Cyberspace Law Committee

February 2014

Message from the Chair

We recently returned to our desks from a terrific Winter Working Meeting and Cyberspace Law Institute in Denver. Thanks to our leaders, helpers, and local planning committee of enthusiastic Front Range cyberslawyers, the meeting came off splendidly, with some terrific contributions from longtime committee members and plenty of newbies. Those of you who attended for the first time, please let us know what you thought of the meeting, and those of you who are still lurking in the cyberworld while reading this, you should seriously consider joining us at a future meeting.

The Denver meeting attendees enjoyed some terrific CLE content, including presentations on:

- "ubiquitous computing" and the Fourth Amendment;
- legal issues raised by the use of location-based data;
- the evolving world of technology that can externally read and interpret brain signals or, as our own Ted Claypoole likes to say, "brainspray" technologies;
- more on the latest fracas over bitcoins and virtual currency (see below for information on an upcoming free "In The Know" webinar on this topic);
- civil liberties and government snooping - issues of the Post-Snowden world; and,
- new tools, strategies and problems for combating online trade secret theft.

Special thanks to all our presenters and big and shout-outs to Sarah Jane Hughes - thanks for all your help and we missed you in the snow; Kristine Dorrain - ditto; and Cheryl Balough - thanks for your airline perseverance and for going above and beyond in helping get things set up for the meeting. And thanks also to Colorado locals Jason Haislmaier and Amy Hirter for helping with our planning, for connecting the committee to some of the techlaw goings-on in Colorado, and for jumping in at the last minute to pinch hit for a storm-waylaid presenter.

Read below for recaps of our roundtable discussions and working-session breakouts, and don't forget to register for the Spring Meeting, April 10-12 in Los Angeles.

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

Bitcoins Accepted Here: Virtual Currencies Explained
March 28, 2014

Following up on the productive discussion at the Winter Working Meeting, the Committee will present a free webinar on bitcoins and other cryptocurrency as part of the Business Law Section's In The Know series. Presenters include Stephen Middlebrook, Andrew Shipe, and Sarah Jane Hughes. Stay tuned for
Technology

Presentations and Publications of Interest

- Privacy in the Age of Big Data
- Payment Systems a Hot Topic
- RSA Conference
- Threading the Needle of U.S./India Deals: Safe Passage through Formidable Risks

Your Articles Are Welcome

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Business Law Section Spring Meeting
April 10-12, 2014
Kristine Dorrain, Programming Director

The Cyberspace Committee is sponsoring or co-sponsoring several wonderful programs for the BLS Spring Meeting. Here's a glimpse at what's on the schedule:

- "Board Portals, Virtual Meetings and Electronic Records" - Thursday, April 10, 10:30 am to 12:30 pm
- "Cybersecurity and Data Breaches in Health Law Facilities: Crisis Management for GC's and Outside Counsel" - Thursday, April 10, 10:30 am to 12:30 pm
- "A Year After the Executive Order on Cybersecurity: Advising Boards of Directors on New Cybersecurity Responsibilities" - Friday, April 11, 8:00 - 10:00 am
- "Calling all Toasters: Risk Management for the Internet of Things." The Committee’s mCommerce Subcommittee is sponsoring this program - Friday, April 11, 10:30 am to 12:30 pm
- "The Creation of the Restatement Third, the Law of Consumer Contracts - What It Means for Companies that Contract with Consumers -- Saturday, April 12, 8:00 - 10:00 am
- "DOJ's Operation Choke Point, State Enforcement Initiatives, and FTC's Proposed Outright Bans: Are They Inspired Public Policy Enforcement through Payment Systems or Misguided Intervention?" This panel will include representatives from the CFPB, FTC, NACHA, the Clearing House Retail Payments Company, the Conference of State Bank Supervisors, and the new Third Party Payments Processors Association -- Saturday, April 12, 10:30 am to 12:30 pm

We will also hold a full Committee meeting, as well as meetings of our subcommittees and task forces. If you haven't already done so, please register now.

