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CALIFORNIA LAWYERS ASSOCIATION

presents

Inaugural Annual Privacy Summit

Session 6, Track 1

Battle of AI Privacy: EU vs. US

MCLE: 1.0 Hours

Friday, February 10, 2023
11:30 a.m. – 12:30 p.m.

Speakers:

Christopher Jeffery, Partner, Taylor Wessing
Felix Hilgert, Partner, Osborne Clarke
Alexandra Laks, Managing Counsel, Privacy, Cruise LLC

Conference Reference Materials

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Battle of AI Privacy: EU vs. US

Jeewon Kim Serrato – **Partner, BakerHostetler**
Christopher Jeffery – Partner, TaylorWessing
Felix Hilgert – Partner, Osborne Clarke
Alexandra Laks – Managing Counsel, Cruise

February 10, 2023

National AI Strategies, Action Plans, and Proposals

http://www.unicri.it/topics/ai_robotics

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Application of AI Framework Considerations

Luciano Floridi & Josh Cowls, ***A Unified Framework of Five Principles for AI in Society***, Harvard Data Science Review (2019)

AI academic research dates to 1950s	Ethical debate began in 1960s

Compared:

- Asilomar AI Principles
- Montreal Declaration
- Ethically Aligned Design Principles
- EC Expert Group
- UK House of Lords AI Committee Report
- Tenets of Partnership on AI

Determined 47 Principles distilled into 5 categories:

- **Beneficence**: Promoting well-being, preserving dignity, and sustaining the planet
- **Non-maleficence**: Privacy, security and "capability caution"
- **Autonomy**: Power to decide (to decide)
- **Justice**: Promoting prosperity, preserving solidarity, avoiding unfairness
- **Explicability**: Enabling the other principles through intelligibility and accountability

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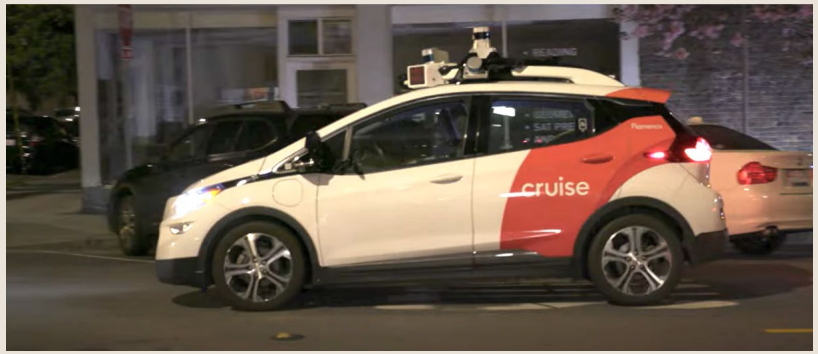
What is Cruise?

