

# Sextech: Sticky Legal Issues?

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**Neil Brown offers some initial thoughts on a topic which you probably haven't thought too much about yet.**

*This is the first time that I have thought it prudent to put a warning before a legal article: while this is an article on the legal issues of sextech, it does, inevitably, talk about sex and sex toys. If this is not for you, please look away now.*

FinTech. HealthTech. LegalTech. EdTech. Stick anything before 'Tech', it seems, and you have a new product category. SexTech is no different: sex and the Internet are long-standing bedfellows, so it should come as no surprise that companies are looking to combine technology with sex toys, to form the growing trend of 'sextech'.

Of course, the combination of sex and technology is far from new — many of the devices you might find in Ann Summers, for example, contain an electric motor — and so one may question whether there is anything particularly deserving of attention here. However, while there is no common definition of 'sextech', the incorporation into sex toys of more cutting-edge technology, including an Internet connection and data gathering potential, presents a number of issues worthy of consideration, even if only in terms of apply existing legal constructs to this particular product category.

So what are we talking about?

At one end of the spectrum is the 'device plus app' approach. Consider the male sex toy 'The Piu ... which syncs with an app that sells a selection of adult films designed to play in time with the app'.<sup>1</sup> The constituent parts are not, in themselves, new, but their combination is relatively innovative.

Moving up a stage, see the female-friendly 'HUM', which is described as 'the world's first robotic, artificially intelligent vibrator', which uses 'body response technology' and 'literally has a computer that interprets many things for your pleasure'. Is it possible that your sex toy knows more about what you like than you do?<sup>2</sup>

Towards the other end of the spectrum, there is a webpage for a \$10,000 bespoke sex robot 'Roxxy', which can be customised with the buyer's preferred eye colour, lipstick, skin tone and other physical characteristics.<sup>3</sup>

## Data and privacy considerations

'Smart' is often synonymous with 'more data'. The combination of hardware with apps enables device manufacturers to build considerable databases of their users' activities.

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<sup>1</sup> <https://www.theguardian.com/lifeandstyle/2016/jan/23/sex-tech-dildo-sexual-health-expo-los-angeles>

<sup>2</sup> <https://www.indiegogo.com/projects/hum-the-first-artificially-intelligent-vibrator#/> and <https://meethum.com/faq/>

<sup>3</sup> <http://www.truecompanion.com/shop/roxyxy-truecompanion-sex-robot/roxyxy/>

Data may be collated and processed for many reasons, both valid and questionable. Perhaps this may be to use server-side processing to analyse an individual user's preferences, and to tailor the functionality of the device to that user, to provide the best possible experience. Perhaps to inform product design and development. Perhaps to permit remote control of a device over the Internet, by a third party. Perhaps, of course, to flog the data to third-party data brokers, to be used for whatever purposes they want.

Given the sensitivity of the information which may be collected from sex toys, considerable attention will need to be given to privacy.

You may recall a story from last year, where a US purchaser of a 'smart' sex toy sued the manufacturer, on the basis of their data collecting.

The lawsuit claimed that:

'[u]nbeknownst to its customers ... [the defendant] designed We-Connect to collect and record highly intimate and sensitive data regarding consumers' personal We-Vibe use, including the date and time of each use and the selected vibration settings, and [to] transmit such usage data — along with the user's personal email address — to its servers in Canada'.<sup>4</sup>

In November 2016, the parties filed a brief stating that there had been a 'successful conclusion of their settlement discussions': a happy ending to this particular case, but most probably it is an issue which we will see again.<sup>5</sup>

I set out below some of the key legal issues relating to personal data and sextech. However, while a company would be ill-advised not to do something which it was required to do, it is likely that, in this context, the law is viewed as a baseline: to build trust among users; manufacturers may need to go far beyond the bare legal minimum.

### **Do you really need personal data?**

As a starting point, a manufacturer will need to ask itself if it needs to process personal data at all. Particularly in the context of data as sensitive as that relating to sex life, a manufacturer should — and, under the General Data Protection Regulation (which I'll call "GDPR" from now on), must — follow 'privacy by design' principles, including the principle of data minimisation.

To the extent that the processing of personal data is necessary for the device's functionality, manufacturers must think about how they fulfil their obligations towards their users, including a clear identification of the purposes of processing, using the minimum amount of data necessary and being clear and transparent about what data are being used and for what purpose.

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<sup>4</sup> <https://cdn.arstechnica.net/wp-content/uploads/2016/09/vibratorsuit.pdf>

<sup>5</sup> <https://arstechnica.co.uk/wp-content/uploads/2016/12/vibsettlement1.pdf>

## **Consensual processing**

From a European point of view, data about a natural person's sex life falls squarely in the 'special categories of data', both under the current data protection framework and under the GDPR.

