

CALIFORNIA'S IOT LAW ON THE SECURITY OF CONNECTED DEVICES

Excerpted from the forthcoming 2023 update to Chapter 27 (Cybersecurity: Information, Network and Data Security)
E-Commerce and Internet Law: Legal Treatise with Forms 2d Edition
A 5-volume legal treatise by Ian C. Ballon (Thomson/West Publishing, www.IanBallon.net)

(These excerpts are unrevised page proofs for the current update and may contain errors. Please email the author at ballon@gtlaw.com for a complimentary copy of the final published version.)

CPRA/SECURITY BREACH CLASS ACTION LITIGATION – HOW TO MITIGATE THE RISKS AND WIN OR FAVORABLY SETTLE CLAIMS

PRIVACY + SECURITY FORUM
MAY 10-12, 2023

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E-COMMERCE & INTERNET LAW

Treatise with Forms—2d Edition

IAN C. BALLON

Volume 3



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ness purposes by erasing electronic media so that the information cannot be read or reconstructed.⁸

A *small business* under the Act—defined as one with fewer than fifty employees, less than \$3 million in gross annual revenue in each of the last three fiscal years, or less than \$5 million in year-end total assets, calculated in accordance with generally accepted accounting principles⁹—is deemed to comply with the law if the small business’s security program contains “reasonable administrative, technical and physical safeguards that are appropriate for the size and complexity of the small business, the nature and scope of the small business’s activities, and the sensitivity of the personal information the small business collects from or about consumers.”¹⁰

The Act does not authorize a private cause of action,¹¹ but provides for enforcement by the New York Attorney General, who is authorized to sue for civil penalties.¹²

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.

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

California’s IoT data security law,¹ 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

⁸N.Y. Gen. Bus. Law, § 899-bb(2)(b)(ii)(C).

⁹N.Y. Gen. Bus. Law, § 899-bb(1)(c).

¹⁰N.Y. Gen. Bus. Law, § 899-bb(2)(c).

¹¹N.Y. Gen. Bus. Law, § 899-bb(2)(e).

¹²N.Y. Gen. Bus. Law, § 899-bb(2)(d).

[Section 27.04[6][L]]

¹The 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. *See generally supra* § 27.03B (explaining IoT).

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 manufacturer² of a connected device³ equip the device with a reasonable security feature⁴ or features that are all of the following:

- (1) Appropriate to the nature and function of the device.
- (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

²*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.” Cal. Civil Code § 1798.91.05(c).

³*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.” Cal. Civil Code § 1798.91.05(b).

⁴A *security feature* is “a feature of a device designed to provide security for that device.” Cal. Civil Code § 1798.91.05(d).

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).

⁶*Authentication* 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).

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 under federal law, regulations, or guidance promulgated by a federal agency pursuant to its regulatory enforcement authority.”¹¹

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.¹² It seems likely that other states or the federal government will seek to enact IoT regulations in the coming years.

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).

¹¹Cal. Civil Code § 1798.91.06(d).

¹²See Adi Robertson, *California just became the first state with an Internet of Things cybersecurity law*, The Verge, Sept. 28, 2018 (quoting Robert Graham); Edward Kovacs, *California IoT Cybersecurity Bill Signed into Law*, SecurityWeek, Oct. 1, 2018 (quoting Graham as stating that the law “will do little [to] improve security, while doing a lot to impose costs and harm innovation.”).

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- ◆ Antitrust in the era of techlash
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- ◆ Software copyrightability and fair use after *Google v. Oracle*
- ◆ Mobile and online contract formation, unconscionability and enforcement of arbitration and class action waiver clauses in an era of mass arbitration
- ◆ TCPA law and litigation after *Facebook v. Duguid* - the most comprehensive analysis of the statute, regulations, and conflicting case law found anywhere
- ◆ The Cybersecurity Information Sharing Act (CISA), state security breach statutes and regulations, and the Defend Trade Secrets Act (DTSA) -- and their impact on screen scraping and database protection, cybersecurity information sharing and trade secret protection, & privacy
- ◆ Platform moderation and liability, safe harbors, and defenses (including the CDA and DMCA)
- ◆ Dormant Commerce Clause restrictions on state law regulation of online and mobile commerce
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- > **Platform moderation and liability, safe harbors and defenses** (ch. 49, 4, 6, 8, 37)
- > **Privacy and IP aspects of Artificial Intelligence (AI) and machine learning** (ch. 5, 26)
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