task force will also examine the potential impact of other recent developments around international efforts at Internet governance in the wake of the Snowden affair, especially the call by the governments of Brazil, India and South Africa, together with ICANN, to host a summit on the future of multi-stakeholderism in Internet governance and the formation of a high-level "Panel On the Future of Global Internet Cooperation." One report suggests, for example, that these efforts might result in requirements of ISPs to host data on a country-by-country basis, trending towards a Balkanization of the Internet, reinforcing control of nation states over the Internet.

Cyber News You Can Use

Success Strategies for the Professional Artist in the Digital Age

On November 6, the NKU Chase Law + Informatics Institute presented a webcast on "Success Strategies for the Professional Artist in the Digital Age." Co-sponsored by the Cyberspace Law Committee, the Copyright Alliance, Kentucky Arts Council, and ArtsWave SpringBoard, this three-hour program featured expert attorneys and filmmakers who discussed a range of business and legal practices. Discussions focused on ways lawyers can help their creative clients understand the legal issues involved in independent film production, terms of services agreements for online content distribution, visual arts licensing terms, crowdfunding strategies, and financing art projects. Lively discussion included Dayton School of Law professor Dennis Greene's advice that "The devil is in the details." Jennifer Kreder added that "when art is created in more traditional visual medium and then digitized, several issues arise," and Stephen Gillen '80 explained that "there is no 'one size fits all answer'" for how best to contract for rights. You can watch the webcast.

See MIRLN for Cyberspace Updates

For up-to-date news on cyberspace law happenings, you should also visit MIRLN, a monthly newsletter edited by Cyberspace Law Committee member Vince Polley. It's free.

Presentations and Publications of Interest

Uniform Commercial Code

Sarah Jane Hughes, University Scholar and Fellow at Maurer School of Law, Indiana University, edited Volume 10A of the Hawkland Series on the UCC, formerly edited by Professor Fred Miller. Volume 10A deals with non-UCC payments and their regulation. The 2013 edition of the series will be published this month. Other contributors CLC members will know include former Business Law Section chair Linda Rusch and Steve Weiser of Proskauer's LA office.

Wrap Contract Terminology

Juliet Moringiello, professor at Widener University School of Law, recently contributed to a ContractsProf Blog online symposium about Prof. Nancy Kim’s new book, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press 2013). Prof. Moringiello's contribution, titled "Wrap' Terminology: Needlessly Confusing or Useful Analytical Tool?" can be found here.

Your Articles Are Welcome

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