CALIFORNIA’S IoT LAW ON THE SECURITY OF CONNECTED DEVICES


STRATEGIES FOR DEFENDING CCPA AND OTHER CYBERSECURITY CLASS ACTION LITIGATION

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This paper has been excerpted from E-Commerce and Internet Law: Treatise with Forms 2d Edition (Thomson West April 2020 Annual Update), a 5-volume legal treatise by Ian C. Ballon, published by West, (888) 728-7677
www.ianballon.net
Ian C. Ballon is Co-Chair of Greenberg Traurig LLP’s Global Intellectual Property & Technology Practice Group and represents companies in intellectual property litigation (including copyright, trademark, trade secret, patent, right of publicity, DMCA, domain name, platform defense, fair use, CDA and database/screen scraping) and in the defense of data privacy, cybersecurity breach and TCPA class action suits. A list of selected recent cases may be found here.

Ian is also the author of the leading treatise on internet and mobile law, *E-Commerce and Internet Law: Treatise with Forms 2d edition*, the 5-volume set published by West (www.IanBallon.net) and available on Westlaw, which includes extensive coverage of data privacy and cybersecurity breach issues, including a novel transactional approach to handling security breaches and exhaustive treatment of trends in data privacy, security breach and TCPA class action suits. In addition, he serves as Executive Director of Stanford University Law School’s Center for the Digital Economy. He also chairs PLI’s annual Advanced Defending Data Privacy, Security Breach and TCPA Class Action Litigation conference. Ian previously served as an Advisor to ALI’s Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transactional Disputes (ALI Principles of the Law 2007) and is a member of the consultative group for the Data Privacy Principles of Law project (ALI Principles of Law Tentative Draft 2019).

Ian was named the Lawyer of the Year for Information Technology Law in the 2021, 2020, 2019, 2018, 2016 and 2013 editions of Best Lawyers in America and was recognized as the 2012 New Media Lawyer of the Year by the Century City Bar Association. In 2020, 2019 and 2018 he was recognized as one of the Top 1,000 trademark attorneys in the world for his litigation practice by World Trademark Review. In addition, in 2019 he was named one of the top 20 Cybersecurity lawyers in California and in 2018 one of the Top Cybersecurity/Artificial Intelligence lawyers in California by the Los Angeles and San Francisco Daily Journal. He received the “Trailblazer” Award, Intellectual Property, 2017 from The National Law Journal and he has been recognized as a “Groundbreaker” in The Recorder’s 2017 Litigation Departments of the Year Awards for winning a series of TCPA cases. In addition, he was the recipient of the California State Bar Intellectual Property Law section’s Vanguard Award for significant contributions to the development of intellectual property law. He is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He has been recognized as one of the Top 75 intellectual property litigators in California by the Los Angeles and San Francisco Daily Journal in every year that the list has been published (2009 through 2020). Ian was also listed in Variety’s “Legal Impact Report: 50 Game-Changing Attorneys” (2012), was recognized as one of the top 100 lawyers in L.A. by the Los Angeles Business Journal and is both a Northern California and Southern California Super Lawyer.

Ian holds JD and LLM degrees and the CIPP/US certification from the International Association of Privacy Professionals (IAPP).
INFORMATION, NETWORK AND DATA SECURITY

27.04[6][L]

who is authorized to sue for civil penalties.\footnote{N.Y. Gen. Bus. Law, § 899-bb(2)(d).}

The Act also broadened the scope of New York’s security breach notification statute, which is separately analyzed in section 27.08.

A copy of the SHIELD Act is set forth in section 27.09[35]. Guidance on how to conduct a risk assessment and draft a written information security program is set forth in section 27.13.

