Message from the Chair

Dear Cyberspace Colleagues:

It was good to see many of you—including a number of newer members—at the Business Law Section Spring Meeting in San Francisco last month.

Co-chairs from three of our subcommittees/task forces led well-attended, very interesting CLE programs on "Losing Control: Who Owns Your Devices Now that They Are Connected to the Internet," "The Right to Be Forgotten: What Your U.S.-Based Business Clients Need to Know about the EU Rule," and "Data Privacy Due Diligence in M&A Transactions." Many thanks go to John Rothchild of the Global and Connected Devices Subcommittee, David Satola and Mike Kelly of the Internet Governance Task Force, and Robert Bond of the Non-U.S. Cyber Regulations Task Force for organizing and moderating the programs. If you could not attend these-or any other-CLE programs, you can access the materials through this link.

We also held a full day of meetings with an hour dedicated to each of our subcommittees and task forces. At the full Cyberspace Law Committee meeting, we were privileged to have Nithan Sannappa, an attorney in the FTC's Division of Privacy and Identity Protection, join us. He shared updates and priorities related to the FTC's activities in the areas of privacy enforcement (with a focus on user interface and design) and cybersecurity (how information flows through products and their vulnerabilities). Read below for updates from each subcommittee/task force on the group's projects as discussed at the San Francisco meetings.

The deadline for submitting proposals for the BLS Annual Meeting is May 22. If you have a proposal for a CLE program that you would like the Cyberspace Committee to sponsor, please see the article below with details about submitting that proposal.

I encourage all of you—especially our new members—to get involved with all of our committee's projects. If you have suggestions or questions, please let me know.

Ted Claypoole, Chair

Program Proposals for BLS Annual Meeting in September

Planning is underway for the Business Law Section Annual Meeting, which will take place September 17-19 in Chicago. The Cyberspace Law Committee has always produced excellent CLE programming for the spring and annual meetings, and we look forward to doing the same this fall with your help. We need your CLE Program Proposals by Monday, May 18. Please send them to Committee Chair Ted Claypoole and Vice-Chair Cheryl Dancey Balough.

For each proposal, please provide us with:

- A proposed program title
- Three key topics the program will cover
- How long the program should last-60, 90, or 120 minutes
- Which other BLS committees will (or should) co-sponsor the program
- Your thoughts about panelists (can be by position rather than name-for example, in-house counsel from a CPG company or UCC professor)
As you put together your proposals, keep in mind that the audience is business attorneys. Because a variety of attorneys attend BLS Annual Meeting, there is demand both for niche programs targeting more experienced lawyers with focused practice areas and for basic-level programs.

Answers to some frequently asked questions:

- Do panelists have to register for the meeting? Yes, although fee waivers and travel expense reimbursements may be granted to two panelists per program.
- Do panelists have to have PowerPoints or other materials? Each panel needs to have original materials so that the program can offer CLE.
- Are there requirements for the types of panelists? BLS is committed to diversity, and each panel should have at least one lawyer speaker who is of color, female, with a disability, young, or identifying as gay, lesbian, bisexual, or transgender. You do not need to identify diversity at this point in the process.
- Is the program proposal deadline firm? Yes. Cyberspace Committee leadership needs to review all proposals the week on May 18, back to you with any questions, and then submit selected proposals that week to BLS leadership. Therefore, we must have your proposals by May 18.
- When do I need to have the final program put together? If your proposal is accepted by BLS, you will need to submit a more detailed program information form with meeting description and speaker information by July 3 and then program materials and speaker releases by August 7.

We look forward to receiving your proposals for CLE programs to be sponsored by Cyberspace Law Committee at BLS Annual Meeting. If you have any questions, please contact Ted Claypoole (tclaypoole@wcsr.com) or Cheryl Dancey Balough (cbalough@balough.com). Thanks very much.

Committee Doings

From the Mobile and Connected Devices Subcommittee

Co-chairs John Rothchild and Richard Balough

Our subcommittee meeting in San Francisco began with a presentation about the principal legal issues that the Internet of Things raises, which led into a brainstorming session on what the subcommittee should tackle as its next project. We mainly addressed two possible subjects: airborne drones and autonomous terrestrial vehicles. There was a consensus that the latter would be the more fruitful subject. We discussed the possibility of organizing a program for the upcoming section meeting in Chicago.

The CLE program that the subcommittee organized for the San Francisco meeting, titled "Losing Control: Who Owns Your Devices Now That They Are Connected to the Internet?,” was a great success. There were excellent presentations from the four panelists, and lots of audience participation in the Q & A session after the presentations.

From the Non-US Cyber Laws Task Force

Chair Robert Bond

The Non US Cyber Laws Task Force met on April 16 in San Francisco to review the collation of "Gotcha" laws - foreign cyber laws that have extra territorial impact on US businesses. Chaired by Robert Bond, the Task Force decided to focus on EU, Canada and other key jurisdictions including Russia, Japan and southeast Asia. The objective is to produce an analysis of the laws and regulations and in due course produce an online toolkit or app. We also considered a panel presentation for next year’s Business Law Spring meeting in Montreal.

