Cyberspace Lawyers,

Welcome to winter, where a lawyer's thoughts should turn to the Cyberspace Law Committee Winter Working Meeting in Ft. Lauderdale, Florida on January 29 and 30. Those of you who have attended past meetings know that this is a top event for anyone interested in digital technology and how it affects the law. There will be CLE, books and articles to work on and excellent lawyers from government, academia, corporations and private practice with a deep understanding of this field.

Those who have not attended should consider joining us for two days. You will find friends and mentors. You will learn about interesting new resume-building projects that need your help. You will remain warm in an otherwise cold time of year, and you will eat well. The price is small and the rewards are great. You don't have anything interesting going on that weekend anyway. Join us. You can build it into your CLE budget. See the details below, but this is a welcoming fraternity of like-minded travelers. We would like to see you there.

Ted Claypoole
Chair

2016 Cyberspace Law Institute and Winter Working Meeting

January 29-30, 2016
Fort Lauderdale, FL

The time is fast approaching to pack your bags and head to sunny Florida for the 2016 Cyberspace Law Institute and Winter Working Meeting. But first you need to register for the meeting, which will include at least 4.5 hours of CLE credit.

The agenda includes programs on:

- Latest developments in e-contracting
- Questions and potential changes to the legal framework related to data ransoming
- Trans-Atlantic data transfers since the ECJ has deemed the safe harbor invalid
- Cyberspace law year in review
- FINRA cybersecurity examinations, investigations and enforcement actions
- How the blockchain technology may reshape financial services
- The draft Regulation of Virtual Currencies Act
- Limits on Section 230 and DMCA protection for internet intermediaries

There are also many opportunities to collaborate with cyberspace law colleagues on a number of projects led by our subcommittees and task forces, including publications and programs to be presented at Business Law Section meetings in 2016. And, of course, we have multiple opportunities for networking.

The cost for ABA members is just $295 and includes the CLE programs, committee meetings, roundtables, two breakfasts, lunch on Friday, a cocktail party, and transportation between the Sonesta Fort Lauderdale Beach and Shepard Broad Law School, where meetings will be held. CLE begins early
Friday morning, so plan to arrive on Thursday, January 28. We will wrap up CLE and meetings by early afternoon on Saturday, January 30. Register now and remember to reserve your hotel room at the discounted rate. We look forward to seeing you in January.

2016 Business Law Section Spring Meeting

The BLS 2016 Spring Meeting will take place in Montreal on April 7-9. Registration is open. Make sure your passports are up to date so you can take advantage of dozens of CLE programs and a full slate of committee/subcommittee meetings. Cyberspace Law's CLE offerings include programs on:

- "The Emerging Cashless Society"
- "Cybersecurity Due Diligence in M&A Transactions"
- "Protecting Your Brand in a Complicated Internet Landscape"
- "Avoiding Traps in Digital Technology Acquisition: License, Development and Service Agreements"
- "What Business Lawyers Need to Know about Privacy Law" (part of Young Lawyers Institute)

Lisa Lifshitz and Ariane Siegel are also organizing both a joint committee dinner on April 7 and a fun activity for Cyberspace Law members on April 6. Plan now to arrive early.

Update from ICANN-54: The IANA Transition

By Michael Kelly and David Satola, Co-chairs, Internet Governance Task Force

In October 2015, ICANN held its 54th meeting in Dublin, Ireland (ICANN 54). Among the rich programming were updates from various committees on the impending transition of certain technical functions regarding the running of the Internet - the so-called "IANA functions" - away from the current model of loose supervisory control via "contract" with the National Telecommunications & Information Administration (NTIA) of the U.S. Department of Commerce, to perhaps an even looser form of supervision by an as-yet undefined international multi-stakeholder group. Originally scheduled for completion by September 2015, NTIA announced shortly before Dublin 54 a delay, until at least 2016, of the transition of these IANA functions.

By way of background, ICANN stands for the International Corporation for Assigned Names and Numbers. Founded in 1998, ICANN, a California not-for-profit corporation, oversees a range of Internet technical matters such as management of domain names and root name servers, as well as numbering facilities that include Internet protocol addresses for IPv4 and IPv6.

