Message from the Chair

The Winter Working Meeting in Charlotte went very well, with constructive and interesting subcommittee and task force events and thought-provoking roundtable discussions. The CLE was exceptional - we learned about everything from an up-to-date report on cyberinsurance to regulation of new electronically based payment systems, and from false advertising online to the legal issues in the emerging business of game streaming. We heard a well-presented Year-in-Cyberspace-Law presentation from John Ottaviani, and discussed changes in foreign cyberlaw with Robert Bond. For those of you who want to listen to these presentations, audio recordings are available.

We had a huge attendance for our Publications Board meeting, discussing the book projects currently underway, as well as law review articles in our survey section of the Business Lawyer, and our mini-themed selections of smaller articles in Business Law Today. We considered new white papers and checklists for practitioners. Please write me or Sarah Jane Hughes if you want to participate in any of these projects. We will also be soliciting for survey articles soon.

See you in San Francisco at the Spring Meeting of the Business Law Section, where we will be presenting CLE relevant to your practice and next steps for the subcommittee and task force projects.

Ted Claypoole, Chair

Business Law Spring Meeting

We are looking forward to the Business Law Section 2015 Spring Meeting, which will take place April 15-18 in San Francisco. If you haven’t yet registered, do so now. The early bird discounted rate ends February 13!

In addition to the 60+ CLE programs offered, the Cyberspace Law Committee has a wonderful agenda planned:

- Arrive early on Wednesday, April 15, and join us for a short hike in the redwoods in Marin County and/or dinner in Sausalito. See below for more details.
- On Thursday, April 16, we have a full day of committee, subcommittee and task force meetings to move forward with the many projects that took shape at Winter Working Meeting. Here is the current schedule (subject to change, so please check the [online schedule](#) for updates):
  - 8 - 9 am: Identity Management Task Force meeting
  - 8 - 9 am: Professional Responsibility and Technology Task Force meeting
  - 9 - 10 am: the full Cyberspace Law Committee meeting
  - 10 - 11 am: Financial Services and Payments Subcommittee meeting
  - 11 am - noon: Cloud, Platforms, and Analytics Subcommittee meeting
  - Noon - 1 pm: Cybersecurity Subcommittee meeting
  - 1 - 2 pm: Internet Governance Task Force meeting
  - 1 - 2 pm: Enterprise Technology Subcommittee meeting
  - 2 - 3 pm: Mobile and Connected Devices Subcommittee meeting
  - 3 - 4 pm: International Trade Subcommittee meeting
4 - 5 pm: Non-U.S. Cyber Regulations Task Force meeting
4 - 5 pm: Social Media Subcommittee meeting

Be sure to save Thursday evening, April 16, for a fun and unique dinner with your Cyberspace Law Committee colleagues and with the Corporate Counsel, Corporate Compliance, Intellectual Property, White-Collar Crime, and Young Lawyers Committees. Look for more details in an email later this month.

We are also sponsoring or co-sponsoring the following CLE programs:
- Protecting Your Company from Cybersecurity Risks: Cybercrime Incident Response Techniques - Thursday, April 16, 10:30 AM - 12:30 PM
- Cyber Security: The Cold, Hard Reality of Protecting Financial Information - Thursday, April 16, 2:30 PM - 4:30 PM
- Losing Control: Who Owns Your Devices Now That They Are Connected to the Internet? (coordinated by John Rothchild) - Friday, April 17, 10:30 AM - 12:30 PM
- The Right to Be Forgotten: What Your U.S.-Based Business Clients Need to Know about the EU Rule (coordinated by David Satola) - Friday, April 17, 2:30 PM - 4:30 PM
- Data Privacy Due Diligence in M&A Transactions (coordinated by Robert Bond) - Saturday, April 18, 8:00 AM - 10:00 AM

Register now. We look forward to seeing you in San Francisco.

Pre-Meeting Outing

Come join the Cyberspace Committee for an excursion on the eve of the Business Law Section Spring Meeting in San Francisco. We are planning a group hike in the Redwoods just north of San Francisco, in Marin County's famous Muir Woods National Monument, which was designated a National Monument by Theodore Roosevelt in 1908 and was the first federal or state park in the Bay Area.

We will have a small bus pick up our group from the Ferry Dock in Sausalito on Wednesday, April 15 at 3:00 pm., following the 2:30 ferry from the Ferry Building in SF. The bus will take us partway up the slopes of Marin's Mt. Tamalpais, for a fantastic view out over the Bay, and to a trailhead, from where we will enjoy a leisurely 1 1/2 - 2 hour hike down into Muir Woods. The bus will pick the group up at the Muir Woods entrance and drive us back to Sausalito for a (non-hosted / pay-on-your-own) seafood dinner at the restaurant FISH in Sausalito by the boat docks on the North side of town (cash only so plan accordingly), after which the bus will take the group back to the Marriott in San Francisco.

