Message from the Chair

We hope everyone is entering winter with a twinkle in the eye and a song in the heart. To that end, we hope to brighten your season with a trip to Charlotte, North Carolina where the sky is nearly always blue and the airport comes equipped with rocking chairs. The Winter Working Meeting will feature interesting CLE lectures and panels, captivating company, mind-expanding roundtable discussions, great food, and for most people, a relatively short flight. The committee is starting or seriously considering at least three book projects and other important publications, and we could use your help. Would you like to add a publication credential to your resume? Thank you for your membership and interest, and feel free to write or call with any questions or ideas to improve the committee’s offerings.

Ted Claypoole, Chair

2015 Cyberspace Law Institute and Winter Working Meeting

January 23-24, 2015 - Charlotte NC

Registration is open for the 2015 Cyberspace Law Institute and Winter Working Meeting to be held January 23-24, 2015 in Charlotte, NC. For just $295, you'll enjoy 4 hours of CLE, a pre-event cocktail party (the evening of January 22), roundtables, opportunities to collaborate on subcommittee/task force projects, additional opportunities to contribute to three book projects, a second cocktail party (the evening of January 23), time to network with long-time and new colleagues, and much more.

The 7 CLE programs to be presented are:

- Electronic Payments: Winnowing the Network and Avoiding the Shadows
- Is Game Streaming Legal? A Billion Dollar Question
- What Is Cyber Insurance Today?
- Doing Business in a Post-Aereo World
- Big Data and Foreign Law Considerations
- Year in Review (with highlights on the bad news for patent trolls)
- Breaking in through the Cloud

You can find a copy of the agenda here.

And don't forget all that Charlotte offers before, during, and after the meeting, including:

- Uptown Charlotte Art Walking Tour
- Average high in January of low 50s
- Charlotte Beer/Brewery Tour
- The nation's best furniture shopping in Hickory or Highpoint, NC.
- The Nascar Hall of Fame
- An Emeril Lagasse restaurant, which will be hosting us on Friday evening with a 3-course dinner for just $65.

We look forward to seeing you in Charlotte on January 23-24. Register now and remember to sign up for the Friday lunch (at the hotel) and the Friday dinner at e2 Emeril's Eatery.
BLS 2015 Spring Meeting

The Business Law Section 2015 Spring Meeting will take place April 16-18 in San Francisco at two hotels near the Convention Center. In addition to a full day of committee, subcommittee and task force meetings, our Cyberspace Law Committee will present three CLE programs:

- Data Privacy Due Diligence in M&A Transactions - coordinated by Robert Bond
- Right to Be Forgotten - coordinated by David Satola
- Remote Disablement via the Internet: How the Modern Repo Man Does His Job Without Leaving Home - coordinated by John Rothchild

The list of all 65 CLE programs will be issued soon. Mark your calendars for April 16-18, 2015 or even register now. After the wildly successful BLS Annual Meeting in September, the Spring Meeting is not to be missed.

Committee Doings

From the International Trade Subcommittee
Co-chairs John Gregory and Hal Burman

The International Trade Subcommittee continues its review of international developments in the law affecting electronic transactions. A conference call was held in early December to consider the work of several organizations, including the United Nations Economic Committee for South Asia and the Pacific (UN/ESCAP) and the UN Economic Committee for Europe's Centre for Trade Facilitation (UN/ECE - CEFACT). Indeed the term 'trade facilitation' tends to be spreading as a cover for thinking about trade at many levels. The World Trade Organization has treaty language using the term, and the Subcommittee considered its implications for business lawyers.

A working document (by Bill Luddy, who is active in many of the organizations discussed) was circulated to the members of the Subcommittee and several engaged members of the Science and Technology Section as well. It is also posted to the Documents section of the Subcommittee's web page here.

The Subcommittee will be devoting some of its time at the Winter Working Meeting in January to pursuing points of interest raised on the call, and in the Bill Luddy's document.