Cruise builds self-driving vehicles for ride hailing and delivery services

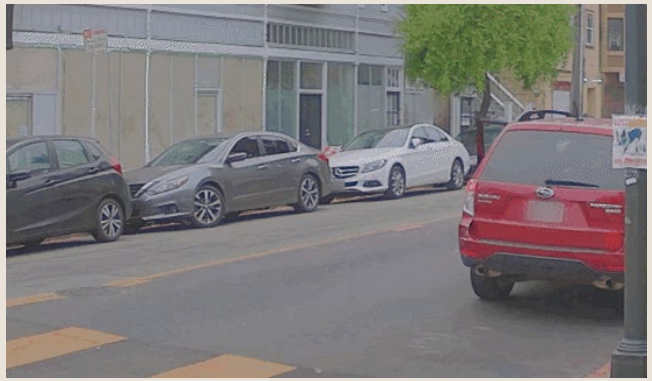


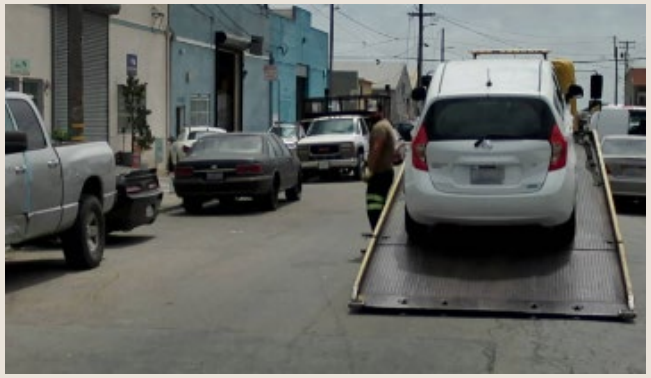
How the Cruise AV drives

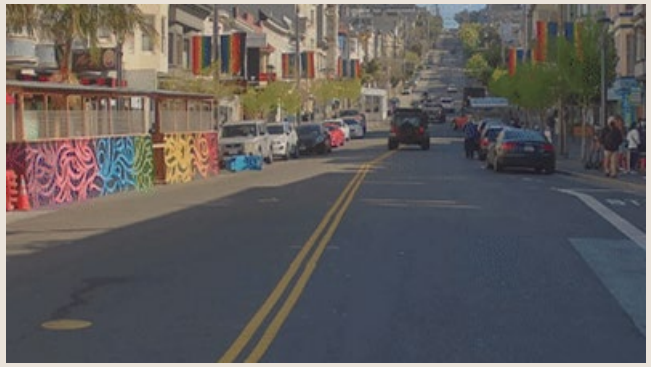
World Understanding

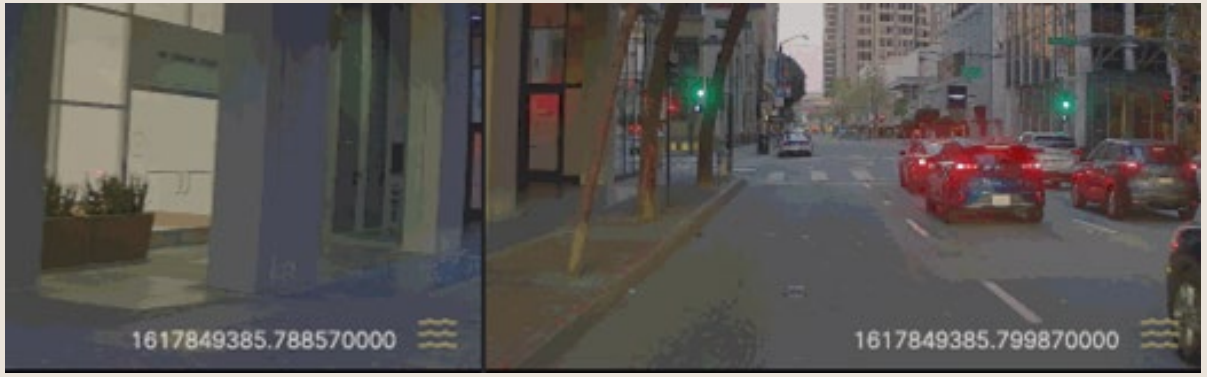
Decision Making

A normal day in the life of a Cruise AV

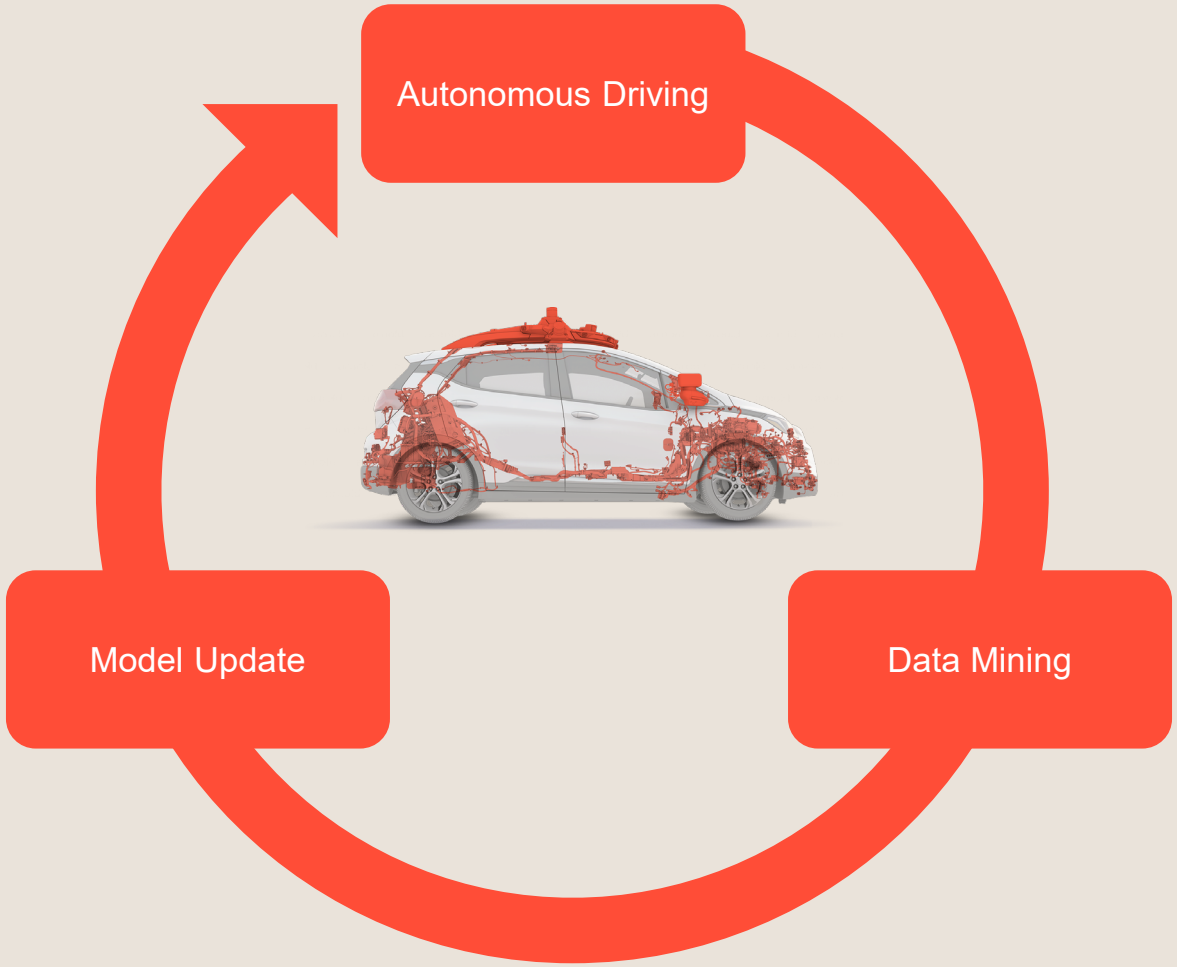








Continuous Learning Machine



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US Approach to AI

Federal

- Section 5 FTC Act
- Fair Credit Reporting Act
- Equal Credit Opportunity Act
- FTC April 2020 Guidance “Using Artificial Intelligence and Algorithms”
- FTC January 2016 Report “Big Data: A Tool for Inclusion or Exclusion?”
- FTC September 2014 “Big Data” Workshop on data modeling, data mining, and analytics
- U.S. Dept. of Commerce, National AI Advisory Committee
- NIST Special Publication Standard for Identifying and Managing Bias in Artificial Intelligence
- White House Blueprint for an AI Bill of Rights

State and Local

- California Consumer Privacy Act (CCPA), amended by California Privacy Rights Act (CPRA)
- Colorado Privacy Act (CPA)
- Connecticut Privacy Act (CTPA)
- Virginia Consumer Data Protection Act (VCDPA)
- New York City Local Law Int. No. 1894-A Regulating the Use of Artificial Intelligence in Employment Decisions

