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Tuesday, September 1, 2015

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IoT Providers should heed FTC authority

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The "Internet of things," or IoT, sometimes called the "Internet of everything," includes the movement of networks from mere computer servers and work stations, to more everyday consumer objects and things capable of connecting the users and devices via the Internet. Such smart devices currently in circulation include thermometers, cameras, refrigerators, washers and dryers and televisions.

Data collectors can obtain rich contextual history on device users because IoT devices can connect to other portable devices such as mobile phones and wearables with social

network applications installed. The data from these devices gives clues as to the consumers' geographical location at different times, their habits, and their preferred products and services.

Currently, there appears to be scant legal guidance for the development of IoT. However, recent Federal Trade Commission actions give clues about what organizations should keep in mind as they develop their IoT products and services.

The Wyndham Lawsuit

The high-end hospitality industry has long envisioned a customized experience for their clients. IoT brings this dream closer to reality. But the FTC will likely seek to regulate all things "cyber" through its Article 5 enforcement powers under the FTC Act.

The 3rd U.S. Circuit Court of Appeals recently upheld a lower court's ruling that Wyndham Worldwide Corporation must face a suit in which the FTC accused Wyndham of failing to reasonably secure its network from hackers. Wyndham's challenge of the FTC's jurisdiction over "unfair and deceptive" data security practices was amongst the first of its kind.

In the spring of 2014, Wyndham argued before the New Jersey district court that the FTC lacked power to assert an Article 5 "unfairness" claim, and that Wyndham was being unreasonably penalized without sufficient due process. Wyndham argued that categorizing cyber practices as "unfair" was too vague, and the FTC must promulgate specific regulation before pursuing such claims.

The FTC responded that it has the power to bring enforcement actions against companies that it believes failed to take reasonable steps to prevent breaches. The district court agreed, and on Aug. 24, the Court of Appeals upheld the FTC's enforcement authority.

U.S. Court of Appeals for the 9th Circuit weighs constitutionality of death penalty

The constitutionality of the death penalty was under intense scrutiny Monday in a highly anticipated hearing before the 9th U.S. Circuit Court of Appeals.

9th Circuit affirms acquittal in obstruction of justice claim in bid-rigging case

A man's exoneration from a federal jury verdict that he obstructed justice has been upheld by the 9th U.S. Circuit Court of Appeals, which ruled Monday that prosecutors did not prove the charge.

Judges and Judiciary Circuit reversals portend new term

As summer yields to autumn, and a U.S. Supreme Court 2015-2016 emerges in October, lawyers and judges can expect another round of 9th Circuit reversals forthcoming. By **Lawrence Waddington**

Judicial Profile

Enrique Camarena

Superior Court Judge San Diego County (El Cajon)

Securities

Local attorneys to assist in SF biotech company's IPO

In another sign of the life science sector's durability, attorneys from Sidley Austin LLP are advising CytomX Therapeutics Inc. on a planned \$100 million initial public offering filed late Friday. Latham & Watkins LLP is advising the under

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Law Practice

Greenberg adds three attorneys to property tax practice

Greenberg Traurig LLP has expanded its local tax practice with the addition of three attorneys from the now-defunct specialized property tax firm Cahill, Davis & O'Neill LLP.

Judges and Judiciary

Federal judge, appellate justice help Ugandan judiciary understand plea bargain

U.S. District Court Judge Beverly Reid O'Connell and 2nd District Court of Appeal Division Eight Presiding Justice Tricia A. Bigelow joined their alma mater in a plea bargaining conference in Uganda.

Corporate Counsel

Deborah R. Schwarzer

General Counsel of Aeris Communications Inc.

Nomi Technologies

Wyndham may be critical to the development of IoT because it shows that the FTC will continue to assert itself aggressively in all matters relating to data privacy, including the in the development of IoT. *In the Matter of Nomi Technologies*, FTC Case No. 1323251 (2015), the FTC provided additional insight to how it may deal with privacy issues in the realm of the inter-connectedness of things.