From the Cybersecurity Subcommittee
Co-chairs Roland Trope and Tom Smedinghoff

On the suggestion of the Department of Homeland Security (DHS), the subcommittee has undertaken a project to write a "Best Practices" Guide for Cybersecurity Assessments in M&A Transactions. The deadline for completion of the project is early May 2015. We are aiming to complete the initial draft in time to review and discuss it during the forthcoming Winter Working Meeting.

We are seeking to produce a Guide that ABA will give serious consideration to publishing in hard copy. In an effort to have the Guide published by end of August 2015, Co-Chairs Tom Smedinghoff and Roland Trope have prepared a book proposal for the Guide for review and consideration by the Business Section Publications Board. Attached to that proposal is the 20-page outline of the Guide that the project co-chairs drafted and revised to incorporate comments and suggestions received from several readers at DHS and in CLC.

Copies of the revised outline will be circulated to the subcommittee members the first week of December for review and comment and to invite volunteers to review and comment on draft sections of the Guide.

We have circulated the outline for review by the ABA Task Force on
Cyberspace, which will discuss it during the next monthly telephone conference, scheduled for Friday, December 6th. A copy has also been forwarded for review to the Business Section’s M&A Committee.

Because the target audience of the Guide will be lawyers involved in corporate transactions (and particularly M&A), the authors for the Guide will include not only members of the CLC but also the Business Section M&A Committee and other committees.

On November 6 the project co-chairs met with the DHS Assistant Secretary (Office of Policy Strategy, Planning, Analysis & Risk), DHS Associate General Counsel and other DHS officials for National Protection and Programs to discuss the project and to receive a tour of the National Cybersecurity and Communications Integration Center -- the government’s cyber ops center.

The project Co-Chairs will participate in a follow-up meeting at DHS on December 19th.

If you are interested in assisting on this project (and have not yet expressed interest to us), please email both of the co-chairs at tsmedinghoff@edwardswildman.com and at rtrope@tropelaw.com.

From the Electronic Payments and Financial Services Subcommittee

Co-chairs Steve Middlebrook and Ed Morse


Of particular interest to Cyberspace lawyers are provisions in the 870-page proposed rule which extend coverage to person-to-person payments - a change which CFPB acknowledges will bring some mobile payment and virtual currency products under Reg. E for the first time. Once adopted, covered prepaid products, including mobile payments and virtual currencies, will have to meet the disclosure, error resolution and liability limitation requirements of Reg. E.

The proposed rule creates a new definition of "prepaid account":

A prepaid account is a card, code, or other device, not otherwise an account under paragraph (b)(1) of this section, which is established primarily for personal, family, or household purposes, and which:

(A) is either issued on a prepaid basis to a consumer in a specified amount or not issued on a prepaid basis but capable of being loaded with funds thereafter;
(B) is redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines, or usable for person-to-person transfers; and
(C) is not: (1) a gift certificate as defined in § 1005.20(a)(1) and (b); (2) a store gift card as defined in § 1005.20(a)(2) and (b); (3) a loyalty, award, or promotional gift card as defined in § 1005.20(a)(4) and (b); or (4) a general-use prepaid card as defined in § 1005.20(a)(3) and (b) that is both marketed and labeled as a gift card or gift certificate

While it builds on existing definitions of "prepaid" used in the Card Act, this new language merges the existing Reg. E concepts of an "account" at a financial institution and an "access device" used to access the account. It also extends coverage to person-to-person payments. There is, however, no requirement that the card, code or device be issued by a financial institution or that the transfer be denominated in "legal tender," "currency," or even "funds." Because the use of a code to conduct a person-to-person transfer triggers a compliance obligation under the proposed rule, the rule appears to include mobile payments and virtual currency.

In a separate report issued by CFPB, the agency specifically names a number of
person-to-person payment products which it thinks will likely be covered by the rule. The list includes: Dwolla, eDeposit, PayPal, Skrill, Square Cash, Venmo and Wingcash. If these service providers are subject to the proposed rule, then dozens of other similar products will likely also be covered.