US Right to Object to Automated Decisionmaking

Regulations Pending

- Automated decisionmaking technology
- Profiling
- Algorithmic Discrimination
- Access and/or Opt-Out Rights in the Context of Automated Decisionmaking
- Legal or Similarly Significant Effects Concerning a Consumer
- Human Involved Automated Processing, Human Reviewed Automated Processing, and Solely Automated Processing

Existing Requirements

- Notice at Collection
- Right to Access
- Consent
- Purpose Limitation
- Contracts

AI Enforcement Considerations

- **FTC** can enforce Section 5 of the FTC Act, FCRA, and ECOA against users and developers of unfair or biased algorithms.
- **FTC** ordered a company to delete models and algorithms developed using users' uploaded photos and videos.
- FTC ordered a company to destroy any models or algorithms developed with the use of improperly collected children's personal information.

Recent EU Initiatives in Context

https://iapp.org/

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AI Act

- Timing, purpose, scope, who needs to be watching this?

- **Definitions are key** - what is an AI system?
  - No settled definition out there
  - Key category of high-risk AI systems – no bright lines around them and they will change

- **Unacceptable risk AI systems** – prohibited

- **High risk AI systems**
  - AI = a product already regulated by EU safety legislation or AI = a safety component of one
  - Or is listed in the appendix: e.g. creditworthiness, recruitment/ HR management, biometric (non-public places) – list can change!
  - Compliance – product liability model: risk management system, documentation, conformity assessment, transparency, oversight, monitoring

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AI Act

- **Low risk AI systems**: e.g. chatbots, games, spam filters, inventory management
  - Compliance: focus on transparency
- **Penalties**: max of €30M or 6% of global revenue (for unacceptable and high-risk systems)
- **Enforcement**: led by EU national regulators
- **Co-operation**: EU Board (regulators and EU Commission) to ensure consistency and issue guidance
- **UK:** some govt plans to promote innovation in AI v early days, no clear sign of new law

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EU Artificial Intelligence Liability Directive

- Procedural changes in disputes about non-contractual liability for harms purportedly caused by an artificial intelligence – not separate damage claim.
- **Key Content of proposal** (full text available here):
  - **Access to information:** Disclosure obligations on operators (and in some cases, creators) of High Risk AI systems
  - **Limited presumption of causality:** If claimant proves negligence & damage caused by an AI output, then presumption that the negligence caused that output. Presumption does not apply if plaintiff has access to enough evidence to prove causality.
  - **Examples** of negligence include failure to use training data of sufficient quality

Further reading: https://www.osborneclarke.com/insights/eu-proposes-new-approach-liability-artificial-intelligence-systems

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Automated decision-making under Art. 22 GDPR

- Automated decision-making is making legally significant decisions without human intervention (can be an AI, doesn't have to be one, but minimum complexity required).
- This includes "profiling", i.e. analyzing or predicting personality traits or behavior based on (other) **personal** data (see Art. 4 No. 4 GDPR).
- **Legal basis**
  - Necessary to conclude a contract (but not using sensitive data such as gender, ethnicity…)
  - Required or permitted by law
  - Express (not implicit / tacit) consent
- Data subject can generally contest decision / request human review

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Enforcement Example: Clearview AI

- Clearview AI collected 10bn selfies and associated data by scraping the web, to build facial recognition service for law enforcement – regulators around the world determined this was without legal basis or otherwise violate privacy law (EU/UK, Australia, Canada, Illinois…).
- Clearview **refused to delete** images upon request and refused to cooperate with regulators and follow deletion orders.
- Fined multiple times (2x 20m EUR in France, 20m EUR each in Italy and Greece, 7.5m GBP in UK)
- Also fines for law enforcement agencies that used the product (250k EUR, Sweden)
- Settlements and deletion orders in US, Canada, Australia

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Digital Advertising: AI Use Cases

- Huge amounts of data lends itself to training models
- AI used to:
  - Design ads – e.g. Lexus, Phrasee – adjust content for individuals
  - Find new audiences, more conversions for less - e.g. Adobe Sensei
  - Place ads best based on how humans view sites – e.g. GumGum
  - Dynamically adjust spend and channel focus to maximise ROI – e.g. Albert
  - Anti-fraud – e.g. HUMAN
- Improvements AI-based contextual targetting may help avoid personal data use
- Existing regulatory pressure may make some companies hesitate

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Monetization in Games: AI Use Cases

- Monetization often through (repeated) microtransactions
- Providers need to predict churn or purchases, identify likely big spenders ("whales")
- One step further: AI-generated bespoke interactive environments (to automatically adapt to user interaction and trigger purchases)?
- Legal issues:
  - Disclosures under (EU) AI Act
  - Limits on profiling under GDPR
  - Consent vs. part of the service?