ICANN accomplishes these vital tasks mainly through IANA. IANA stands for the Internet Assigned Numbers Authority, which predates ICANN by 10 years (ICANN was created to house IANA). Since its inception, ICANN has performed and overseen the IANA functions pursuant to a series of contractual arrangements with NTIA.

Read more...

Report from the ABA Cybersecurity Task Force Meeting

By Candace Jones

The ABA Cybersecurity Legal Task Force met in Washington, D.C. in mid-
November. The Task Force was organized several years ago by the Office of the ABA President to identify and compile resources within the ABA that pertain to cybersecurity and to focus and coordinate the ABA’s legal and policy analyses and assessments of proposals relating to cybersecurity.

A request to the Task Force spawned a significant current Cyberspace Committee project - the M&A Cybersecurity Due Diligence Guide. Tom Smedinghoff and Roland Trope are leading a group of authors in writing a book to help transaction lawyers through due diligence activities that focus on cyber risk. Task Force Committee Chairs Judith Miller and Harvey Rishikof were pleased to know that the Cyberspace Committee is producing a resource to broaden the awareness of cybersecurity issues among business lawyers.

Task Force members noted the need to raise awareness of technology issues and cyber risk among lawyers, generally, and the particular challenges faced by small businesses, including small law firms. Since its inception, the Cyberspace Committee has been at the cutting edge of that effort for the Business Law Section, introducing technology issues to Section members with materials and presentations that provide practical tools for general business lawyers. Cybersecurity presents another opportunity for the Committee to contribute to lawyers' understanding of the parallel evolution of law and technology. Also, because it is the mission of the Task Force to make cybersecurity resources more widely available through its public website, the Cyberspace Committee may have opportunities to publish appropriate content there.

The Task Force plans to meet briefly each month. As a new member of the Task Force, I am still learning about its work. I am also interested in questions or ideas you would like to share with the Task Force. You may contact me at Candace.Jones@ny.frb.org.

Committee Doings

Update on A Handbook on Social Media Law for the Business Lawyer
Chair John Isaza

We are happy to report a tremendous response to a proposed outline for this upcoming book. Almost all chapters are already assigned, but there may still be opportunities to collaborate on individual chapters. We will plan to discuss this at the winter meeting in Fort Lauderdale. If you will not be able to attend, please remember that we always facilitate a conference line, should you wish to join us by telephone.

We are so excited to see this project take flight. Thank you for your enthusiasm.

Here is the current outline:

1. Introduction (assigned to John Isaza, Lead)

This handbook will deal with social media laws and related governance principally in the US. It is intended simply as a high level "checklist" of considerations, as opposed to a detailed tome on the issue. Furthermore, given the global nature of corporate business, the use of social media compels US lawyers with international clientele to have an understanding of other jurisdictions. Therefore, this handbook will contain separate chapters on social media law in (i) the UK and Europe; (ii) Canada; and, (iii) Asia. These chapters will highlight both specific issues and the jurisdictional differences in the respective territories.

2. Definition of Social Media / What is Social Media /Summary of challenges (assigned to Val Surgenor, Lead)

3. Employees and Social Media (assigned to Natasha Dorsey, Lead and Tom White)
   - Use as a tool in recruitment of employees - what can and can't you do?
What are the risks to the organisation in using social media tools in the vetting and recruitment process?
- Social Media Policies and setting boundaries for employees. How to deal with employees who breach the rules
- Cyber-bullying

4. Social Media Governance (assigned to Adam Nadelhaft, Lead and Alex Gavis)
- Legal Counsel and approaching the Board
- Social Media policies - to protect brand and reputation. What are the permissible rules of engagement?
- Social Media Training
- BYOD
- FTC's social media disclosure guidelines
- When it goes wrong? Social Media Crisis management plan
- Financial services concerns (assigned to Alex Gavis)

5. Cyber Security and Risk (assigned to Paul Lanois, Lead and Dan Klein with Paul Beattie)
- Hacking
- Theft of corporate details
- Identity Theft
- Astro-turfing
- Data loss, data breach and notification rules (assigned to Paul Beattie)
- Recovery of data
- Cyber Insurance
- Applicable Legislation - Computer Fraud and Abuse Act 18 USC 1030 (CFAA)