The excursion will cost $30 per person, payable 1 week in advance, to cover the transportation, but not including the one-way ferry. The excursion is limited to 25 people. But others can join us, as can those who are arriving later or who don't want to walk in the redwoods, at the restaurant for dinner.

Please RSVP By March 1 to Jon Rubens: Jon@jrlegalgroup.com.

Committee Doings

From the Mobile and Connected Devices Subcommittee

Co-chairs Richard Balough and John Rothchild

Thank you to everyone who attended the subcommittee’s meeting at WWM, and for your valuable input.

Here's a list of the discussion points:

- Remote reconfiguration on the Internet of Things. The subcommittee is sponsoring a panel at the upcoming Spring meeting of the Business Law Section in San Francisco that will address issues arising from the ability of the seller of an Internet-connected device to exert continuing control over the device, such as by rendering it unusable if the buyer misses an
installment payment or modifying the device's functionality for any of a variety of reasons. We are in the process of finalizing our list of speakers.

- **Wearables.** Google Glass wearable displays are undergoing change. Other devices measure health information. What are the legal implications? Privacy issues?
- **Drones.** They still are not legal for commercial purposes without a special FAA permit. When will the rules be released? What will be the effect? What are the privacy implications? What do business attorneys need to know?
- **Connected cars via Bluetooth or insurance apps.** What are the liability issues when vehicle-to-vehicle communications becomes the norm? Self-driving cars?

If you are interested in working on any of the above, or have other topics that you want to develop into publishable materials or a presentation, let us know.

**From the Subcommittee on Cloud, Platform and Analytics**

*Co-Chairs Richard Cohen and Ariane Siegel*

The Subcommittee held its inaugural meeting at WWM. We were pleased to welcome the following people to the Subcommittee: Sue Nolan, David Ma, Val Surgenor, Antonio Porras, Candace James, Jon Rubens, Lisa Lifshitz, Bill Denny, Mike Jerbic, Tom Mcthenen, and Mika Dunn. Anyone else interested in joining the Subcommittee should contact the committee Co-Chairs.

We discussed many aspects of developments in this area with a focus on cloud service level agreements and current developments in the world of data analytics. Upcoming projects include a panel discussion on data analytics at the Spring meeting in San Francisco, a future session on cloud SLAs, and a book project to address cutting issues in these areas. If anyone is interested in getting involved in any of these projects, please let the Co-Chairs Richard Cohen (rcohen@kelleydrye.com) and Ariane Siegel asiegel@signalhilldigital.com know.

**From the Financial Services and Electronic Payments Subcommittee**

*Co-chairs Ed Morse and Steve Middlebrook*

Our Subcommittee met during WWM. Approximately 18 attendees were present for various portions of the meeting, though only 11 signed the roster. Regrettably, Co-Chair Steve Middlebrook was absent due to illness.

After welcoming remarks, we began with a brief presentation by Ryan Hodge of Dwolla, an electronic payments firm. Ryan was also joined by Andy Schroeder, who until recently served as general counsel and director of finance for the company. After an introduction to the operational platform and business model, the presenters took questions from a veritable “shark tank” of industry participants who attended the meeting. We had a vigorous discussion about how Dwolla worked, its regulatory challenges, and various applications, including the one-to-many model for business payments.

We then turned to discuss other developments in the payment space, including the emerging usage of Apple Pay in the retail space. Discussion then moved to the topic of EMV migration in the payment card realm. (EMV stands for Europay, MasterCard, and Visa - the three companies that created the chip-and-PIN payment card standard used in Europe and Canada.) The group noted somewhat limited progress toward issuance of EMV cards and adoption of enabling technology in the retail segment, despite an October 2015 deadline for liability to shift based on EMV adoption. Some Canadian members suggested that their country had experienced as successful transition to EMV, which had resulted in significant fraud savings. Members expressed some interest in having a more extensive discussion of the Canadian example and exploring the economics of investing in EMV-enabling technology, including the locus of costs and benefits within the payment card space. It was noted that without additional technology in the hands of consumers, the online environment will continue to experience fraud challenges despite EMV adoption.

Although there was some discussion of potential needs for small retailers in terms of getting information on the practical and legal implications of the
upcoming changes in EMV rules, interest in pursuing this was limited. However, members did express interest in a comparative discussion of various payment mechanisms. This might involve exploration of the technological and legal implications of each mechanism, providing a primer of sorts for those who are not experts in the payment space with implications for consumers and merchants in each category. For example, we might cover credit cards, stored value cards, Pay Pal, Apple Pay, and others.

