



February 2017

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 April 6-8, 2017
 New Orleans, LA

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Message from the Chair

As January closes, we celebrate its namesake Janus by looking both backward and forward. The Cyberspace Law Committee Winter Working Meeting in San Diego was successful last week, with about 60 lawyers attending and important topics from Data Security in the World of Satellites to an excellent review of the cyberlaw notable cases of 2016. Per usual, the winter meeting was the time for speculative and cutting edge thought as we discussed the hackability of autonomous vehicles, the ability of software to create its own legally-recognized intellectual property, the new rules of cyber liability insurance and the inevitability of smart contracts. Two of our book projects are fast tracked for publication, and a group of younger cyberlawyers contributed to the legal and business discussions. We left California invigorated and with a new set of leaders and new topics to discuss.

Looking forward, we are preparing for the Business Law Section Spring Meeting in New Orleans, April 6-8. As discussed below, we have a number of strong CLE programs and committee projects to discuss then. We hope you will join us.

Ted Claypoole
 Chair, Cyberspace Law Committee

Register Now for BLS Spring Meeting, April 6-8

The Cyberspace Law Committee has a revised programming format for the Business Law Section Spring Meeting in New Orleans, April 6-8, 2017. Our full committee and subcommittee/task force meetings will still take place, but we will offer three CLE programs **within** scheduled subcommittee times, along with two standalone CLE programs. Each of the following programs has an excellent panel of presenters:

- EU Privacy Shield Impact on Data Transfers from Mobile Devices
- Changing Standards of Unfairness: Recent Enforcement Actions by the CFPB
- Keys to Celebrity Use of Social Media and Paid Endorsements
- Enforcement and Litigation Trends in Privacy and Data Security
- The Uniform Law Commission's Draft Uniform Regulation of Virtual Currency Business Act --- A Report from the Drafting Committee Participations and Stakeholders

Read more below about the various subcommittee and task force plans flowing from our recent Cyberspace Law Institute and Winter Working Meeting. The full [Spring Meeting agenda](#) is online.

Take advantage of the early bird discount (scheduled to end February 3) and [register now](#) for the meeting. Most of our programming occurs on Thursday starting at 8 a.m., so plan to arrive on Wednesday. And reserve a spot at the Cyberspace Law Committee dinner Thursday evening. We'll be enjoying downhome southern fare with an open bar in a private room at [Mother's Restaurant](#)-a short walk from the hotel. See you in New Orleans!

Committee Doings

From the Electronic Contracting Subcommittee

Chair Juliet Moringiello

The Electronic Contracting Subcommittee had a spirited discussion at the Winter Working Meeting about smart contracts. Although the term "smart contract" seems to be one of the legal tech world's "flavors of the month," there is little agreement on what makes a contract smart. Identification of the key features of smart contracts is essential to determining how existing contract law applies to them and whether existing law needs any modifications to accommodate them. The subcommittee is working on these questions and intends to present a program to discuss its findings and suggestions at the Business Law Annual Meeting in Chicago in September.

From the Legal Analytics Working Group

Chair Warren Agin

Last week, we held the Business Law Section's first ever Prototype Jam at WeWork's offices the night before the Cyberspace Law Committee's Winter Working Meeting. About twenty Business Law Section members joined technologists and law students from the San Diego area to design a system that could help small businesses understand cloud service contracts. Amy Wan of Legal Hackers and Susan Salkind of CodeX traveled to San Diego to help the various teams polish their presentations for judges Mike Bommaritto, Susan Bokermann and Steve Obenski.

Mike Dunne, Bill Denny and Alexander Baker narrowly beat out the other five teams with their AI-powered *Yolanda* system. Second place went to a team including Cyberspace members Lisa Lifshitz, Lois Mermelstein, Ted Claypoole and Kirk Howell. A group of MIT students and Thomson Reuters data professionals, headed by Media Lab researcher Dazza Greenwood, worked on the project remotely; a video showing off their results is online [here](#). The event was a great success thanks to sponsors Kira Systems, Bloomberg BNA and LexPredict, and the support of WeWork, Legal Hackers, the ABA Center for Legal Innovation, and a bunch of LAWG members.