Other Programs of Interest

Ten Tech Trends for 2014: The Legal Benefits and Ethical Risks of the Latest Technology
February 24, 2014
Location: N/A
Format: Webinar/Teleconference

101 Cloud Computing: Legal Challenges and how to Address Them
March 4, 2014
Location: N/A
Format: Webinar/Teleconference

CLCC Projects

Cloud Security Checklist Working Group Update
Co-Chairs Lisa Lifshitz and Ariane Siegel

The Cloud Security Checklist Working Group had a very productive meeting on Friday, January 31, 2014. We reviewed what is now an almost final version of the Cloud Security Checklist. Based on the group's recommendations, we plan to prepare an introduction to the Checklist describing the thought process and organization structure. Some links with regulatory guidelines regarding cloud security will also be inserted, as well as a description of the contractual process. Once final amendments are made, it is our intention to have it published.

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

The meeting of the Consumer Protection Subcommittee began with an update on the status of the Subcommittee’s project to update the ABA’s Safeshopping.org website. The project is complete. Thanks to those who contributed to the work: Kali Banks, Ray Ferrell, Eran Kahana, Nancy Kim, Juliet Moringiello, Jim Nehf, and John Rothchild. Co-chair Rothchild then gave a presentation titled “Consumers and the Internet of Things.” He spoke about the development of the IoT in four areas: the home, health and fitness, the smart electricity grid, and connected cars. He then addressed three sets of legal issues that are likely to become increasingly salient to consumers as more and more everyday devices become connected to the Internet: privacy, security, and self-help by vendors in the form of remote disablement of devices. There was a good deal of discussion by those present, many of whom were very knowledgeable about these subjects. The group considered that the issue of electronic self-help might yield a worthwhile project for the subcommittee.

Criminalization of Technology Group Update
Chair Cathy Gellis

The Criminalization of Technology group met at the Winter Working Meeting in Denver and decided on two main projects to tackle this year:

- Drafting a resolution for the ABA to consider reaffirming the importance of attorney-client privilege, in response to the news that the NSA has potentially intercepted these otherwise private communications; and
- Drafting a primer for in-house counsel on what to do when the government starts investigating your company.

We are going to attack the resolution project first because we may be racing against the clock and want to have the resolution, and a supporting white paper, ready for the BLS Spring Meeting so the BLS can decide whether to officially advance it, at which point we can then look for the support of other sections to have it passed at the annual meeting. Let Cathy Gellis know if you are interested in contributing on the drafting. We will likely also need help with brainstorming and reviewing, but the key action item for right now is just to let us know whether you are willing to keep getting emails on the subject.

Once this project is behind us we will take up the primer again (probably sometime this summer). We did some brainstorming on what it should include and will explore this further after the resolution project is completed.

Digital Media Subcommittee Update
Chair Jon Garon

Many thanks to everyone who attended the Digital Media Subcommittee breakout session at the Winter Working Meeting. During the session, we agreed to three projects for the remainder of the year:

1. We are offering to write a Business Law Today mini-theme issue on copyright issues involving the business lawyer.
2. We hope to provide a webcast panel regarding American Broadcasting Companies, Inc. v. Aereo, Inc., 13-461 (cert. granted 2013).
3. We will present a program for the September 2014 BLS Annual Meeting involving copyrighted works embedded in non-media objects.

We are looking for volunteers and recommendations for each of these three projects. The programs and their topics are intended to intersect business issues with copyright rather than purely copyright issues. Please email Jon Garon with your interest and feel free to forward this information to others you think are well positioned to participate. These programs are an excellent way for attorneys not involved in the Cyberspace Law Committee or the Section to become part of our community.

Fiduciary Access to Digital Assets
Chris Kunz and John Gregory

Chris Kunz and John Gregory led a discussion at the Winter Working Meeting
about a draft uniform act on Fiduciary Access to Digital Assets (FADA). The discussion was based on their attendance at the Uniform Law Commission drafting committee meetings. This act seeks to ensure that conservators, agents with power of attorney, personal representatives, and trustees ("fiduciaries") can gain access to the "digital assets" of the persons, estates, or trusts they represent. The roundtable discussion focused on (1) whether access to digital assets should be a "hot power" for a power of attorney (so that the represented person must expressly assent to that power), (2) the effect of the draft act making certain fiduciary powers "subject to the terms of service" (especially if the terms of service interfere with the fiduciary's ability to comply with its statutory fiduciary duties), (3) the need to clarify that a fiduciary gains no more than the represented person's rights but doesn't gain all of those rights (e.g., the fiduciary doesn't take over the represented person's club membership rights), and (4) the need to rethink the "transition" provision on when the act will take effect (e.g., should it apply only to wills entered into after the act takes effect?). John and Chris will take these concerns back to the drafting committee before its spring meeting. The draft act will have its second reading at the ULC's annual meeting this summer and might be approved then.

