



September 2016

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[Business Law Section Annual Meeting](#)

 September 8-10, 2016
 Boston, MA

Editorial Board

[Lois Mermelstein](#)

Message from the Chair

I have two significant topics for your attention in this edition. First, with our Business Law Section Annual Meeting exploding over Boston next month, we have listed below the cyberspace highlights, including CLE and committee/subcommittee meeting speakers. Tickets will be available onsite for the Thursday Cyberspace Law dinner, held with the IP Committee, Corporate Counsel Committee and others. Contact me if you arrive early and want to join us for a casual dinner at TICO Wednesday night.

In addition, time limits are quickly approaching for suggesting panels/presentations for the ABA Business Law Section Spring Meeting in New Orleans (by September 20) and the Cyberspace Law Committee Winter Working Meeting in San Diego (by October 14). See the details. Remember that our Winter Meeting is the place for creative and thoughtful topics aimed exclusively at a sophisticated audience of cyberlawyers.

Ted Claypoole
 Chair, Cyberspace Law Committee

BLS Annual Meeting - September 8-10

If you aren't able to join us in person at the ABA Business Law Section Annual Meeting in Boston, you can still collaborate with your colleagues by dialing in to our Cyberspace Law Committee meeting and/or subcommittee meetings of interest. You can access the full list of dial-in numbers through the Annual Meeting [website](#). For convenience, here is the schedule for the Cyberspace Law meetings.

Dial-in Information:

- U.S. and Canada: Toll-free dial-in number: (866) 646-6488
- International dial-in number: (707) 287-9583
- Conference code as noted by each meeting below

Thursday, September 8:

9 - 10:30 am: Cyberspace Law Committee meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 584273785

At this main committee meeting, we will address all of the Committee's current ongoing projects and we will hear from local Boston attorney Stephen Chow, who will discuss Cybertheft: Access to and Ownership of Information:

The 114th Congress responded to reports of \$300 billion of annual cybertheft (1) overwhelmingly with a Defend Trade Secrets Act that gives "owners" (including by "license") of trade secrets a private right of action for breach of confidential relationship and (2) contentiously with a Cybersecurity Act granting immunity for information sharing which has prompted a bill to repeal it. Left unsettled are issues of access under the Computer Fraud and Abuse Act and disclosure under the Stored Communications Act. The path from patent protection of information technology back to trade secrecy will be paved with a federal common law of online contracts and relationships.

10:30 - 11:30 am: Social Media Subcommittee meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 584273785

10:30 - 11:30 am: International Trade Subcommittee meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

11:30 am - 12:30 pm: Enterprise Technology Subcommittee meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

At this meeting, the subcommittee will be summarizing the observations from a series of conference calls we have had since the spring meeting about information security in vendor contracts. We will have a list of topics for short sections to be contributed to commentary for which we will be soliciting volunteers, and we will guidance about our process to collect sample clauses.

1 - 2 pm: Mobile and Connected Devices Subcommittee meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

The Mobile and Connected Devices Subcommittee will explore two timely topics at this meeting. First, the subcommittee will have a presentation on the vulnerability and potential consequences of the 2016 election being disrupted by a cyberattack on the voting system. Second, we will discuss the National Telecommunications and Information Administration (NTIA)'s Internet Policy Task Force's efforts regarding the benefits, challenges, and potential roles for the government in fostering the advancement of the Internet of Things.

1 - 2 pm: Cyberspace Publications Subcommittee meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 584273785

2 - 3 pm: Non-U.S. Cyber Regulations Task Force meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 584273785

2 - 3 pm: Electronic Contracting Task Force Meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

At this meeting, Juliet Moringiello and John Ottaviani will be leading a discussion on the distinction between "click-wrap" terms and "browse-wrap" terms. Courts have routinely found offeree assent when the offeree was required to click a box acknowledging existence of the terms regardless of the presentation of the terms themselves. Courts have been far more skeptical of browse-wrap, a moniker given to purported contract terms that do not invite an express manifestation of assent. Several recent judicial decisions have rejected a clear distinction between click-wrap and browse-wrap, engaging in a more detailed analysis of the presentation both of the terms and the notice of the terms. We will discuss these recent opinions and whether they warrant a new project on the part of the Electronic Contracting Task Force.

3 - 4 pm: Financial Services and Payments Subcommittee meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 584273785

Jess Cheng, Deputy General Counsel at Ripple, Inc., an international payments firm using distributed ledger ("blockchain") technology, will be a guest at this meeting. Jess will discuss the particulars of the payment system utilized at Ripple, as well as other innovative blockchain applications. Co-chairs Ed Morse and Steve Middlebrook will also provide an update on our book project, *Electronic Payments in the 21st Century*, and address some new developments.

3 - 4 pm: Federated ID Management Task Force Meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

4 - 5 pm: Cloud, Platforms, and Analytics Subcommittee meeting
Westin Copley, Helicon, 7th Floor - Conf. code 6513805024

Friday, September 9, 2016:

12 - 1 pm: Internet Governance Task Force meeting
Westin Copley, Great Republic, 7th Floor - Conf. code 5842737852

We look forward to your participation-either in person or via phone!