We are looking for volunteers to help complete the analysis work. If you are
interested, please email Robert (robert.bond@crsblaw.com).

From the Enterprise Technology Subcommittee

**Co-chairs Cheryl Burtzel and Candace Jones**

The Enterprise Technology Subcommittee focused on two topics at the Spring Meeting: open source and behavioral marketing. The Subcommittee will launch a quick project to write a practical article about software license provisions that require the vendor to disclose and make certain representations and warranties regarding open source components. What is the practical purpose of those provisions and what further diligence should be done based on the information disclosed? The piece will offer negotiation and drafting tips. If you have guidance you would like to contribute, please email the Subcommittee co-chairs, Cheryl Burtzel and Candace Jones.

The Subcommittee is also looking for a volunteer to draft a short article suitable for publication in *Business Law Today* about the open source questions posed by Ximpleware Corp. in its lawsuit to enforce the open source license for its parsing software. *XimpleWare Corp. v. Versata Software, Inc.,* Case No. 3:13-cv-05160-SI (N.D. Cal.), was settled in February 2015 leaving for another day a number of important questions about using open source code, including, for example, what it means to "distribute" a product that includes open source code licensed under the GNU General Public License.

The Subcommittee is also planning to take on a project to provide guidance to companies about keeping their privacy policies in line with behavioral marketing innovations, including combinations of personal data collected across multiple platforms and multiple devices. Marketing departments may not always connect the dots effectively or in a timely manner between technologies that deliver customer profiles and other information collected, purchased, or traded to build more targeted marketing programs. The Subcommittee wants to explore developments in the behavioral marketing sector and relate them back to typical examples of privacy policies to illustrate where privacy policies might not be keeping up. We hope to organize a program for the Section Annual Meeting in Chicago this fall.

Cheryl can be reached by email at cburtzel@dwmrlaw.com, and Candace can be reached by email at Candace.Jones@ny.frb.org

From the International Trade Subcommittee

**Co-chairs Hal Burman and John Gregory**

The International Trade Subcommittee met during the spring meeting to discuss a variety of initiatives being taken by international bodies around the world that may affect American businesses doing e-commerce abroad. The group updated members on these efforts and discussed how to set priorities for reviewing the work being done abroad and recruitment of volunteers to read and comment on the document for the group.

The United Nations Commission on International Trade Law (UNCITRAL) has two major initiatives, one on online dispute resolution and one on electronic transferable records. The Subcommittee has held a conference call on the latter topic and will hold another in the first full week of May, in preparation for the UNCITRAL working group's meeting later in the month. The views of the Subcommittee are passed on informally to the US government (the head of the US delegation often participates in the calls) and to the UNCITRAL Secretariat.

The meeting also discussed prospects for UNCITRAL's work after the transferable records project is completed. A strong possibility, promoted by the EU and also by elements of the ABA - including the Cyberspace Committee - is identity management. Tom Smedinghoff is involved in these discussions.

Regional bodies active in e-commerce matters include the United Nations' Economic Commission for Europe (UN/ECE) through its Centre for Trade Facilitation (CEFACT). It has been looking at a Russian proposal to establish a trust framework for authenticating commercial documents. The Subcommittee
held a conference call before the Spring meeting on that topic, and has held another since the meeting to continue review of the document. This will continue when the next draft of the Russian proposal is available.

Some Asian organizations, notably the United Nations Economic Commission on Asia and the Pacific (UNESCAP), have been considering authentication issues as well, often in the context of 'single-window' border-crossing facilities. The Subcommittee has reviewed the latest text from that initiative at conference calls earlier in 2015.

Any member of the Committee interested in knowing more about, or better, getting involved in, the work of the Subcommittee should contact either of the co-chairs. Notice of the conference calls is given through the Subcommittee's listserv, which can be subscribed to from its web page. The calls deal with both strategic and technical legal aspects of the work. They are generally joined as well by some knowledgeable members of the ABA's Science and Technology Section.

### Member News

Hal Burman, Roland Trope, and Sarah Jane Hughes joined with David Brummond of DLA Piper (formerly Senior Sanctions Advisor at OFAC) to present a CLE program on Friday, May 1st, at the Spring Meeting of the International Law Section. Entitled "Reckoning with Iran: Transacting Amidst the Tightening or unwinding of Sanctions," with Hal moderating, the presenters discussed the state of play on the P5+1 negotiations, S. 615, and the likelihood of and probable schedule for unwinding the sanctions programs currently prohibiting U.S. Persons from exporting to Iran or otherwise dealing with Iran, depending on various potential schedules and conditions that may affect the unwinding process.

Roland, David, and Sarah Jane previously presented a CLE on U.S. sanctions programs and the value of voluntary self-disclosure at the 2013 Business Law section meeting in D.C., which was co-sponsored by CFSC's International Payments subcommittee then chaired by Roberta Torian, and by the Electronic Payments subcommittee of the Banking Law Committee then chaired by Rob Hunter.

CLC members interested in updated materials prepared by Roland and Sarah Jane for the May 1, 2015 CLE should email Sarah Jane at sjhughes@indiana.edu.

