February 2016

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April 7-9, 2016
Montréal, QC, Canada

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Lois Mermelstein

Message from the Chair

Help us make this busy season more productive. We need writers. Your publication opportunities are great, and your work commitment may be small. Thanks to a receptive and farsighted editorship, Business Law Today has offered to fill an entire issue with Cyberspace Law articles, and we need your help. Remember that BLT articles are short and easy to write - no footnotes - just 3000 words (about 6 good pages) of well-organized thoughts about a relevant topic covering the law of the Internet, software, bizarre tech-based payment systems, bet-the-company vendor contracts, software-capture extortion plots, rights to be forgotten, spying cell phones, international data transfers, rogue police officers with cutting edge equipment, hijacked medical devices implanted in living bodies, social media bullying, revenge porn, facial recognition programs in toy stores, domain name kidnapping - you know, the mundane stuff of a cyberlawyer's existence. Pick an interesting subject, propose writing an article about it, and write. You have more than a month to finish it. To make a proposal, write to me (tclaypoole@wcsr.com) or to Lisa Lifshitz (llifshitz@torkinmanes.com). Build your resume and help us at the same time.

We had a great Winter Working Meeting at the Sheppard Broad College of Law in Fort Lauderdale, from fascinating and enlightening CLE to cocktails beside the ocean, from superb project meetings to dinner served by gauchos with long knives. We have three book projects moving apace, including our books on 21st Century Payment Systems, Social Media Law, and Data Protection in Mergers and Acquisitions. Our Enterprise Technology Subcommittee has also begun a long term project creating data security contract terms for vendor agreements, in cooperation with ABA committees and the U.S. Treasury Department. Let us know if you are interested in these projects and see the excellent meeting write up below.

The Spring meeting in Montreal beckons and we hope you will join us for more solid programing and project development. Learn about your legal world from some of the top scholars and practicing lawyers. You will fit right in.

Ted

Ted Claypoole
Chair, Cyberspace Law Committee of the ABA Business Law Section

2016 Business Law Section Spring Meeting

If you have not yet signed up for the BLS 2016 Spring Meeting, register now. The meeting will take place in Montreal on April 7-9. Make sure your passports are up to date so you can take advantage of dozens of CLE programs (schedule here) and meetings that interest you. On Thursday, the full Cyberspace Law Committee and each subcommittee will hold its own meeting to further projects in the works, discuss cutting-edge topics, and plan new initiatives. In addition, our committee is sponsoring CLE programs on:

- "The Emerging Cashless Society" - chaired by Ed Morse with Denis Rice serving as a panelist
- "Cybersecurity Due Diligence in M&A Transactions" - chaired by Roland Trope
- "Protecting Your Brand in a Complicated Internet Landscape" - chaired by John Rees
• "What Business Lawyers Need to Know about Privacy Law" (part of the Young Lawyers Institute) - chaired by Bill Roberts

We will once again invite our friends from the Intellectual Property and several other committees to join us for a fun dinner on April 7. Montreal is rated as one of the 18 best food cities in the world, and we will help you understand why. The destination will be announced soon. Of course, you can also use Spring Meeting as a wonderful excuse to practice your high school French. A bientôt à Montréal.

Cyberspace Law Institute and Winter Working Meeting Wrap-Up

More than 70 Cyberspace Law Committee members enjoyed the hospitality of long-time committee member Jon Garon, Dean of Shepard Broad College of Law, at the recent Cyberspace Law Institute and Winter Working Meeting. We enjoyed 8 CLE programs on hot-of-the-press topics, debated issues challenging (or soon to challenge) our clients, and moved several book and article projects close to publication. Many thanks to Jon, all of the presenters, and subcommittee co-chairs! We also were treated to a wonderful Caribbean lunch and a Brazilian dinner. If you could not attend, you can access the written material for most of the CLE presentations here (see "Recent Program Documents") and read more about ongoing projects below, but you are out of luck as far as the jerk chicken, cheese rolls, fried bananas, and other gastronomic delights.