6. Ownership Issues (assigned to Martha Katz, Lead and Sara Beth Kohut)
- Personal social media accounts and corporate social media accounts
- Right to be forgotten - how can this be dealt with in the social media context?
- Accessing accounts of the deceased (assigned to Sara Beth Kohut)

7. Intellectual Property Law (assigned to Paul Beattie, Lead)
- Copyright;
- Creative Commons;
- Trade Marks;
- Designs.

- False and actionable postings; both organizational and user generated content; ISP defense and service provider liability.
- Privacy by design
- Evidential matters - admissibility of evidence in court
- Special court issues - tweeting and use of social media from court?

9. Lawyer Ethics Considerations (assigned to Jerry Cohen, Lead and Sara Beth Kohut with Molly DiBianca)
- Ex Parte Communications
- Investigations
- Misleading Statements

10. UK and European Social Media Legislation and Other Specific Matters (assigned to Val Surgenor, Lead and Pamela Egan)

Particular legislation in the UK
- Consumer Protection form Unfair Trading Regulation 2008 and unfair trading generally - Social Media Advertising
- Data Protection Act 1998 and proposed GDPR (European Wide)
Disclosure and Transparency Rules
Communications Act 2003

Russian perspective (assigned to Pamela Egan)

11. Canadian Social Media Legislation and Other Specific Matters (assigned to David Ma, Lead)

12. Asian Social Media Legislation and Other Specific Matters (unassigned)

Endnotes (v. footnotes)

Appendix: For further information, see..... (identify other useful resources on the topic)

From the Identity Management Legal Task Force
Chair: Tom Smedinghoff

The Identity Management Legal Task Force will be holding a meeting in conjunction with The World Bank and the Open Identity Exchange on January 14, 2016, to discuss identity management legislation. The European Union and Virginia have already enacted significantly different versions of identity management legislation. As well, two major identity management legislative initiatives are in the works. The United Nations Commission on International Trade Law (UNCITRAL) has agreed to undertake a project to develop international legal rules for identity management. And in the U.S., the Uniform Law Commission is considering a proposal recommending the appointment of a committee to draft uniform identity management legislation for enactment by the fifty U.S. states. In light of these developments, the meeting will focus on a possible path forward for such legislation both in the U.S. and internationally. The meeting will be held at the World Bank in Washington, DC. Please contact Tom Smedinghoff at Tom.Smedinghoff@lockelord.com to register or for further information.

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

The International Trade Subcommittee held two conference calls in November, one focusing on the meeting of the UNCITRAL Working Group on Electronic Commerce and its draft provisions on electronic transferable records, and the other on possible future work of the UNCITRAL group on identity management, with comparative views of developments on that topic at the UN Centre for Trade Facilitation (CEFACT), in the EU and in the Asia-Pacific region.

The Subcommittee will pursue discussions in December on these topics, including updates on the recent meeting of the Working Group and the possibility of ABA input. It will also do an initial review of potential UNCITRAL work on cross border cloud issues (data rights, typical contract issues, jurisdiction, etc.) and basic approaches we might take on proposals for identity management.

From the Electronic Payments and Financial Services Subcommittee
Co-chairs Ed Morse and Steve Middlebrook

We have excellent news to report: Our committee's book proposal, "Electronic Payments in the 21st Century", has been formally approved for development by the ABA. Ed Morse will serve as editor, and he is in the process of recruiting the all-star cast of chapter authors to join in on this work. If you are interested, please contact Ed (morse@creighton.edu or 402-280-3091).

Ed Morse will also be developing "The Emerging Cashless Society", which is one of the Committee's sponsored programs scheduled for Friday, April 8, 2016, at the Spring Meeting in Montreal. This program, which is the brain child of longtime member Denis Rice, will explore legal, social, and economic benefits and challenges associated with alternative payment systems. If you have suggestions for content, feel free to contact Ed.
We are looking forward to seeing many of you at the upcoming WWG program in Fort Lauderdale. In addition to scheduled CLE programs, our Electronic Payments subcommittee will meet for a roundtable discussion of current developments in the payments space. Please come join us!