CFPB also acknowledges that the proposed rule may cover virtual currencies, but provides no analysis as to how the proposal would apply, why this outcome is warranted or the implications of making such a rule. CFPB states:

The Bureau also recognizes that the proposed rule may have potential application to virtual currency and related products and services. As a general matter, however, the Bureau’s analysis of mobile financial products and services, as well as and virtual currencies and related products and services, including the applicability of existing regulations and this proposed regulation to such products and services, is ongoing.

The scope of the proposed rule and its application to mobile payments and virtual currency will be discussed by the Electronic Payments and Financial Services subcommittee at the Winter Working meeting. Interested persons are invited to join us.

**Possible New Electronic Contracting Project**

*By Juliet Moringiello*

Is there anything new to say about electronic contracts? As many Cyberspace Committee members know, this committee did pioneering work on “clickwrap” and “browse wrap” agreements.

Chris Kunz led the effort, which resulted in two widely-cited *Business Lawyer* articles. After the group finished “Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements” in 2003, there were murmurs about doing a follow-up project about modification of online contracts.

Well, folks, now would be a great time to revive that project. The American Law Institute has embarked on a project to produce a Restatement Third of Consumer Contracts, and modification is one of the topics to be covered. We're trying to gauge interest in weighing in on the issues involved in modifying online agreements by producing a *Business Lawyer* article as a long-overdue follow up to the 2003 browse wrap article and the 2001 click wrap article. If you're interested in working on such a project, please contact Juliet Moringiello at jmmoringiello@widener.edu. If there's sufficient interest, we'll set up some time to meet and discuss at the Winter Working Meeting in Charlotte.

**In the News**

John Gregory recently published a study of the law of drones that deals with Canadian and US law (with a quick reference to an EU source too).

On November 21, Roland Trope was the speaker in the Jones Seminars on Science, Technology and Society series at the Thayer School of Engineering at Dartmouth College. Title of his presentation was: Preparing to Recover from Cyber Disruptions of the Grid. The presentation was videotaped and, in January 2015, it will posted on the Thayer School website here.

In November, the Northern Kentucky Law Review published a special symposium issue on Cyber Defense Strategies and Responsibilities for Industry. The special issue included two articles by CLC members: Roland Trope’s article entitled Threading Needles in the Dark: Will Deals Survive When Cyberattacks Collapse the Grid? and Professor Sarah Jane Hughes’ article entitled Did the National Security Agency Destroy the Prospects for Confidentiality and Privilege When Lawyers Store Clients’ Files in the Cloud - and What, if Anything, Can Lawyers and Law Firms Realistically Do in Response? Digital copies of their articles will be available in December on the Law Review’s web site.
Sarah Jane Hughes and Steve Middlebrook planned to participate in a December 4 conference call convened by the Uniform Law Commission's Study Committee on Alternative and Mobile Payments. The call's purpose is to approve a tentative recommendation to the ULC to convene a drafting committee in 2015 for alternative payments products such as virtual currencies. Sarah Jane is the reporter for the Study Committee and Steve is a BLS advisor to it. Other CLC members involved as observers to the Study Committee include Jim Nehf and Tom Brown.

Robert Bond will be presenting at the Winter Working Meeting on "Big Data and Foreign Law Considerations". He recently hosted a webinar on this topic with FTC, POST, European Commission and ESOMAR. The link to the recorded webinar on 2nd October is here.

### Upcoming Events of Interest

**ABA Techshow: April 16-18, 2015, Chicago**
The ABA TECHSHOW Conference and EXPO is where lawyers, legal professionals, and technology all come together. For three days, attendees learn about the most useful and practical technologies available, including CLE and an EXPO Hall where more than 100 legal technology vendors are eager to demonstrate their helpful products and services. More information and registration information is available here.

### Write!

Have you written an article or spoken on a topic cyberspace folks would be interested in? Your newsletter contributions are always welcome. Email Lois Mermelstein.