The subcommittee is also considering a book proposal and other projects - stay tuned for more details.

**From the Internet Governance Task Force**

*Co-chairs Michael Kelly and David Satola*

"The Right to Be Forgotten" - what is it and how will it impact you or your clients? The European Court of Justice ruled last year that the right to be forgotten is a cognizable legal right, enabling natural and juridical individuals to request internet search companies to block or remove negative content about them after a certain amount of time. Please join the Cyberspace Law Committee's Internet Governance Task Force panel on Friday, April 17 from 2:30 to 4pm in San Francisco to hear the perspective of European and American experts as well as that of the industry which must comply with this new mandate. Google’s office of general counsel will be participating in the panel discussions.

**From the International Trade Subcommittee**

*Co-chairs John Gregory and Hal Burman*

At WWM, the International Trade Subcommittee reviewed a document (available on its web page) by Bill Luddy on recent international developments affecting the law of cyberspace. Some discussion ensued about ‘single window’ initiatives (centralizing the submission of documents needed to get goods across borders). There was considerable interest in the topic in south-east Asia, perhaps because the concept is particularly attractive where goods move by ship. Little interest seemed likely in the US, unless it raised national security issues.

It was noted, however, that if there is an ASEAN standard that the US chooses to adopt, US practice is to apply such practices to all its ports, not just those on the Pacific coast - so businesses using east-coast or Caribbean ports could also be affected.

The security of single window data transfers was mentioned - ‘security’ in the sense of accessibility to intelligence gathering (military or commercial) and in the sense of vulnerability to interference or data corruption. Is it possible that the NSA could intercept the data transfers that single window systems rely on?

It seems useful to focus on the impact of single windows on supply chain management and security, though the topic overlaps with transferable electronic records (notably shipping documents that can also affect financing). We are considering reaching out to other parts of the Section whose clients could be interested, notably banks (their collateral and letters of credit), insurance companies, big users of supply chains (either buyers or sellers - the Walmarts and Targets of the world), pharmacy and food suppliers. We are also considering a *Business Law Today* article on the topic, and a search for author(s) is under way.

**From the Enterprise Technology Subcommittee**

*Co-chairs Candace Jones and Cheryl Burtzel*

The Enterprise Technology Subcommittee had an energetic discussion of open source software licensing and compliance issues at its first meeting at the Winter Working Meeting in Charlotte. Pending litigation may finally answer some fundamental questions about the GNU General Public License, such as what it means to "distribute" open source code.

What should enterprises be doing to comply with open source software license terms, either as developers or as users? The topics discussed included:

- Issues surrounding the distribution and procurement of open source
software:
  - What compliance issues face developers using open source code for their company products?
  - What due diligence and compliance measures should an entity procuring products or services that may contain open source code take or implement?
  - What practical guidance can the subcommittee offer for structuring compliance initiatives, including specific questions that can frame the discussion between lawyers and developers?
  - Appropriate terms and conditions for license and services agreements:
    - What representations and warranties should be included in transactions for products that include open source software components?
    - What disclosures should be made or required?
  - Recent commercial litigation making its way through the state and federal court systems regarding open source code. These include: XimpleWare Corp. v. Versata Software, Inc., Case No. 3:13-cv-05160-SI (N.D. Cal.), which continues to include as defendants Ameriprise Financial Services, Inc. and various of its affiliates, and which had at one time also included as defendants United Healthcare Services, Inc., Pacific Life Insurance Co., Prudential Insurance Company of America, Wellmark, Inc. and Aviva USA Corp.; Versata Software, Inc. v. Ameriprise Financial, Inc., Case No. A-14-CA-12-SS (W.D. Tex.) (remanding to state court); and Versata Software Inc. v. Ameriprise Fin., Inc., No. D-1-GN-12-003588 (Tex. Civ. Dist. Ct.).

The meeting concluded with a discussion of potential projects for the subcommittee, including future presentations at Business Law Section meetings as well as the production of written checklists or desk references for practitioners dealing with open source matters.

Participation in Subcommittee projects or discussions is welcome and invited. For more information, please contact the Enterprise Subcommittee Co-chairs Candace Jones at candace.jones@ny.frb.org or Cheryl Burtzel at cburtzel@dwmrlaw.com.

From the Non-US Cyber Law Task Force
Chair Robert Bond

The Task Force met for the first time at WWM. Its objective is to identify non-US cyber laws and regulations, particularly those that apply extraterritorially, which have an significant impact on US corporations domestically and in their international activities.

