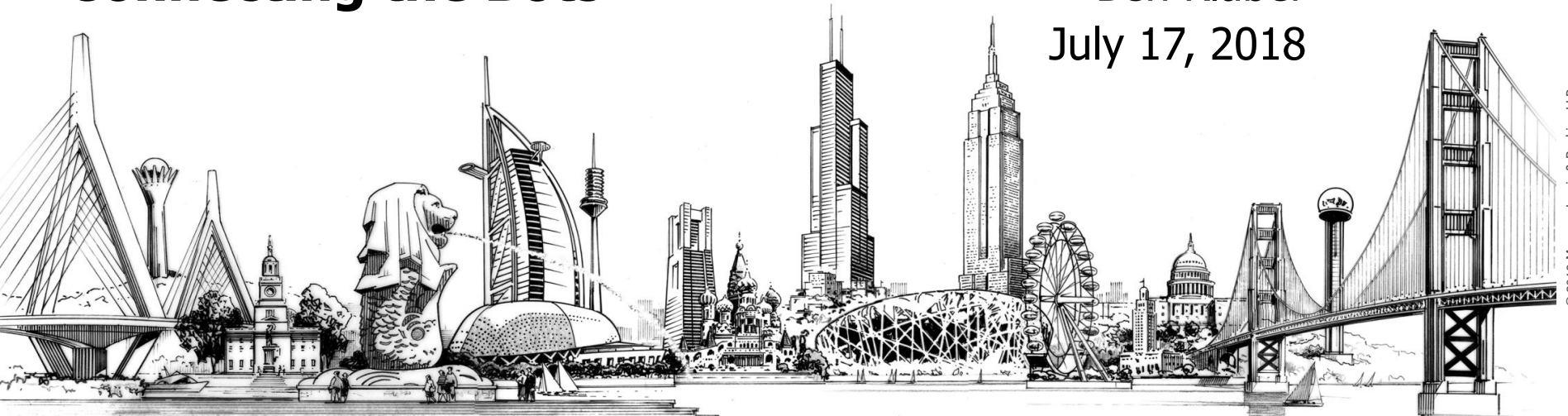


**Morgan Lewis**

# **2018 CYBERLAW UPDATE: IMPACT OF IOT ON PRIVACY AND SECURITY**

**Connecting the Bots**

Ben Klaber  
July 17, 2018

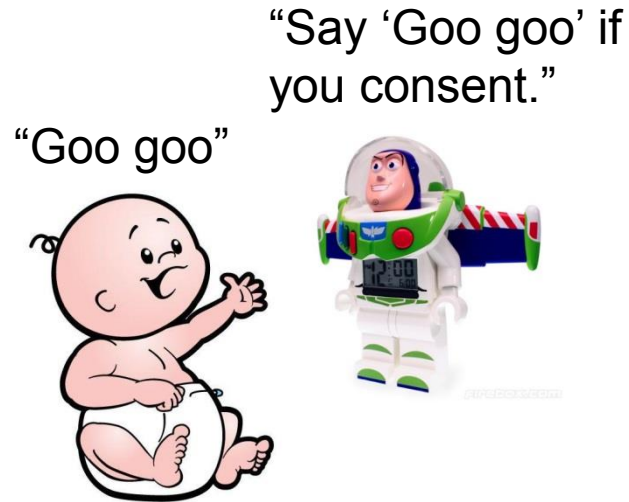


# Agenda

- Kids
- Workplace
- Geotargeting
- Biometrics
- Contracting
- Privacy Assistants

# IoT & Kids

- Regulatory Framework
- Regulatory Enforcement
- Approach



# Kids: Regulatory Framework

- Children's Online Privacy Protection ACT (COPPA) Rule
  - Requirements for protecting children's online privacy and safety
  - Enforced by FTC
  - Operators of a "website or online service" that's "directed to children under 13"
    - Broadly interpreted
    - Includes connected toys and some other IoT devices
  - Collecting a voice recording without parental consent OK in VERY limited circumstances (solely to replace written words, like an instruction, and not personal information); the recording must be immediately destroyed
  - Fines up to \$40,000 per violation

# Kids: Regulatory Enforcement

- Connected Toys
- VTech:
  - Apps, online platforms and tablets
  - FTC alleged failure re: notice and consent under COPPA
    - No direct notice to parents re: data collection
    - Privacy policy links not included in each relevant place
    - Privacy policy overstated encryption practices
    - Failed to take reasonable steps after a security breach
  - Settlement with FTC (including \$ and data security program)

# Kids: Approach

- Keys: transparency and security
- Proactive (and creative) approach so parents understand and consent
- See FTC enforcement/guidance in general consumer context, e.g.:
  - Don't merely rely on service providers (without assurances)
  - Have a system and plan to prevent, detect, mitigate and respond to intrusions
  - Avoid:
    - Misleading or hidden information collection practices
    - Unnecessary or insecure data usage, storage or transmission
  - FTC: It's "more important than ever that companies let parents know how their kids' data is collected and used and that they take reasonable steps to secure that data."