Committee Doings

From the Identity Management Legal Task Force
Chair Thomas J. Smedinghoff

On January 14 the Identity Management Legal Task Force, along with the World Bank and the Open Identity Exchange, co-sponsored a day-long International Identity Law and Policy meeting and discussion, particularly focused on identity management legislation and upcoming new legislative efforts. The meeting was hosted by the World Bank at its Washington DC headquarters. The purpose was to discuss the main issues surrounding the adoption of identity management legislation.

Attendees were lawyers, business leaders, policy experts, and technologists representing a broad spectrum of public sector, private sector, and NGO leaders in identity. Participants also included experts involved in drafting the recently-enacted identity legislation in the EU and Virginia, and experts currently involved in planned and proposed upcoming legislative initiatives relating to identity management in both the U.S. and internationally.

The impetus for the meeting was several recent developments relating to identity management legislation. They included the following recently adopted identity management legislation:

• The European Union eIDAS Regulation adopted in 2014, and
• The Virginia Electronic Identity Management Act adopted in 2015;
• and the following planned or proposed projects to develop new identity management legislation:
  • The United Nations Commission on International Trade Law project to develop international rules providing "a basic legal framework covering identity management transactions;"
  • The Uniform Law Commission proposal to develop uniform identity management legislation for the 50 U.S. states; and
  • The Virginia Identity Management Standards Advisory Council project to advise the Virginia Secretary of Technology on the identity management standards to be adopted as regulations in Virginia under its new Identity Management Act.
The goal of the meeting was to discuss the direction that such new identity management legislation should take, the issues it should address, and desired approaches.

The documents prepared for the meeting, and the Report summarizing the discussions at the meeting are posted on the Task Force webpage at http://apps.americanbar.org/dch/committee.cfm?com=CL320041.

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

Thanks to all who attended our meeting in Fort Lauderdale on Saturday, January 30. We had an excellent discussion on the emerging role of blockchain technology and the prospects for applications beyond Bitcoin. If you missed the conversation, you missed a lot! We intend to continue that discussion in Montreal during our April committee meeting - on Thursday, April 7 at 4 pm.

At our April meeting, we hope to invite some lawyers from outside the U.S., Canada, and Europe to share insights about current usage of blockchain technology in their markets. We have also invited an expert in the matter of shadow credit reporting and data analytics to discuss how electronic payments, social media, and other data points are bringing new credit opportunities - and threats to privacy and security - to the marketplace. We thus have reason to look forward to another interesting conversation. If you have additional ideas, please let one of the co-chairs know.

Note that our Cyberspace Law committee is also sponsoring a CLE program, "The Emerging Cashless Society", which will be held April 8, 2016, from 2:30-4:00 p.m. We have an all-star cast scheduled for this event, which will outline the drivers of innovation in the electronic payments space, effects on consumers and businesses, risks and threats, and social consequences of our movement toward electronic payment systems and away from cash.

Finally, the preparatory work on our book, Electronic Payments in the 21st Century, which has been approved for development by the ABA, continues. Most authors have been identified, and we have only a handful of topics yet to be assigned. Writing is about to begin! If you have an interest in participating, please contact Ed Morse (morse@creighton.edu or 402-280-3091) for more information.

From the Electronic Contracting Subcommittee
Chair Juliet Moringiello

The Electronic Contracting Subcommittee had a productive working meeting in Fort Lauderdale. We developed an outline for an article proposing strategies for effective online contract modifications. We are looking for contributors, so please visit our web page where you can find the outline. Please also sign up for the subcommittee's listserv to be assured of receiving subcommittee updates.

From the Cybersecurity Subcommittee
Co-chairs Roland Trope and Thomas J. Smedinghoff

The Cybersecurity Subcommittee is continuing to work on drafting chapters for its book entitled Guide to Cybersecurity Due Diligence in M&A Transactions. The co-editors are Tom Smedinghoff and Roland Trope.

The IEEE Security & Privacy magazine, in its January/February 2016 issue, has published an article on VW's "dieselgate" which discusses VW's decisions to develop and install "defeat device" software in its diesel engine automobiles. The article analyzes the decisions that engineers made that led to that practice, the denials to regulators that kept the software concealed even after evidence appeared pointing to its existence, and the ethical challenges that this new insider threat (the use of corrupt software) poses for the engineering profession. The article is co-authored by a senior software engineer, Eugene K. Ressler, and Roland Trope.