LAWG's next events are scheduled for the Section's Spring Meeting in New Orleans. We will have a working meeting from 9 to 10:30 am on Friday, April 7. On Saturday, April 8 from 10:30 am to 12:30 am we are running two programs. First, James May and Prof. Dan Linna chair "*Data Driven Risk Assessment for Litigators and Transactional Lawyers*." Then, Mian Wang will chair "*Behavioral Economics: How it Informs Corporate Compliance, Dispute Resolution, and Disclosures*." For those interested, Consumer Financial Services is running a program on privacy issues and blockchain Thursday afternoon. It's not too late to register and book your tickets to New Orleans. Remember that committee dinners will be Thursday evening.

Finally, the Business Law Section meeting after that will be September 13-16 in Chicago. It's not too early to think about programs we can run at that meeting. If you have a great idea, and are interested in running a program, let [Warren Agin](#) know. We will want to have the ideas lined up in advance of the Spring meeting.

From the Identity Management Legal Task Force

Chair Tom Smedinghoff

The Identity Management Legal Task Force, in conjunction with The World Bank and the Open Identity Exchange, will be holding an International Identity Management Law and Policy meeting on May 18, 2017. The meeting will focus in part on the issues being raised in the discussions regarding identity management

legislation at the United Nations Commission on International Trade Law (UNCITRAL) and the Uniform Law Commission Study Committee on Identity Management in Electronic Commerce. The full-day 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 Hal Burman and John Gregory

The IT subcommittee tracks, reviews and provides guidance on various projects and actions underway at international organizations or otherwise taking place across country borders. The focus is either on issues the Subcommittee recommends be taken up or in response to agendas set primarily at international bodies.

In San Diego, the Subcommittee focused mostly on two areas - (A) whether e-commerce law provisions should continue to be included in future or amended US or Canadian trade agreements, and if so should they be as now in the proposed Trans Pacific Partnership (TPP) which may be a model for the future, or could be proposed to be expanded or made more limited. (B) Cross-border Identity Management (IdM) and Trust services: what should be considered as responses to those initiatives now in three international bodies, and possibly more to come.

Trade Agreements: The Subcommittee began an initial review of the draft TTP trade agreement which if it is pursued would involve many countries in the Asian - Pacific zone. The draft agreement has more ambitious e-commerce law provisions (Chapter 14 on E-commerce) than these agreements have had. There are however pros and cons to engaging the commercial law of cyberspace in such agreements, and these will be discussed in more detail in working conference calls. In addition to the direct e-commerce provisions, Chapter 28 on dispute resolution and other sections need to be weighed, as well as the interaction with the UN E-commerce Convention, the Convention on International sales of Goods (CISG), etc. Since planning the scope of and provisions within trade or similar agreements takes place well ahead of negotiations, and changes will be on the table, this is an opportunity for the Cyberspace Committee to have a meaningful impact on those considerations.

Cross-border Identity Management (IdM) and Trust services: The Subcommittee discussed whether to engage in work proposed on those two interrelated topics at the UN Commission on International Trade Law (Uncitral). Proposals have been submitted by the EU based on their member-state IDAS system, and by the Russian Federation which outlines an international framework under which national regulatory regimes would oversee country systems which could generate results to be recognized by other participating countries. Comments were generally that while there is not yet a clear or achievable path forward, if international work does go forward it would be better to engage it than allow e-commerce networks to be developed without North American input which could impact our interests. Upcoming conference calls will examine the proposals and whether alternate proposals should be made, taking into account work by the ABA IdM Task Force.

Other topics expected to be taken up in this spring: Uncitral - Proposals are expected at Uncitral for work on cross-border aspects of cloud data management, rights and obligations with regard to data, jurisdiction etc. which will need review. A review of proposed final provisions on Electronic Transferable Records will need to be engaged by late March. Active or proposed work projects will be reviewed this spring at other international bodies including - but not limited to - the UN Economic Commission for Europe's CEFACT organization, the International Standards Organization (ISO), the International Telecommunications Union (ITU), and others.

This means a challenging scope of activities for the Subcommittee and volunteers

and participants on the working conference calls are welcome! Contact co-chairs Hal Burman (halburman@aol.com or hsburman@earthlink.net) and John Gregory (john@Euclid.CA).

From the Cybersecurity Subcommittee

Co-chairs Roland Trope and Tom Smedinghoff

The ABA Business Law Section has approved for publication as a book the manuscript of *Guide for Cybersecurity Due Diligence in M&A Transactions*. Tom Smedinghoff and Roland Trope were the co-editors. Contributing authors were: Candace Jones, Matt Staples, Jon Adams, Stuart Levi, William Denny, Robert Bond, David Flint, as well as Tom and Roland. Projected publication date is late May or early June.