\textbf{27.04[6][L] California’s IoT Law on the Security of Connected Devices}

California’s IoT data security law,\footnote{The Internet of Things (IoT) is a broad term used to refer to connected devices—such as smart refrigerators, smart televisions, wearable exercise monitors, self-driving cars, home security systems, and home or office climate control systems, among other things—that collect, store, or transfer information to other devices and networked computers, including personal data. \textit{See generally supra} § 27.03B (explaining IoT).} \textit{Cal. Civil Code} §§ 1798.91.04 to 1798.91.06, which took effect on January 1, 2020, requires a manufacturer of a connected device to equip the device with a reasonable security feature or features that are appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, and designed to protect the device, and any information it contains, from unauthorized access, destruction, use, modification, or disclosure. Specifically, the law requires that a manufacturer\footnote{Manufacturer means “the person who manufactures, or contracts with another person to manufacture on the person’s behalf, connected devices that are sold or offered for sale in California. For the purposes of this subdivision, a contract with another person to manufacture on the person’s behalf does not include a contract only to purchase a connected device, or only to purchase and brand a connected device.” \textit{Cal. Civil Code} § 1798.91.05(c).} of a connected device\footnote{Connected device means “any device, or other physical object that is capable of connecting to the Internet, directly or indirectly, and that is assigned an Internet Protocol address or Bluetooth address.” \textit{Cal. Civil Code} § 1798.91.05(b).} equip the device with a reasonable security feature\footnote{A security feature is “a feature of a device designed to provide security for that device.” \textit{Cal. Civil Code} § 1798.91.05(d).} or features that are all of the following:

\begin{enumerate}
\item Appropriate to the nature and function of the device.
\item Appropriate to the information it may collect, contain, or transmit.
\end{enumerate}
(2) Appropriate to the information it may collect, contain, or transmit.

(3) Designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure.⁵

Subject to these requirements, if a connected device is equipped with a means for authentication⁶ outside a local area network, it will be deemed a reasonable security feature under the statute if either:

(1) The preprogrammed password is unique to each device manufactured; or

(2) The device contains a security feature that requires a user to generate a new means of authentication before access is granted to the device for the first time.⁷

The statute also includes four express exclusions. It may not be construed “to impose any duty upon the manufacturer of a connected device related to unaffiliated third-party software or applications that a user chooses to add to a connected device.”⁸

It may not be construed “to impose any duty upon a provider of an electronic store, gateway, marketplace, or other means of purchasing or downloading software or applications, to review or enforce compliance . . .” with the statute.⁹

It may not be construed “to impose any duty upon the manufacturer of a connected device to prevent a user from having full control over a connected device, including the ability to modify the software or firmware running on the device at the user’s discretion.”¹⁰

And it may not be applied “to any connected device the functionality of which is subject to security requirements

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⁵Cal. Civil Code § 1798.91.04(a). Unauthorized access, destruction, use, modification, or disclosure means “access, destruction, use, modification, or disclosure that is not authorized by the consumer.” Id. § 1798.91.05(e).

⁶Authentication means “a method of verifying the authority of a user, process, or device to access resources in an information system.” Cal. Civil Code § 1798.91.05(a).

⁷Cal. Civil Code § 1798.91.04(b).

⁸Cal. Civil Code § 1798.91.06(a).

⁹Cal. Civil Code § 1798.91.06(b).

¹⁰Cal. Civil Code § 1798.91.06(c).
under federal law, regulations, or guidance promulgated by a federal agency pursuant to its regulatory enforcement authority.”

California’s IoT security law, which was the first U.S. statute to specifically address the security of information shared by connected devices, has been either applauded by security experts for taking a step in the right direction or criticized for focusing on adding “good” features instead of removing bad ones that subject devices to attacks. It seems likely that other states or the federal government will seek to enact IoT regulations in the coming years.

27.04[6][M] Insurance Industry Data Security Laws

An increasing number of states—including Alabama, Connecticut (effective October 1, 2020), Delaware, Michigan (effective January 20, 2020 and January 20, 2021), Mississippi, New Hampshire, Ohio, and South Carolina—have enacted variations of the National Association of Insurance Industry Data Security Laws
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