Nomi makes sensors that allow retail stores to track customers moving through their stores. The sensors track and aggregate device data including MAC addresses, type, date and time, and signal strength, which allow the retailers to assess and analyze consumer shopping patterns.

Nomi and the FTC ultimately entered into a consent decree against Nomi because the FTC found Nomi's online privacy statement "unfair and deceptive." Although Nomi provided a consumer-facing privacy policy on its website allowing consumers to "opt out" of Nomi's services, the FTC alleged that no such option was available at the brick-and-mortar retailers using their service. In fact, when customers entered the stores, they were already being tracked, and there was no assurance at all that they would be informed that they were being tracked.

Notably, two of the five reviewing commissioners dissented, commenting that Nomi had no direct relationship with the customer, and that the company was actually trying to "go over and beyond its legal obligation to protect consumers" by trying to provide an opt-out mechanism. One commissioner commented that the decision may actually encourage organizations to be less comprehensive in their privacy policies.

Nomi is instructive for organizations developing smart devices because it illustrates the difficult legal issues relating to data compiled from the additional connectivity. Nomi wanted to provide privacy options for consumers interacting with their devices, but they only dealt with consumers through clients who were using and controlling their devices.

As more devices become more connected, such privacy issues will only become more complicated and difficult to resolve. The connectedness of things may require organizations to review both their customer and vendor contracts, in addition to ensuring that their outward-facing privacy policies are consistent with their inward-facing policies.

Beyond Current FIPPs

Most privacy-oriented organizations have been merely focusing on complying with general fair information practice principals (FIPPs). But looking at most FIPPs, the primary focus is on how organizations and their vendors relate to consumers. There is little on how businesses providing enterprise technologies need to deal with their customers, who then use their technologies to connect with consumers.

The impact of *Nomi* is that current FIPPs may not necessarily have contemplated the additional connectivity issues brought about by the rapid evolution of IoT. Organizations involved in manufacturing smart devices, IoT applications, and data analytics should consider the lessons from *Nomi*. Here, one may agree with the dissenting FTC commissioners in arguing that Nomi attempted to "go over and beyond its legal obligation to protect consumers" by giving them an option to opt out. Nonetheless, the opt-out option apparently created more problems, instead of fewer.

Perhaps the best way organizations can protect themselves in anticipation of uncertain times due to evolving technology is to look to the FTC for some limited guidance. However, as the FTC noted in its own "FTC Report on the Internet of Things" (released Jan. 27, 2015), the "[t]raditional methods of providing consumers with disclosures and choices may need to be modified as new business models continue to emerge." Ironically, the FTC also noted in its report: "[t]his does not mean that every data collection requires choice. The Commission has recognized that providing choices for every instance of data collection is not necessary to protect privacy ... companies should not be compelled to provide choice before collecting and using consumer data for practices that are consistent with the context of a transaction."

Regardless, the lesson of *Wyndham* is that the FTC believes that its authority in all areas relating to data privacy is here to stay. It would be wise for IoT organizations to implement some consistent data and security practices with the assistance of legal counsel. See *In re Morgan Stanley Smith Barney LLC*, FTC Case No. 1523083 (2015) (closing investigation after breach due to "human error" but finding appropriate policies in place). Businesses would be betting against the odds

Santa Clara

Law Practice

Collector cars race out of recession

Last month marked the 65th annual Concours d' Elegance - a gathering of the world's most important collector cars on the famed Pebble Beach golf links. By **Jonathan Michaels**

Labor/Employment

Has PAGA really saved the wage and hour mass action?

California employees increasingly are turning to the Private Attorneys General Act for mass wage and hour actions, but should they? By **Gene Williams**

Administrative/Regulatory

IoT Providers should heed FTC authority

Currently, there appears to be little legal guidance on the Internet of Things, but the FTC may be dropping clues. By **Hsia C. (Mark) Mao and Shiela Pham**

Litigation

Complaints targeting companies for slave labor use may be start of a trend

Lawsuits alleging slave labor in the supply chains of Costco Wholesale Corp. and Nestle USA Inc. are the first of what attorneys suggest will be a cascade of actions designed to shame major corporations.

otherwise.

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