The Cybersecurity Subcommittee meeting was held on Friday, January 27th, during the WWM. The majority of the meeting focused on discussion of potential new projects for the Subcommittee. Among new projects being considered are:

- a guide on issues related to products to be installed in IoT platforms (connected cars, appliances, home-based digital assistants, personal robot assistants, and the like); the National Highway Administration's position that connected or autonomous motor vehicles are "critical safety systems" and that, if defective or vulnerable, must be recalled and repaired; the question of whether an owner may turn off functions or effect self-repairs without losing warranty coverage; and the convergence of copyright law and cybersecurity in connected and autonomous products, and
- a white paper or article describing the bundle of rights a purchaser of goods gets with connected or autonomous devices, and of data flows from the devices.

This report was not composed by either co-chair of this Subcommittee, but by that officious interloper, Sarah Jane Hughes, whose cell phone served to connect the co-chairs to those physically present at the WWM session. Please forgive all errors of content and do not attribute them to the co-chairs.

From the Mobile and Connected Devices Subcommittee

Co-chairs John A. Rothchild and Richard C. Balough

The Mobile and Connected Devices Subcommittee has launched a project to produce a product for business lawyers who may not be intimately involved in cyberspace and applications law. More specifically, the product would aid a business lawyer in assisting clients regarding legal issues surrounding apps that are used on mobile devices, either as a developer or a business using the device. The exact form of the product remains to be determined but could be an article for *Business Law Today*, a "checklist" for lawyers, an issue spotting document, or a webinar. The product could include (the list is not intended to be exhaustive, but merely illustrative):

- Copyright issues
- Privacy issues
- Risk analysis
- Best practices
- Breach notices
- Terms of service (what to include and how to make it binding)

The committee is seeking volunteers to work with one or two discrete aspects to develop the material and/or checklist. The goal is to complete the package as quickly as possible.

Contact either John A. Rothchild (jrothchild@wayne.edu) or Richard C. Balough (rbalough@balough.com) if you are interested in participating.

From the Financial Services and Electronic Payments Subcommittee

Co-chairs Ed Morse and Steve Middlebrook

The Financial Services and Electronic Payments subcommittee met in San Diego on Friday, January 27. This meeting included discussion of topics under consideration for future CLE programs. First, we discussed the new proposed requirements for a special purpose fintech charter offered by the Office of the Comptroller of the Currency. This initiative presents some interesting possibilities, but many uncertainties remain. Possibilities include the ability to obtain a national charter, thus potentially avoiding the need to engage in state-specific licensing. But the charter process also seems to raise barriers to many start-ups, including unspecified capital reserve requirement and the OCC authority to vet members based on their experience. The group generally agreed that the topic was interesting, but perhaps it should await future developments before pursuing this as a program topic.

The subcommittee also discussed some other program ideas, including the possibility of pursuing a basic program rooted in exploring emerging technologies in the payments space. For example, new technologies in authentication are being used to satisfy the "know thy customer" requirements for new accounts online. Authentication technologies have a broad range of applications within and beyond the payment space. Data analytics are also being used extensively in payment authorization, fraud detection, and credit monitoring, all of which have connections to the payments regime. Moreover, distributed ledger technology that began in the payments space is now potentially migrating to other areas, including the matter of software security. There are also ethical issues lurking in this area, which might also be explored. The group opted to defer this topic for future consideration, as we will reconvene in New Orleans in April. We thank everyone who was able to join in the discussion, and hope to see you in New Orleans.

From the Current Law Task Force

Chair John Black

The next teleconference call for the Current Law Taskforce will be held on **Wednesday, February 15, 2016, at 11 am Central Time/noon Eastern Time.** Taskforce participants are invited to note 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 call. Our goal is to choose at least one topic every meeting for a participant to draft a few paragraphs to include in the monthly newsletter and the website and potentially to be developed into a webinar or BLT article.

Our calls occur once a month at **11 am Central Time/noon Eastern Time** on the third Wednesday of the month. An email reminder will be sent with call-in instructions a week 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.

Programs of Interest

[Cars, Cars, Cars: From Potential Liabilities of Driverless Cars to Privacy Concerns to Aging Airbags and Beyond](#)

February 15, 2017

Location: Webinar

[Product Liability Law: The Uncertain Landscape of 3-D Printing](#)

February 21, 2017

Location: 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](#).

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