From the Mobile and Connected Devices Subcommittee
Co-chairs: Richard C. Balough and John Rothchild

At the subcommittee's meeting at September's Annual Meeting of the Business Law Section, co-chair John Rothchild discussed the Copyright Office's consideration of new exemptions to the Digital Millennium Copyright Act anti-circumvention provisions. We focused on two proposed exemptions that might affect mobile and connected devices. Over the objections of car manufacturers, the Copyright Office has granted two exemptions where circumvention would be fair use.

The first exemption allows an "authorized owner" to diagnose, repair, or "lawfully" modify the code as long as such information does not violate other statutes. This exemption retains the ability of car owners to work on their own vehicles as long as they do not make modifications that would disable or downgrade pollution control systems in violation of the Environmental Protection Act. However, the exemption does not apply to computer programs chiefly designed to operate a vehicle's entertainment and telematics systems.

The second exemption permits security research "for purposes of good-faith testing, investigation and/or correction of a security flaw or vulnerability, when such activity is carried out in a controlled environment designed to avoid any harm to individuals or the public." This exemption was opposed by car manufacturers who claimed that the security research could be used by "bad actors" to hack into cars.

In another development relating to cars and cyberspace, McAfee Labs in its 2016 Threats Prediction noted that cyberattacks on automobiles in 2016 and beyond will increase "likely resulting in lost lives." The McAfee report said the cyberattack problem is acute because there has been a rapid deployment of hardware in cars connected to the internet and much of the hardware is "built without foundational security principles," leaving the systems vulnerable to cyberattack. In order to protect cars and drivers, the interconnected systems should include features such as "secure boot, trusted execution environments, tamper protection, isolation of safety-critical systems, message authentication, network encryption, data privacy, behavioral monitoring, anomaly detection, and shared threat intelligence." Unfortunately, McAfee says, "many connected cars lack some or most of these security features."

Member News

Valerie Surgenor and David Flint of MacRoberts LLP will be presenting at the Cyberspace Law Institute and Winter Working Meeting in Fort Lauderdale 29-30 January 2016. Valerie and David will take the opportunity to examine the European Court of Justice decision in Maximillian Scherms v. Data Protection Commissioner which deemed the Safe Harbor mechanism, by which data could be exported from the European Union to the United States, to be invalid for reasons of not providing adequate data protection. The decision sent shockwaves through the commercial world and pushed trans-Atlantic data transfers into murky waters. This aftermath will be considered as well as what progress Europe and the United States have made in the bid to formulate a "Safe Harbor 2.0."

On December 1, Sarah Jane Hughes testified at a hearing called by the Senate Banking Committee on mobile payments. She has also been interviewed numerous times -- by the American Banker, the New York Times, the Boston Globe, and the New York Business Journal -- since AG Schneiderman issued the cease and desist orders to FanDuel and Draft Kings, mostly about payments issues and de-risking challenges.
Upcoming Programs of Interest

The Internet of Things: The IP Impact of IoT Innovations  
December 15, 2015  
Format: Webinar

Government Contracting on the Cybersecurity Frontier: Cyber Landmines, Compliance Risks, and Emerging Rules  
December 17, 2015  
Format: Webinar

Flying on the Legal Edge with Drones: Emerging Acquisition, Security, and Regulatory Issues for Unmanned Aerial Vehicles  
January 12, 2015  
Format: Webinar

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 (including on your firm's website). To submit an article or ask questions, please contact the editor, Lois Mermelstein.
Update from ICANN-54: The IANA Transition

By Michael Kelly and David Satola, Co-chairs, Internet Governance Task Force

In October 2015, ICANN held its 54th meeting in Dublin, Ireland (ICANN 54). Among the rich programming were updates from various committees on the impending transition of certain technical functions regarding the running of the Internet – the so-called “IANA functions” – away from the current model of loose supervisory control via “contract” with the National Telecommunications & Information Administration (NTIA) of the U.S. Department of Commerce, to perhaps an even looser form of supervision by an as-yet undefined international multi-stakeholder group. Originally scheduled for completion by September 2015, NTIA announced shortly before Dublin 54 a delay, until at least 2016, of the transition of these IANA functions.