From the Social Media, Corporate Governance, and Strategy in Cyberlaw Subcommittee
Co-chairs John Isaza and Valerie Surgenor

Thank you so much to the many of you who attended Social Media Subcommittee meeting in Fort Lauderdale on Saturday, January 30th. We were delighted to see a standing room only crowd in a relatively large room, in addition to ten who called into the meeting. This reflects the interest in our mission: to provide business lawyers guidance and best practices on social media corporate governance and strategy. We are now at nearly 80 participants, which is heartening. Please continue joining us, and we will do our best to make your attendance worthwhile.

Our next meeting will be in Montreal in April. At that meeting we will be finalizing our book project (hopefully), before submitting the manuscript to the ABA for publication. In the interim, please do not hesitate to contact John Isaza or Valerie Surgenor if you have further questions or comments about the book or any other issue you would like to see us address as a subcommittee. John may be reached at John.Isaza@RimonLaw.com and Valerie at valerie.surgenor@macroberts.com.

In terms of volunteer opportunities, we still need someone to handle populating our web page. You may contact John Isaza if you need guidance on what content to post.

From the Enterprise Technology Subcommittee
Co-chairs Candace Jones and Cheryl Burtzel

The Cyberspace Law Committee’s Enterprise Technology Subcommittee has launched a project to aid business lawyers addressing information security and resiliency in vendor contracts. The project will include work on a survey of relevant regulatory guidance and rules, commentary highlighting issues to be considered in documenting a range of third-party relationships and the various perspectives and concerns of different transaction parties, and sample contract clauses with annotations.

Project participants will first compile information for the regulatory survey. The survey is intended to provide an overview of the regulatory landscape across a range of industries. It will identify sources of relevant regulatory authority, the nature and scope of guidance or regulation, and the mechanism, if any, for enforcement. Information will be collected in a standard template. Anyone interested in contributing to the survey is welcome to contact project co-chairs Cheryl Burtzel and Candace Jones for the template and additional guidance.

Project participants will also be invited to contribute to an outline of issues to be covered in commentary and sample clauses. A work plan and information about the project will be circulated by email to individuals who sign up with Cheryl or Candace.

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

The International Trade Subcommittee met twice at the Winter Working Meeting in Florida. We talked about identity management initiatives, particularly in the light of Tom Smedinghoff’s three-level classification of legal rules: general e-commerce statutes, identity-specific statutes and system rules.

Tom has noted two recent initiatives in the second category: the European Union’s e-identity and signature regulation (eIDAS) and Virginia’s Electronic Identity Management Act. (See Tom’s report elsewhere in this newsletter for more on these.) Both of these are steps towards a complete concept, but both need completion. The EU regulation applies only to authentication by public authorities, and operates only for countries who submit their authentication systems for the purpose - after which other member states have to recognize nationals of the first states based on the first states’ methods. The Virginia statute sets up a technical standards panel to prescribe the levels of assurance of authentication and the means needed to assert compliance with any level.

Our first meeting discussed the implications of these initiatives and some of the challenges they will face. Two other international developments were noted in
this context: a Russian proposal to the United Nations Centre for Trade Facilitation (CEFACT) for ensuring 'legally significant trusted trans-boundary interaction', and a United Nations Commission for Asia and the Pacific (UN/ESCAP) project to develop cross-border recognition of electronic records. Both are in draft form but being discussed in meetings. The Subcommittee is reviewing the details in conference calls (held with members of the Section of Science and Technology) to evaluate whether the ABA or the Committee should make submissions on them.

Our second meeting mainly discussed online dispute resolution, the reasons for the difficulties encountered by the UNICTRAL working group on the topic and some practical considerations in choosing a service provider and host jurisdiction for ODR.

The Subcommittee will hold further conference calls later in February and in March. They will be announced to the group's mailing list. If you are interested in the topics, you are welcome to participate. Ensure you are a member of the Subcommittee and sign up for the list on our web page.

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

The Subcommittee met in Florida to discuss the applicability of Federal Trade Commission's unfairness jurisdiction to manufacturers and users of connected devices that lack reasonable security protections, deciding to propose a program to address the issue.