A number of topics were discussed and suggested, including:

- Strategic issues like the EU General Data Protection Regulation;
- Data breach notification laws;
- Data security and cyber risk;
- Jurisdictional issues;
- The impact of data breaches on the value status of trade secrets;
- Enforcements and fines/cost of non-compliance;
- Laws that impacted on US corporates that has now been relaxed with the focus on sanctioned and formerly sanctioned countries such as Cuba.

Various names were suggested as Task Force recruits - those efforts are ongoing. The Task Force is also considering proposing a presentation for the Business Law Section's annual meeting this fall, perhaps on the impact of case law such as the rule in Rylands v Fletcher and the TJ Hooker case. If you are interested in joining or have suggestions, please contact one of the co-chairs.

From the Publications Committee
By Sarah Jane Hughes

The "Publications" meeting at the WWM drew its largest attendance in some years, including by many first-time WWM attendees. Welcome to everyone who was new! We discussed three book projects, several "white paper" or article projects, and the value of short articles for Business Law Today, the Section's
online publication. We also heard from Juliet Moringiello, the committee's liaison to the Section's Publications Board, Lisa Lifshitz, the committee's liaison to Business Law Today, and former committee chair Jonathan Rubens, who is spearheading projects with other BLS committees. John Rothschild reminded attendees that the call for contributors to the 2015 Survey of Cyberspace Law would be out in March.

Attendees registered their interests in particular projects that are planned for this year or next, including a new e-payments book project to be headed by Stephen Middlebrook and others and Richard Cohen's Cloud Analytics book project. Both projects are recruiting authors so contact Steve at stm@aol.com or Richard at rcohen@kelleydrye.com if you may be interested.

If you have other ideas for publications - whether books, full-scale law-journal-style articles for The Business Lawyer, shorter articles for Business Law Today, or practical check-lists to distribute to other practitioners - please let Juliet (jmmoringiello@widener.edu) or Sarah Jane (sjhughes@indiana.edu) know at your earliest convenience. Thanks to everyone who attended.

New Electronic Contracting Projects
By Juliet Moringiello

At the Winter Working Meeting in Charlotte, an enthusiastic group of CLC members convened to discuss whether to form a subcommittee on electronic contracting practices. Although that subcommittee has not yet been formalized, the group did decide to pursue three areas of interest. The first is a project to examine cases involving successful and unsuccessful modifications of online contracts and to recommend strategies for modifying online agreements effectively. The goal is to develop an article for The Business Lawyer on the topic. Two members proposed two other projects. One is a project to develop model web site terms of use. The other is to explore the ways in which terms of use for "smart goods" conflict with traditional property principles. If you are interested in any of these projects, please contact Juliet Moringiello at jmmoringiello@widener.edu.

Programs of Interest

The 2015 Nova Law Review Symposium, New Media and Old Metaphors, a joint production with the NSU Sports and Entertainment Law Society, is February 12-13, 2015. For those unable to attend, live streaming will be available at no cost. See: https://www.nsulaw.nova.edu/students/orgs/lawreview/symposium/index.cfm

The program will feature six panels plus round table discussions. Topics include speech, film, fair use, allied rights, copyright and terminations, and new technologies. Registration includes 9 CLE credits in Florida, and 7.5 CLE credits in Minnesota (for live attendance only). The registration fee includes breakfast, lunch, reception, and all published materials. Two- and one-day registrations are available.

Cybersecurity and Understanding the Practice Setting: Government and Public Interest
February 19, 2015
Location: N/A
Format: Webinar

Current, Compelling, and Ethical Websites for Law Firms
February 24, 2015
Location: N/A
Format: Webinar

Get Off My Cloud! Keeping the Bad Guys (and the NSA) Away From Your Confidential Data
February 25, 2015
Location: N/A
Format: Webinar

http://apps.americanbar.org/buslaw/committees/CL320000pub/newsletter/201502/
Mission Intractable? Protecting Trade Secrets and Confidential Information in Cross-Border Deals in Asia
February 26, 2015
Location: N/A
Format: Webinar

March 5, 2015
Location: N/A
Format: Webinar

Privacy, Security, and the Internet of Things: The Looming Crisis
March 10, 2015
Location: N/A
Format: Webinar

Encryption for Lawyers: The Time Has Come
March 17, 2015
Location: N/A
Format: Webinar

30th Annual Intellectual Property Law Conference
March 25-27, 2015
Location: Bethesda, MD
Format: In-Person Conference

A Note from the Editor
Have you written a scholarly article or spoken about a topic your fellow committee members would be interested in? Let me know! Member contributions are always welcome, and are due by the 25th of each month. I also hope to see many of you at upcoming ABA meetings.