By way of background, ICANN stands for the International Corporation for Assigned Names and Numbers. Founded in 1998, ICANN, a California not-for-profit corporation, oversees a range of Internet technical matters such as management of domain names and root name servers, as well as numbering facilities that include Internet protocol addresses for IPv4 and IPv6.

ICANN accomplishes these vital tasks mainly through IANA. IANA stands for the Internet Assigned Numbers Authority, which predates ICANN by 10 years (ICANN was created to house IANA). Since its inception, ICANN has performed and overseen the IANA functions pursuant to a series of contractual arrangements with NTIA. The IANA functions (see figure 1) include:

1. Coordination of the assignment of technical Internet protocol parameters;
2. Administration of certain responsibilities associated with Internet DNS root zone management;
3. Allocation of Internet numbering resources; and
4. Other services related to the management of .ARPA and .INT top-level domains.
The contractual oversight arrangements between ICANN and NTIA began in 1998 with the so-called “Memorandum of Understanding” which has evolved through a series of iterations to the arrangement that is now in place, the 2009 “affirmation of commitments.” With each iteration, the U.S. government has slowly relinquished control and oversight of the IANA functions performed by ICANN. (see figure 2).

ICANN embraces the multi-stakeholder model as its governing philosophy. Its organizational chart shows the various constituent bodies it comprises (See figure 3).
Within ICANN, this means that national governments are joined by civil society, private interests, multinational corporations and non-governmental organizations at each of its thrice annual week-long public meetings (like ICANN 54 in Dublin) so that input may be collected on all policy and technical issues, assimilated, and added to the ongoing conversation of the various groups and sub-parts of the ICANN organization. Consequently, ICANN treats public sector, private sector, and technical experts as equals in governance. The multi-stakeholder governance model differs dramatically from the multi-lateral model, which is grounded in much more formal control by national governments.

The multi-stakeholder model – beyond ICANN - is also the current model used for global Internet governance, including the UN’s annual Internet Governance Forum (IGF). This is also the model that will describe the ultimate destination of the authority that houses the IANA functions after transition occurs. Indeed, the pressure to transition came in some ways, ironically, from this very model – endorsed by the United States.

Thus, the international community, perhaps encouraged by states with some anti-U.S. animus, began building broad consensus and mounting pressure to transition these critical Internet governance functions away from the U.S. The Snowden Affair revealing U.S. government cyber-spying played into this dynamic, making it all but certain that the IANA functions would be moving further outside of U.S. control as soon as possible.
In response to this pressure, the U.S. decided not renew its contract with ICANN, although NTIA asserted that it was not inclined to renew in any case. When NTIA announced in March 2014 its intent to transition its current oversight of the IANA functions, ICANN was asked to develop a transition proposal that would then be approved by NTIA, followed by implementation. However, as it became apparent that the September 30, 2015 deadline (date of the NTIA oversight contract’s expiration) would not be met, NTIA informed Congress of its intent to extend the contract with ICANN for one more year. Consequently, the contract between ICANN and NTIA runs until September 30, 2016 with options to extend for up to three additional years if necessary.

So where is ICANN in the transition proposal process? Much work has been done, and everyone in Dublin at the ICANN-54 conference acknowledged this. Each of the major ICANN advisory committees and working groups presented progress reports. Of these, the Government Advisory Committee, the constituency representing nations (GAC) provided the broadest review of progress to date and also the most skepticism as to whether ICANN will meet its transition proposal targets before the 2016 deadline. Failure to do so will trigger optional renewals with NTIA.

The GAC is the formal mechanism for governments to provide input and advice to ICANN, but GAC also operates to make sure ICANN’s activities and policies avoid conflict with national laws or international agreements. GAC has found itself at the center of controversy over the role it will assume in the new organization. Right now, GAC is considered by some as the “first among equals” – enjoying a more privileged advisory role to the ICANN Board than other bodies. [1] The various ICANN sub-units are divided into three groups: technical advisory bodies, supporting organizations, and Board of Directors’ advisory committees (AC’s). The other ACs besides GAC include the At-Large Advisory Committee, the DNS Root Server System Advisory Committee, and the Security & Stability Advisory Committee. (See figure 4).