The discussion centered around the impact of the recent decision in FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015), in which the Third Circuit upheld the FTC's application of its enforcement authority against a hotel management company that gave so little thought to securing its IT systems that it was hacked three times in an 18-month period, exposing unencrypted payment card information belonging to over 600,000 customers. The FTC brought an action against Wyndham on the ground that its poor cybersecurity practices amounted to an "unfair method of competition" in violation of the FTC Act. In doing so the FTC applied a statutory provision that limits its unfairness jurisdiction to practices that cause "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Wyndham, characterizing the FTC's enforcement action as a classic blaming of the victim, fought back, arguing, among other things, that an enforcement action based on such a vague standard of liability violated its right to due process of law. The district court rejected Wyndham's argument and so did the Third Circuit, having granted interlocutory appeal limited to the question of the FTC's authority to apply its unfairness jurisdiction in a case of this sort.

The Third Circuit's confirmation of the FTC's authority in this arena may lead to additional FTC actions against manufacturers and users of connected devices, which often contain notoriously poor security against intrusions by hackers. Such intrusions can lead to real-world harms—consider a burglar who lets himself into your house by hacking into your connected home security system, or a malefactor who takes control of your connected car by remote control. We decided to propose a panel discussion that will address these issues at an upcoming meeting of the Business Law Section. The central issue is: What steps should manufacturers and users of connected devices take to avoid being subject to an enforcement action by the FTC predicated on its unfairness authority?

Update on the Uniform Law Commission's Regulation of Virtual Currency Business Act
By Sarah Jane Hughes

The second meeting of the Uniform Law Commission's Regulation of Virtual Currency Business Act Drafting Committee will be held in Palo Alto beginning at 9 am, Friday, February 19, and running to noon on Sunday, February 21. If you have not already registered with the ULC as an Observer for this project, do so quickly before registration closes for this meeting. Steve Middlebrook is the ABA's Advisor to the Drafting Committee; Keith Rowley is a member of the
Member News

A book on EU Privacy and Data Protection Laws, co-authored by committee member Greg Voss and Katherine Woodcock, is now out at the ABA's online book shop. This handbook presents various concepts for EU privacy and data protection law in a comprehensible manner, providing analysis of existing and practical advice on how to approach data policy compliance. With global businesses and companies struggling to meet varying EU national privacy compliance laws, this book will be a useful primer to guide academics, practitioners, law students, and business professionals in understanding data privacy compliance, and provide additional supplemental resources on specific national legislation. This book is available for purchase. W. Gregory Voss is a Professor of Business Law at the University of Toulouse, Toulouse Business School (TBS). He is a member of the Cyberspace Law Committee and a repeat contributor to the Cyberspace Survey. In addition, he is Co-Chair of the ABA Section of International Law's Privacy, E-Commerce, and Data Security Committee.

Stealing a page from Ed Morse, the committee's first author to tackle the Unlawful Internet Gambling Act of 2006, Sarah Jane Hughes has been interviewed by major media about the dispute between FanDuel and DraftKings and New York State, and the effect on banks and payment processors who clear and settle "deposits" made by players. The image of someone who knows practically nothing about professional sports talking about Daily Fantasy Sports should be frightening. But, a payments geek is a payments geek, right? Most recently, SJ gave interviews to the New York Times, ESPN, and the Boston Globe about the apparent decision by Ohio-based VANTIV to exit processing for all DFS operations.

Upcoming Programs of Interest

A Virtual Fireside Chat with the FTC on Native Advertising
February 11, 2016
Format: Webinar

National Institute on Cybersecurity
February 23, 2016
Format: In-Person, New York City

The Cloud Above Us All: Data and Intellectual Property Issues in Cloud Computing
February 25, 2016
Format: Webinar

March 9, 2016
Format: Webinar

National Institute on the Internet of Things
March 30-31, 2016
Format: In-Person, Washington, DC
Speakers include Committee members Richard Balough, Lisa R. Lifshitz, and Tom Smedinghoff. Register soon! Rates go up February 12.

2016 Digital Currency and Blockchain Technology National Institute
April 1, 2016
Format: In-Person, Washington, DC
Speakers include Committee member Sarah Jane Hughes. Register soon! This program is expected to sell out.
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.