Financial Services Subcommittee Update
Chair Stephen Middlebrook

The Committee's Financial Services and Payments Subcommittee met at the Winter Working Meeting, despite the fact that co-chair Steve Middlebrook was waylaid by the weather and could not connect to a plane to get him to the meeting in time, and our able stand-in and Congressionally-certified payments expert Professor Sarah Jane Hughes was waylaid by a bad flu. Nonetheless, our faithful committee chairman (Jon Rubens) coordinated the session in their stead, leading an interested group through a further discussion of bitcoin and cryptocurrency issues, including some brainstorming for the restructuring of the bitcoin presentation of earlier in the meeting into an edition of the Business Law Section's "In The Know" free webinar series, which is now scheduled for March 28 (more information upcoming). The group discussed some additional payments topics, such as Remote Deposit Capture, and heard about the Federal Reserve's in-progress study on payments - of which we are certainly sure to hear more come Spring Meeting.

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

In Denver, the International Trade Subcommittee discussed the work of UNCITRAL on online dispute resolution, noting the divide between the EU and the US positions, especially on enforcement questions; the UN Economic Council for the Asia-Pacific's draft rules on cross-border recognition of electronic documents, and communications, with a view to preparing a Cyberspace Law Committee response for the next meeting of that body and an ABA draft resolution on electronic authentication of signatures for persons abroad which may be linked to cloud computing. The subcommittee plans to hold one or two conference calls in the coming weeks to advance this work. The calls will be announced in the subcommittee's mailing list. If you wish to be part of the subcommittee's mailing list, please contact John Gregory or Hal Burman.

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

The Internet Governance Task Force gave an overview of its activities since the Annual Meeting, which included attending the UN's annual Internet Governance Forum (IGF) this year held in Bali, Indonesia. One of the main issues raised at the IGF and which will be the focus of the task force's work in the coming year, is the tension between "multi-stakeholderism" vs multilateralism as the prevailing governance model. Under multi-stakeholderism, all actors, whether they be governments, corporations, NGOs, academics or individuals, have a role in the governance of the Internet. It is under this model that ICANN, for example, operates. By contrast, the multilateral model would be the exclusive domain of "states". The multilateral model is being pushed by Russia, China, etc. This debate has come to the fore in light of the Snowden affair. Both sides are holding summits and counter-summits outside the IGF process and this will likely inform
much of the dynamic at the next IGF in September 2014 in Istanbul. No resolution is expected. The task force plans to prepare a program for the Section’s annual meeting in Chicago. The WWM presentation slides are posted on the Committee website.

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

The mCommerce Subcommittee met at the WWM and generated many strong suggestions for organizing the “Internet of Things” panel at the Business Law Section Spring Meeting. Some of the most interesting recommendations revolved around the little-discussed industrial Internet of things, breaking from the usual consumer issues in this space. In addition, the subcommittee agreed that too many firms and organizations had released recent papers on BYOD considerations, so that the BYOD topic is no longer a subject of interest in the subcommittee. New topics of interest also emerged, including exploration of captive mobile advertising to airplane and cruise customers.

**Professional Responsibility and Technology Task Force Update**  
*Co-Chairs Lois Mermelstein and Juliet Moringiello*

At the 2014 Winter Working Meeting, the Task Force on Professional Responsibility and Technology discussed two of the recent revisions to the Model Rules of Professional Conduct and their comments related to the use of technology by lawyers in their practices. The two revisions discussed were (1) the definition of "writing" in Rule 1.0(n) and (2) Comment 1 to Rule 7.3, which distinguishes between solicitations and advertisements. In the opinion of the Task Force, the revisions adopted by the ABA do not adequately address the realities of the use of technology, and we are going to urge a change to Rule 1.0(n) and a formal opinion to address ambiguities in Rule 7.3. Our goal is to prepare draft memos on these issues for discussion at the Spring Meeting in Los Angeles. We had an enthusiastic group of volunteers at the meeting; if you were unable to attend and want to get involved, please contact Juliet Moringiello or Lois Mermelstein.