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Synthetic Data

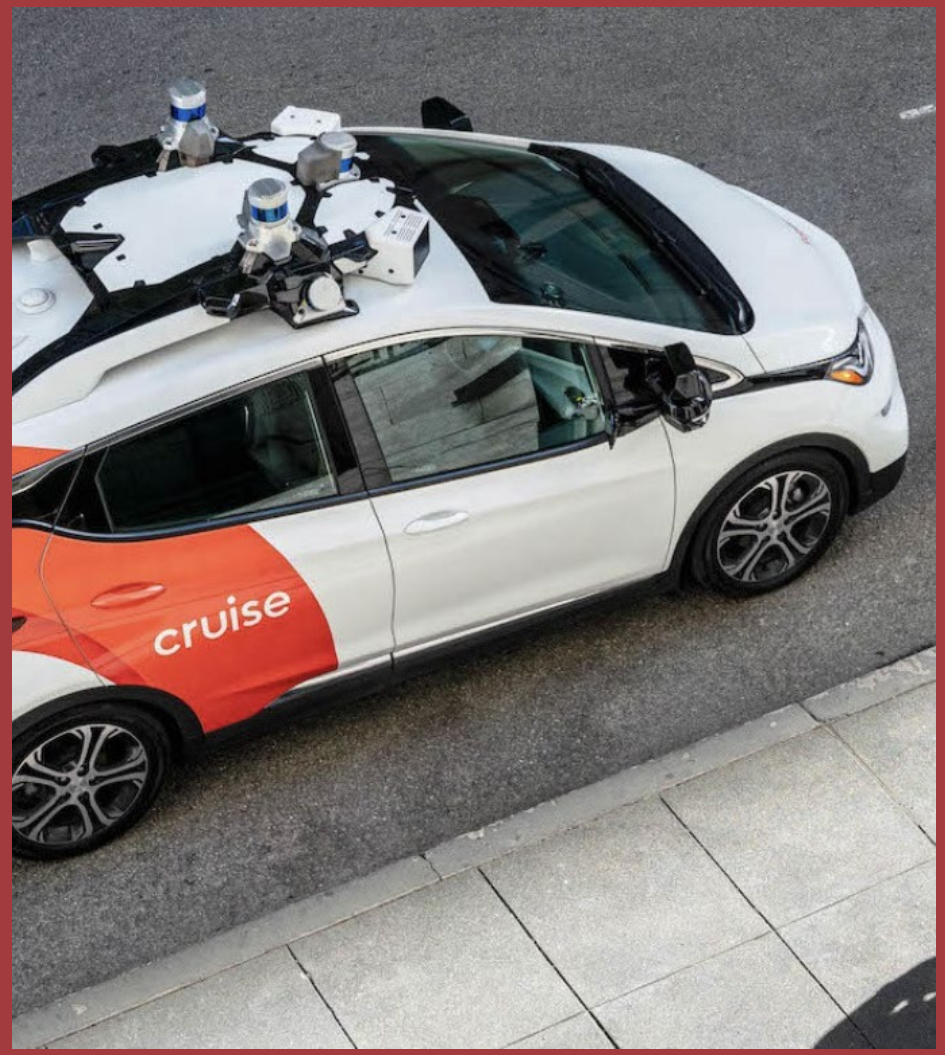
- One challenge for AI: can you use identifiable datasets to train the models?
  - Beware anonymisation techniques that obfuscate data – probably don't work
  - Eg Meta case and lossy hashing by Whatsapp
- Increasing use of synthetic data
  - Aims to extract global structure, patterns, and correlations from an existing dataset
  - Whilst being robustly, verifiably anonymous – e.g. outliers removed.
  - Removing risk of attribution/ re-linking to real people v complex
  - NB to generate the synthetic data, you often need to process identifiable data
- NB an enabling technology to train the models at the heart of effective AI