We will also sponsor CLE programs on:

1. Don't be Spokeo'd: What You Need to Know in Litigating Data Breach Cases (from Breach to Remedies) (Katris)

- This program will cover practical tips regarding what every attorney should know and do when a data breach occurs.
- Includes unique discovery concerns in data breach matters as well as potential remedies and resources for recovery.

2. The Legal Landscape Through a Virtual Reality Lens (Huffman)

- What's up with Virtual Reality technology - development, progress and future outlook of an industry.
- Will cover legal concerns of developers, including IP, privacy, speech, impersonation, jurisdiction, data security, and liability concerns.
- The concerns of consumers and advocates also will be addressed.

3. The Government's Role in Your Cyber Incident: Friend, Foe or Both? (McAndrew)

- This program will discuss the various roles that different governmental entities play in a company's cyber life - including establishing standards for, and direct regulation of, organizational cybersecurity and cyber information sharing.
- Provides an understanding of the benefits and costs of interacting with federal law enforcement agencies in the investigation of different types of cyber incidents, using actual case examples to illustrate the issues.
- Highlights key issues in civil and criminal litigation relating to organizational cyber incidents.

4. Securing Your Connected Devices: Plan to Avoid Liability from the Internet of Things (Rothchild)

- Program will provide insight into the Federal Trade Commission's use of its unfairness jurisdiction against manufacturers and users of connected devices with security vulnerabilities.
- Includes a discussion of potential private actions/suits that can be raised, and ways a manufacturers and users of connected devices can reduce their exposure to liability.

5. Director and Officer Liability and Cybersecurity: Questions Every Officer and Director Must Answer (Sarkar)

- Program will discuss the Director and Officer liability exposures as a result of a cyber-incident, including the duties of directors and officers have with respect to cyber security and how to address their related fiduciary responsibilities.

6. Blockchain for Business: Emerging Legal Issues Associated With Using Distributed Ledger Technology in a B2B Environment (Middlebrook/Hughes)

- Program will discuss what distributed ledger technology ("DLT") is and how it is being integrated into business models and processes.
- Includes a description of the roles and responsibilities of entities involved in DLT projects as well as the key legal issues business lawyers need to assess when reviewing DLT projects.

Be sure to [add](#) the Cyberspace Law Committee's dinner at Summer Shack-a fun

seafood joint run by Jasper White, a James Beard award-winning chef who believes great food doesn't need to be "haute"! We look forward to seeing you in Boston.

And don't forget the Legal Analytics Working Group's CLE and meeting. Cyberspace is a co-sponsor of the program, and a parent committee for the group.

The Legal Analytics Working Group Presents - The New Paradigms: an Introduction to Legal Informatics for the Business Lawyer

September 9, 2016; 10:30 to 12:30 - Marriott Copley Wellesley, Third Floor

Big data, math and economics are changing business law. Our panel will examine how this came to pass, explain why lawyers need to understand these new practice methods, and demystify new tools like data analytics, machine learning, computational contracts, and behavioral economics.

Speakers include:

- Gary Sangha - CodeX fellow, LitIQ CEO
- Dazza Greenwood - MIT Media Lab
- Michael Bommarito - CodeX fellow, LexPredict CEO
- Kelly Peters - BEworks CEO

Also, join the Legal Analytics Working Group (#BLSAnalytics) for its inaugural working meeting, September 10, 2016, at 9:00 am - Marriott Copley Dartmouth, Third Floor. Help us decide how to introduce analytics, math, and economics to the Business Law Section.

The Working Group was formed to explore, and educate business lawyers about, the use of math and economics in the substantive practice of business law. It covers the impact of tools such as legal analytics, risk analysis, statistics and probability analysis, game theory, economic theory on decision making, and behavioral economics.

Submissions for Upcoming Meetings

The BLS Annual Meeting is still a few days away, but we are already planning for our upcoming meetings in San Diego this winter and New Orleans in the spring. The deadline to propose presentations and panel discussion topics for the Spring Meeting of the Business Law Section in April is fast approaching. Which new laws, new technologies, or new business models in cyberspace should we discuss in New Orleans? If you have an idea for a topic that might interest the Committee and the Section, please let [Ted Claypoole](#) or [Cheryl Burtzel](#) know immediately. We need your proposals by September 20. And for those with true cutting-edge imaginations and interests, propose a talk for the Cyberspace Law Committee Winter Working Meeting in San Diego in late January. Plan to join us, and propose a topic for discussion. We need those proposals by October 14.