**Post-Snowden Reform Proposals**  
*Chair David Delaney*

In the WWM roundtable session on “Long-term Post-Snowden Reform Proposals for the Executive and Legislative Branches,” participants discussed U.S. business interests and legal concerns related to cyber intelligence programs and policies disclosed by Edward Snowden since early 2013. A proposal to study the effects of government surveillance on attorney-client privilege was moved to the Criminalization of Technology Task Force. Committee members will continue to explore the following topics in future meetings: relationships with the International Law Section, the American Society of International Law, and other groups to study trade, intellectual property, and other international issues (beyond the ongoing work of the Internet Governance Task Force); opportunities for the Foreign Intelligence Surveillance Court to benefit from business community expertise; and best-practice lists for government and business communities on the collection, retention, analysis, purchase/sale, and sharing of personal data. The discussion also prompted several individuals to propose writing projects on trends in national security law, comprehensive civil liberties issues, privacy, and promoting technical knowledge among practitioners. For more information about this roundtable discussion, you can access the write-up on the Committee website.

**Cyber News You Can Use**

**New Anti-Spam Regulations in Canada**  
*Ariane Siegel*

On December 4, 2013, the Canadian government finalized regulations for its anti-spam legislation known as CASL. The government also fixed the implementation date of the new legislation. The majority of the rules come into force on July 1, 2014. Rules dealing with computer programs will come into force
on January 15, 2015, while those establishing a private action come into force on July 1, 2017. The introduction of CASL will require organizations doing business in Canada to evaluate and update their practices regarding electronic communications. Organizations should pay special attention to the requirement for express consent in many circumstances.

NKU Chase College of Law Launches W. Bruce Lunsford Academy for Law, Business + Technology

Jon Garon

The Northern Kentucky University Chase College of Law has approved a new curriculum for the W. Bruce Lunsford Academy for Law, Business + Technology, with the first courses being offered in the 2014-15 academic year. The Academy is an honors immersion program focused on developing "Renaissance lawyers" for the Information Age. The Academy's curriculum will emphasize legal technology, business, finance, leadership and other skills critical to the future of the practice of law. The announcement regarding the opening of the Lunsford Academy has received a warm reception. The E-Lawyering Task Force of the ABA's Law Practice Management Section named Chase one of “13 Top Law Schools Teaching Law Practice Technology.” More information is available here.

Presentations and Publications of Interest

Privacy in the Age of Big Data

Ted Claypoole, of Womble Carlyle, has written with Theresa Payton a new book, Privacy in the Age of Big Data: Recognizing Threats, Defending Your Rights, and Protecting Your Family. The book highlights the many positive outcomes of digital surveillance and data collection while also outlining those forms of data collection to which we do not always consent, and of which we are likely unaware, as well as the dangers inherent in such surveillance and tracking. The Daily Show's Jon Stewart calls the new book "the discussion of the era."

Payment Systems a Hot Topic

Sarah Jane Hughes, University Scholar and Fellow at Maurer School of Law, Indiana University, was interviewed in January by Liberation, the second largest French newspaper in France. The interview appeared on January 31 in the paper and online editions and focused on recent developments relating to bitcoins, including the indictment of a principal in BitInstant and an associate reputedly connected to Silk Road for their alleged money-laundering aid to suspect transactions on Silk Road. She also was interviewed by the online legal news provider Law360 about the biggest banking news of 2013 and by the deputy Washington bureau chief of the American Banker, where she was quoted in the article "Why the Payment System Is Suddenly a Hot Topic in D.C."

RSA Conference

The Cyberspace Law Committee will be well-represented at this year's RSA Conference to be held in San Francisco on February 24-28. Tom Smedinghoff, of Edwards Wildman, will be giving a presentation entitled "Deciphering the Legal Framework that Governs Online Identity Systems"

Threading the Needle of U.S./India Deals: Safe Passage through Formidable Risks

On February 13 - 15, 2014, at a conference in New Delhi, co-sponsored by ABA International Law Section's India Committee and by the Society of Indian Law Firm, Roland Trope, of Trope and Schramm LLP, will be speaking on three panels

- Defense Procurement and Policy
- Coping with the Complexities of U.S./India Trade Controls
- Threading Needles in the Dark: Will Deals Survive When Cyberattacks Collapse the Grid?
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 communications co-directors Cheryl Balough and Lois Mermelstein.