AI Risk Management Frameworks

Safety Management System (SMS)

NIST Artificial Intelligence Risk Management Framework (AI RMF)

- AI Risks and Trustworthiness
- Managing risks
  - Govern
  - Mapping
  - Measuring
  - Managing



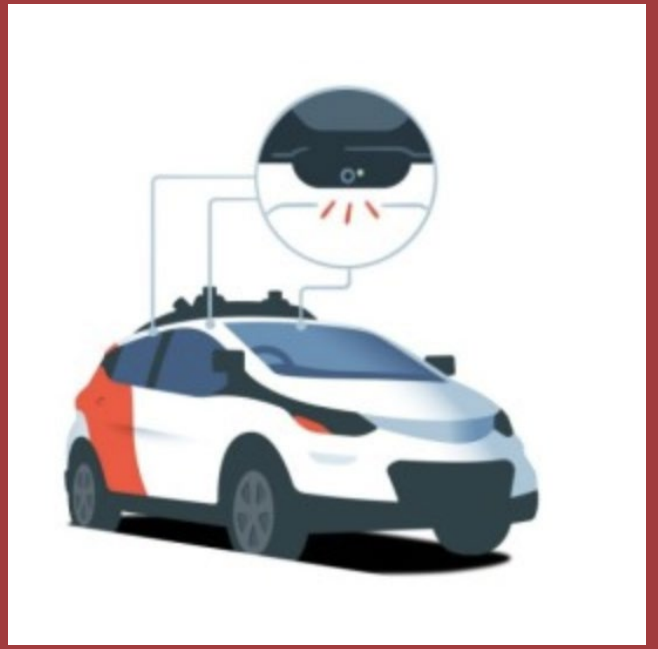
Cruise AI Privacy Considerations

Exterior sensor data processing
- Data classification and minimization
- Data management controls

In-cabin AI considerations
- Detections, alerts, and automating safety
  - Human v. machine intervention
- Personalized customer experiences
- Notice and transparency

Customer profiling, marketing, and preferences
- Data sharing
- Sensitive data

Documentation and compliance



Addressing AI Privacy Risk

Discovery and planning
- Identifying key point people and stakeholders
- Documenting in-flight efforts and gaps

Governance and coordination
- Adopting a holistic approach to data management and governance (including AI)
- Leveraging existing procedures and processes

Risk assessment and documentation
- Privacy review and risk assessment processes
- Measuring, prioritizing, and escalating risks

Risk mitigation and management

Key Takeaways

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Osborne Clark

Felix is a technology and video games lawyer with a focus on helping North American companies expand and succeed abroad. His practice centers on IP/IT agreements, e-commerce, as well as specific issues of the interactive entertainment industry.

Felix advises innovative software and technology companies as well as online retailers and digital platforms on license, development and Software-as-a-Service (SaaS) contracts, AR/VR, as well as standard terms for B2B and B2C transactions, manages international expansion projects and complex contract negotiations, and advises on e-commerce and consumer protection. He is also regularly involved in technology driven transactions.

Clients in the entertainment industry particularly benefit from his industry experience. He provides comprehensive legal advice regarding the content and distribution of entertainment products for the German market.

Felix joined Osborne Clarke's Cologne office as a lawyer in 2011 after studying in Cologne and Paris and training with a German federal youth protection authority, as well as an international law firm in Vancouver. He has also worked at a Toronto law firm specializing in cross-border advice. In 2021, he relocated to Osborne Clarke's San Francisco office.

Felix has published on IT, privacy and youth protection law and regularly speaks at legal conferences around the world. He also contributes to the specialized blog www.gameslaw.org.