N.D. III. Holds No Article III Standing Where Only Technical Violation of Biometric Privacy Law Was Alleged

*By Michael Silvestro
Principal, Skarzynski Black LLC*

The Northern District of Illinois recently dismissed a putative class action brought under the Illinois Biometric Information Privacy Act ("BIPA") for lack of Article III standing where only technical violations of the BIPA -- but no actual harm -- were

alleged. *McCollough v. Smarte Carte, Inc.*, No. 16 C 03777 (N.D. Ill. Aug. 1, 2016) involved storage lockers at a Chicago train station that were unlocked by customer fingerprints. The lead plaintiff alleged technical violations of BIPA, including failures to obtain advance consent to collect biometric data and to provide notice of the data retention period beyond the rental period. No allegations of actual harm, such as the disclosure or risk of disclosure of biometric data to third parties, were made. The Northern District of Illinois, following the U.S. Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), dismissed the case for lack of Article III standing. The Northern District held that the alleged technical violations of the BIPA alone, absent allegations of any actual harm, did not constitute "concrete and particularized" harm and therefore failed to satisfy the injury-in-fact element of Article III standing.

Editor's Note: this is the first update from the Committee's new Current Law Task Force. See below for more information on the Task Force and how you can contribute.

Committee Doings

From the Internet Governance Task Force

Co-Chairs David Satola and Michael Kelly

On June 27, 2016, the United Nations General Assembly adopted a resolution affirming "that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice..."(A/HRC/32/L.20).

In recognition of this, the Guardian newspaper did a special 4-part series in its tech podcast, "Chips with Everything". Internet Governance co-chair, David Satola, was interviewed for the [fourth episode](#) in the series on the future of the Internet in the developing world.

This series provides a great basic overview of the history of the Internet and how human rights - especially rights of privacy and free speech (freedom of expression) - are evolving with it. The first episode in the series featured Vint Cerf, who lays out some of the technical and philosophical bases of the Internet, and UC-Irvine law professor and UN Special Rapporteur, David Kaye, who explains the nexus of the Internet and these foundational rights. The second episode features a case study on Estonia showing what a digital state could look like. Episode 3 explores various threats to an open and democratic web, focusing on how the outcome of "net neutrality" arguments might affect these rights.

David will speak more about human rights and the Internet at the upcoming meeting of the Task Force in Boston.

From the Current Law Task Force

Chair John Black

Thank you to all who were able to participate in the first Current Law Task Force teleconference on August 24th. See above for our first news update.

Our next teleconference will be on **Wednesday, October 17, 2016, at noon Eastern Time**. Members are asked to watch for changes in cyberspace law, such as significant new cases, regulatory prosecutions, rulings, and statutes or regulations that affect the business of cyberspace, data, or the digital world, and share those developments on the teleconference. Our goal is to choose at least one topic to write upon every meeting and assign a writer to draft a few paragraphs for inclusion in the newsletter and on the website. Topics of sufficient interest may be developed into a webinar or BLT article.

Our calls occur every other month at **noon Eastern Time** on the third Wednesday

of the month. An email reminder will be sent with call-in instructions before the meeting. If you are interested in participating in the next call, please register on the website or email your contact information to John Black, jblack@skarzynski.com, to be included in the listserv notice for call-in details.

From the Enterprise Technology Subcommittee

Co-chairs Candace Jones and Cheryl Burtzel

The Enterprise Technology Subcommittee will meet in person at the Business Law Section Annual Meeting in Boston - see above for details and dial-in information.

Since the Spring Meeting, the Subcommittee has used a series of workshop conference calls to elaborate the commentary for its project, ***Contracting with Vendors for Information Security and Resiliency***. For the Boston meeting, will be circulating a list of commentary topics and notes and looking for volunteers to write the commentary. We will also have instructions for contributing sample clauses for the project. The Boston meeting will take the place of our regularly scheduled project workshop call that day.

Subcommittee members Lisa Lifshitz, Cheryl Burtzel, and Candace Jones collaborated with members of the ABA Cybersecurity Legal Task Force on a checklist for vendor contracts. Subcommittee members attending the workshop calls offered feedback on a draft, and the Task Force has solicited comments from its members as well. We anticipate the Task Force will finalize the checklist in September and share it with representatives of the United States Department of Treasury, which requested ABA assistance with materials providing practical guidance on the topic. We will distribute copies of the current version of the checklist for the Annual Meeting.

We look forward to seeing you in Boston. If you would like more information about the Subcommittee and its ongoing activities, please contact [Cheryl Burtzel](#) or [Candace Jones](#).

Other News

Sarah Jane Hughes and David Whitaker are featured panelists on Monday, November 28th, at The Clearing House's annual symposium in New York City. We will be discussing fraud-resolution paradigms in the wake of Experi-Metal, Patco, and the more recent issues involving the Bangladeshi Central Bank. The conversation is not limited to wire transfer frauds.

The Drafting Committee for the Uniform Law Commission's Uniform Regulation of Virtual Currency Business Act will hold its next meeting in Minneapolis on October 28 & 29th. Observers are welcome. To register as an Observer for this meeting, contact Katie Robinson at the ULC, katie.robinson@uniformlaws.org.

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](#).

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