BRICK-AND-MORTAR IS BACK!
EMERGING PRIVACY ISSUES IN PHYSICAL RETAIL SETTINGS IN THE U.S.

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TECHNOLOGIES TO COVER

• WiFi Signal Tracking
• Mall App Trackers
• Body Scanners
• Digital Signage
• Customer-Level Video Cameras
• PII Collection at Point of Sale
WIFI SIGNAL TRACKING

What is it?
– Tracking consumer phone signals
  • Based on WiFi signals emitted from smartphones
  • Retailers receive anonymous reports, but companies that collect the information may have additional data

What is it used for?
– A retail store wants to know:
  • How often a customer visits the store
  • Which parts of the store the customer lingers in
  • How long he or she spends in the store
  • If he or she visits other locations of the same store
  • Whether he or she would visit more frequently if the store changed its hours or its storefront displays

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WIFI SIGNAL TRACKING (CONT)

Potential Legal and Regulatory Issues

• No specific federal/state law on point
• Section 5 is potentially applicable
  • To what degree is notice and choice necessary/appropriate?
  • How would one provide notice and choice?
WIFI SIGNAL TRACKING (CONT)

Issues to Watch

• Sen. Franken’s March letter to Euclid
• Sen. Schumer’s July letter to FTC, asking agency to require a “clear and obvious opt-out” before tracking
• Industry group, including Euclid and Future of Privacy Forum, is creating a set of best practices
MALL APP TRACKERS

What is it?

- Mobile applications that use geofencing technology to send coupons and other information to customers when they walk near certain stores.

What is it used for?

- Targeted advertising, based on physical proximity to certain stores.
MALL APP TRACKERS (CONT)

Potential Legal and Regulatory Issues

• Section 5
  – Opt-in makes this less problematic
  – Opt-in also allows for privacy policy
  – App provides platform to collect additional information
MALL APP TRACKERS (CONT)

• **Issues to Watch**
  – Will this technology become an alternative to WiFi signal tracking?
  – What else will retailers do with the data?
  – The value proposition for consumers; are the coupons worth the price?
BODY SCANNERS

What is it?

• Clothing stores offering TSA-style body scanners for “made to measure” product

What is it used for?

• Improved fit of merchandise
• Suggest specific clothing for customer to try on, given his or her body type

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Potential Legal and Regulatory Issues

• Section 5
  – Opt-in makes practice less problematic
  – Biometric data subject to framework principles of privacy by design, simplified choice, and transparency

• State Biometric Laws
  – Texas and Illinois statutes
  – Strict notice and choice requirements, including written release from customer in Illinois

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BODY SCANNERS (CONT)

Issues to Watch

• Will scanning become commonplace?
• What expectations will customers have about scanner data?
  • Should scanner data be retained?
  • Under what terms? For how long?
• Compliance with potentially divergent state laws
DIGITAL SIGNAGE

What is it?

• Mall information kiosks with cameras and motion detectors that use identity software to estimate a person’s gender and age

What is it used for?

• Tailoring advertising on mall displays
• Also collects data on mall traffic volumes and shopping patterns

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DIGITAL SIGNAGE (CONT)

Potential Legal and Regulatory Issues
• Section 5
  • Best Practices for Digital Signs Specifically addressed in FTC Report on Facial Recognition
    » Protect against hacking by third parties
    » Avoid placing in sensitive areas
    » Don’t store images
    » Provide clear notice and choice
      – Heightened privacy concerns if:
        » Images are stored
        » Customers are tracked across signs, or
        » Images are run against a database to identify specific customers
  • State biometric laws also implicated

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DIGITAL SIGNAGE (CONT)

Issues to Watch:

– Renewed Congressional Interest?
– Will changing consumer expectations affect analysis?
– Self-Regulatory codes
  • Point of Purchase Advertising International's Digital Signage Group ("POPAI")
  • Digital Signage Federation and Center for Democracy and Technology

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CUSTOMER-LEVEL VIDEO CAMERAS

What is it?
• Video cameras installed in stores at a customer’s level, such as in display mannequins

What is it used for?
• Tracking customer shopping habits
• Suggesting products for a customer
• More sophisticated versions can even recognize specific VIP customers

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CUSTOMER-LEVEL VIDEO CAMERAS (CONT)

Potential Legal and Regulatory Issues

• Section 5
• Federal and State Video Voyeurism Laws
• Federal and State Wiretap Laws
• State privacy torts
• State biometric laws
CUSTOMER-LEVEL VIDEO CAMERAS (CONT)

Issues to Watch

• How will technology evolve?
• Which technologies will be combined with video cameras, and for what purpose?
• Likely to be affected by regulation of facial recognition technology / FTC workshop?
CUSTOMER INFORMATION AT POINT OF SALE

What is it?
• Collecting any personal identification information when the customer is in store and paying by credit/debit card

What is it used for?
• Use only for specific purposes allowed by statute, such as collecting address in order to ship goods to customer
Potential Legal and Regulatory Issues

- State laws restrict collection of personal identification information in connection with credit or debit transaction

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<td>Address, telephone number or any other “identification information”</td>
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CUSTOMER INFORMATION AT POINT OF SALE (CONT)

Issues to Watch

• Expansion of Williams-Sonoma and Michael Stores to other jurisdictions
  – Hancock v. Urban Outfitters

• Expansion of Apple to other scenarios, including physically-shipped goods
RESOURCES

- **Wi-Fi Signal Tracking**

- **Mall App Trackers**

- **Body Scanners**

- **Customer-Level Video Cameras**
  - Fast Company, Kraft Store Kiosk Scans Your Face Then Knows What to Feed It, http://www.fastcompany.com/171684/kraft-store-kiosk-scans-your-face-then-knows-what-feed-it-video

- **Digital Signage**

**Customer Information at Point of Sale**

- **Hancock v. Urban Outfitters**, Civil No. 13-939 (D.D.C.)
- **Krescent v. Stubhub, Inc.**, Civil No. 11-512525 (Cal. Sup. Ct. Dept. 305 July 8, 2013)