Figure 4. Voting powers at the Board of different ICANN Constituent entities
Currently, none of the AC’s except the At-Large member having voting power on the Board, although they do have representation. Movement to empower GAC with a voting member on the Board of the new entity has been met with stiff resistance by civil society.[2] Movement to increase GAC’s already privileged advisory power by including in the bylaws a provision that would compel the Board to accept GAC’s advice if arrived at by consensus (it would take a vote of 2/3 of the non-conflicted Board members to resist accepting GAC’s advice on a given issue.[3]) has also been met with stiff resistance.

As one private sector group put it, “The sweeping by-laws change could well result in national governments dictating the management of critical Internet policies. Some of these governments are democratic and respect freedom of expression and commercial rights; others are authoritarian and seek to limit the free use of the Internet – or worse, seek to use the Internet to advance their own repressive policies. The Internet and its applications are far too important to the global economy and to freedom of expression to permit governmental entities to use this technology for their own parochial or ideological purposes, as surely could happen if this change were adopted.”[4]

The consensus requirement might make this an unlikely scenario. Currently, GAC is composed of representatives from 154 national governments and 33 non-voting observers, mostly multilateral organizations.[5] Although much of the discussion in Dublin centered on the current and future roles of the GAC as the transition begins to materialize, the actual documents that NTIA will be reviewing during the transition phase are nearing completion. The Stewardship Transition Coordination Group (IGC) has completed almost all of its proposal encompassing names, numbers, and protocol parameters. The last remaining portion, concerning names, is being finalized by the Cross Community Working Group on ICANN Accountability (CCWG-Accountability), which has been tracking its own progress. The chart
below[6] lays out the near-term timeline targets for progress on the CCWG portion of the IGC proposal:

Thus, Dublin’s ICANN-54 can be seen as having “delivered” in that the transition proposal is now ready, and publicly available on NTIA’s IANA transition micro-site (https://www.icann.org/stewardship). According to the IGC, the Dublin conference was an important step in that “matters relating to the dependency between the CWG and the CCWG, the Post-Transition IANA, the Root Zone Maintainer, the jurisdiction of ICANN, intellectual property related to IANA, and conformance with the NTIA criteria, among other matters, have been clarified.”[7]

According to the proposal, again grouped into the three categories of names, numbers, and protocol parameters, this is the basic outline for transition:

The **Names** proposal was developed in the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG). The Names community proposed to:

- Form a new, separate legal entity, Post-Transition IANA (PTI), as an affiliate (subsidiary) of ICANN that would become the IANA Functions Operator for names, in contract with ICANN. The legal jurisdiction in which ICANN resides is to remain unchanged.
- Create a Customer Standing Committee (CSC) responsible for monitoring the operator’s performance according to the contractual requirements and service level expectations.
- Establish a multistakeholder IANA Function Review process (IFR) to conduct reviews of the performance of the naming functions.

The **Numbers** community proposed that:

- ICANN continue to serve as the IANA Functions Operator for number resources and perform those services under a contract with the five Regional Internet Registries (RIRs).
• A contractual Service Level Agreement (SLA) be established between the Regional Internet Registries and the IANA Numbering Services Operator.
• A Review Committee (RC) be established comprising community representatives from each region to advise the RIRs on the IANA Functions Operator’s performance and adherence to identified service levels.

For the **protocol parameters**, ICANN currently serves as the IANA registries operator. The IETF community expressed satisfaction with the current arrangements and proposed:
• That the IANA protocol parameters registry updates continue to function day-to-day, as they have been doing for the last decade or more.
• To continue to rely on the system of agreements, policies, and oversight mechanisms created by the IETF, ICANN, and IAB for the provision of the protocols parameters-related IANA functions.

Thus, ICANN would remain subject to the laws of California as a corporate body that operates a contract with the PTI for names. ICANN would diversify its control of numbers to five regional agencies also operating under contract. And ICANN would continue to control protocol parameters. To be sure, conversations remain ongoing and will continue through the entire process, especially with regard to the importance of power structures and governance. ICANN-55 at Marrakech in March 2016 will likely be the culmination of these conversations as NTIA begins its review process of ICANN’s proposals for transition of IANA’s functions. Whether the September 2016 contract deadline will be met remains to be seen.

Endnotes:
[4] Id.
[5] Mr. Satola is the representative of the World Bank at the GAC.