# IoT & the Workplace

- Opportunities & Issues
- Approach

# Workplace: Opportunities & Issues

- Opportunities
  - Virtuous circle of connectivity, intelligence and automation
  - Efficiency, insight and safety
  - May become ubiquitous
- Issues
  - Security
  - Scalability
  - Interoperability



# Workplace: Approach

- Approach
  - Get by with a little help from your end-to-ends
  - Update policies and procedures (including training)
    - Restrictions where risks outweigh expected benefits
    - IoT Devices: registration, use, maintenance and network access
    - IoT Data: use, storage, disclosure and ownership/rights
    - Encryption
    - Monitoring and enforcement

# IoT & Geotargeting

- Delivering content based on location – powerful marketing tool
- BUT certain locations (e.g., medical facilities) – privacy concerns
- Example in Massachusetts
  - Digital ad agency geofenced health clinics (reproduction; methadone) and sent related third party ads
  - Settlement with AG
- Takeaways: transparency, choice, consent, respect and security
  - Specific discussion in privacy policy
  - Limit intrusions
  - Disclosures (consider multiple, just-in-time, etc.)
  - Brands should be careful when using ad agencies

# IoT & Biometrics

- Unique Problem; Illinois
- *Rosenbach*

# Biometrics: Unique Problem; Illinois

- Biometrics are special – biologically **unique** and **permanent**
- Illinois Biometric Information Privacy Act (IBIPA)
  - Regulates collection, retention, disclosure and destruction
  - Requirements include using reasonable care to protect data
  - NOTE: “biometric information” includes information “based on an individual’s biometric identifier used to identify an individual”
  - Right of private action
  - Flood of class actions

# Biometrics: *Rosenbach*

- *Rosenbach*
  - Amusement park collected fingerprints – season passes
  - Allegedly without written consent or disclosing a biometric plan
  - Court: Plaintiff must allege “*some* injury or adverse effect” – must be “aggrieved”
  - BUT NOTE: The threshold for harm could be low (or even emotional)
- Imagine eyes, voices, fingers, faces, etc. used for access/orders

# IoT & Contracting

- Contract Distancing
- Approach



# Contracting: Contract Distancing

- Contract distancing
- Seller's needs include:
  - Disclaim warranties, limit liabilities and curb disputes
  - Rights to data
  - Restrict modifications or unauthorized use
  - Limit obligations (e.g., updates)
  - Disclaim responsibility for third parties
- Example: Smart trash can
- Example: Smart TV (California)

# Contracting: Approach

- Enforceability: conspicuous, clear, reasonable, accessible and expressly accepted
  - Availability and persistence
  - Natural opportunities (e.g., registration)
  - Limit perceived abuses of information asymmetry
  - Monitor and potentially coordinate with other sellers
- Agreements with partners/suppliers/distributors
  - Ensure necessary updates/support
  - Control/disclaim scope of use (e.g., safety roles)
  - Maintain flexibility
  - Security and privacy controls
  - Data



# IoT & Privacy Assistants

- 244 hours per year – fatigue and helplessness
- FTC:
  - The question is **how** (not whether) to provide simplified notice and choice
  - Urges (1) IoT self-regulation, and (2) stronger broad-based privacy laws
- GDPR instructive: transparent and accessible; clear, plain language
- Notice: consider timing, channel, modality and control
- Simplify and standardize (like a nutrition label)
- If machine-readable, could facilitate assistant apps/ratings
- Be careful defining or using terms (e.g., “biometric information”)
- <http://lorrie.cranor.org/>

# Review & Questions

- Kids
- Workplace
- Geotargeting
- Biometrics
- Contracting
- Privacy Assistants

# Blog: Tech & Sourcing @ Morgan Lewis

- Kids
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2018/01/ftc-enforcement-of-coppa-for-internet-of-things-reaches-flashpoint>
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2016/07/1345>
- Workplace
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2017/04/navigating-the-iot-workplace-quagmire>
- Geotargeting
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2017/04/geotargeting-medical-facilities-massachusetts-says-no-snoop-for-you>
- Biometrics
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2018/01/illinois-court-says-biometrics-plaintiffs-must-put-a-finger-on-alleged-harm>
- Contracting
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2017/04/contract-corner-standard-terms-in-the-iot-age>
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2016/07/ftc-urges-prescient-end-of-life-strategy-for-iot-products>
  - <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2017/12/contract-corner-an-anthology>

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Ben is a double agent: an agent of agents of change.

In his technology-based transactional practice, Ben helps clients in a range of industries develop, negotiate, and expand transformative relationships with their customers, suppliers, service providers, distributors, marketers, integrators, consultants, partners, and investors.

He regularly assists emerging and high-growth companies with developing, licensing, acquiring, and commercializing software, applications, data, inventions, and other intellectual property, conducting tech-related transactional diligence, and navigating privacy and security issues.

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