On April 29 David Delaney, joined by Indiana University colleague Dr. William Barnett, delivered a presentation titled "Cybersecurity Leadership" during the annual conference of Indiana University's Tobias Center for Leadership Excellence. The executive-level presentation describes a process through which organizations can develop leaders endogenously to improve their security practices and shape external cybersecurity debates. Drawing upon scholarly leadership research and the presenters' experience in executive cybersecurity positions, the presentation also identifies examples of innovative and effective cybersecurity leadership. Presentation slides can be accessed here https://scholarworks.iu.edu/dspace/handle/2022/19818.

Some committee members and friends kicked off the Spring Meeting with a hike among the redwoods of Muir Woods National Monument and dinner. Lisa Runquist shared a few photos of the expedition:
Golden Gate Bridge, from the ferry

Where are we?

Now we know!
Tall trees

Among the trees

Rest stop
Privacy Officers for Life
By Robert Bond

As you are reading this article, the US telecommunications giant AT&T is collecting the staggering amount of $25 million to be paid to the US Federal Communication Commission (FCC) and appointing a Compliance Officer who must be privacy certified.

AT&T has entered into the settlement with FCC to resolve an investigation on whether AT&T failed to protect the confidentiality of 51,422 customers' data. The settlement will impact not only AT&T's financial performance results, but also it will affect the way companies such as AT&T conduct their business when it comes to safeguarding consumer personal data.

So what did happen?

For more than six months in late 2013 and early 2014, employees in Mexico, Columbia, and the Philippines call centres, with systems maintained and operated by AT&T and subject to the company's data security practices, used their login credentials to access customers' accounts and grab their names and last four digits of their Social Security numbers. This was used by mafia gangs to submit 290,000 handset unlock requests for mobile phones through AT&T's website. The FCC concluded that AT&T security measures failed to prevent or timely detect the ongoing breach.

By allowing unauthorised access to customer data, AT&T failed to secure customers' proprietary information and therefore violated its statutory duty under the Communications Act.

The privacy certificate is a must

In light of the severity of the case, the FCC has issued a wide range of duties and obligations to be observed by AT&T, among them the requirement to appoint a certified Privacy Officer. In addition to general privacy knowledge the Privacy Officer must have specific knowledge of information security principles and practices that are necessary to implement the requirements of the FCC decision. One of the new requirements is to ensure that the Privacy Officer is privacy certified by an industry certifying organisation and must keep up to date by continuing his or her privacy education. This is the first decision of this kind that requires a privacy certification when appointing a privacy compliance officer.

Impact on companies

FCC suggested looking at the decision as guidance for other companies that process personal data. The FCC decision shows the importance of putting the consumer first not only when it comes to creating and selling products, but especially when it comes to protect consumers' valuable information. At the same time, by requiring the appointment of a certified Privacy Officer, the FCC has officially recognised the role of the privacy officer as a career speciality.

Telecoms are expected to step up and take "every reasonable precaution" to protect their consumers' data. Companies who fail to create appropriate technological and organizational measures will face not only civil penalties from enforcement agencies, but may experience a decline in consumer trust, which eventually may lead to drop in share prices and possible job losses. Just last year, the data breach suffered by the US retailer Target cost $148 million in revenues and some top executive jobs.

When creating a compliance programme, companies should appoint a privacy certified employee who will have not only wider experience in building a compliance programme, but also understands what is required to preserve and maintain the consumer's trust when handling their private information.
Other Programs of Interest

The FCC's New Net Neutrality Rules: A Modernist Or Outdated Regulatory Approach For The Information Age
May 14, 2015
Location: N/A
Format: Webinar

Cybersecurity Summit
May 18, 2015
Location: Washington, DC
Format: In-Person Conference

Independent Contractors and the Sharing Economy: Uber, Lyft, and other "Tech" Business Models
May 19, 2015
Location: N/A
Format: Webinar

Cloudy With a Chance of Security
May 19, 2015
Location: N/A
Format: Webinar

The committee's own Jon Rubens will be leading a free webinar for the Business Law Section on May 28 called "Privacy & Data Security Soup to Nuts". This will be the first in the new BLS series of free webinars, "Business Law Basics", a companion to the successful "In the Know" series of free webinars. The program is a reprise of the program Jon did with Lisa Lifshitz and Michael Fleming as part of the Institute for the Young Business Lawyer in 2013 and 2014. This time around, joining in the fun will be our own Ted Claypoole and Richard Balough, and once again Lisa Lifshitz (of Toronto) will provide some input on non-US privacy law.

Dealing With Cybersecurity Threats & Breaches
May 28, 2015
Location: N/A
Format: Webinar

Committee member Lisa R. Lifshitz is the Course Leader at the upcoming "Cloud 2.0 - Drafting and Negotiating Effective Cloud Computing Agreements" conference on June 1 in Toronto. More details are here.

A Note from the Editor

In addition to reporting on the committee's work and what its members are up to, we'd like the newsletter to include articles on topics of interest to members. Articles should be 250-500 words, timely, and original content not already published elsewhere. To submit an article or ask questions, please contact the editor, Lois Mermelstein.

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