The impact of this is that any processing of those data must either be done anonymously, or else after obtaining the data subject's explicit consent. And, as with consent to sexual activity, the absence of a 'no' does not mean 'yes': consent must, among other things, be an 'unambiguous indication of the data subject's wishes', and Recital 32 of the GDPR provides that '[s]ilence, pre-ticked boxes or inactivity should not ... constitute consent'.

In this context, the requirement is one not just of 'consent' but of 'explicit consent', and so the standard is higher still.

In practice, to ensure that this standard is met, manufacturers will need to be communicating very clearly to users about what data they will be processing for what purpose, and obtain a clear, recordable record of that user's consent. To ensure that consent is valid, each purpose should be covered separately; users must not be required to accept non-essential processing (eg for product development purposes) to be able to make use of the product which they have bought.

## **Security, storage and pseudonymisation**

Under both the current regime and the GDPR, where personal data are processed, the controller is required to take appropriate technical and organisational measures to protect those data. What is 'appropriate' will depend on the particular circumstances, and will require a careful case-by-case analysis.

Measures which a manufacturer might consider include the location of the data, and the degree of identifiability. For example, while there may be more processing power or analytical capability available if the data are extracted and processed outside the device — for example, on a manufacturer's server or even 'in the cloud' — the data may be safer if left on the individual devices or apps, ideally in encrypted containers. If the data are to be stored centrally, a robust set of information security procedures, along with non-technical controls, will be essential, and usual considerations around the use of platforms outside the EEA, if applicable, will be required.

Pseudonymisation is also likely to be an important factor. Unless there is a compelling reason to retain records which use a user's name or other real-world identifier (and so which could readily identify users if the records were compromised), pseudonymising the records can be a valuable part of a system's security. (Pseudonymous data are still personal data, both under the current directive and the GDPR, and so must still be protected appropriately.)

## **AI and sextech**

The smarter sex toys become, the more interesting the legal issues. Take the 'HUM', for example, which is described as an 'artificially intelligent vibrator'. The incorporation of AI, or other learning technologies, into a device may mean that, through assessment of your reactions to particular stimuli, the software on the device knows more about your

preferences than you do. If these data are communicated back to the device manufacturer or any other party, a very rich and hugely personal dataset is created.

Looking beyond issues of consent and data gathering, data subjects have, for many years, had the right of access to data processed about them: device manufacturers must ensure that they have mechanisms of communicating these data to their customers and, where the data are generated through machine-learning or other forms of automated decision making, they must also provide 'knowledge of the logic' (Article 12(a), 95/46/EC) or 'meaningful information about the logic involved' (Article 15(1)(h) GDPR).

Building on this, the GDPR introduces the right of data portability, at Article 20. Under this, a data subject has the right to receive the personal data 'in a structured, commonly used and machine-readable format', so that they can give the data to another data processor: a data subject might transfer a device's knowledge about them to another device manufacturer which offers an appropriate import function.

To be clear, neither of these rights are limited to AI-derived data, but they may pose particular compliance challenges to more sophisticated data sets, and so would need to be considered early on in the design process, to avoid breach or costly re-engineering.

### **Additional considerations under the GDPR**

Once the GDPR takes effect in May 2018, device manufacturers and other sextech data controllers will have more compliance obligations.

Where a controller is processing personal data about sex life on a 'large scale', it will need to appoint a data protection officer to oversee its processing operations. The GDPR does not define what 'large scale' means, and the Article 29 Working Party's Guidelines on Data Protection Officers ('DPOs') is equally vague, recognising that this is a 'large grey zone'. It provides examples (at para 2.1.3) which it considers will constitute 'large scale' but none are particularly helpful here, and it recommends that controllers consider a number of factors in making their determination, including number of data subjects, volume or data, duration or permanence of processing activity, and the activity's geographical extent. Unfortunately, it will require a judgment call on a case-by-case basis and, until we have seen how regulators and courts will interpret this provision, there is very little to go on.

Whether or not they require a data protection officer, data-using sextech companies are likely to be required to conduct data protection impact assessments (although, frankly, they should probably be doing so irrespective of a legal mandate). They will also be required to consult the relevant data protection supervisory authority before beginning the processing, if the processing activities would 'result in a high risk' to the rights and freedoms of natural persons, leaving aside any controls which the controller might have in place to prevent this.

The less data used, or the more restricted purposes for which it used, the easier the compliance burden will be.

### **S&M agreements**

No, not what you 'Fifty Shades of Grey' readers are thinking. Support and maintenance.

The more advanced systems become, the more likely they are to need care and attention, be that hardware upkeep or ongoing software maintenance activity.

A manufacturer may build this into the sale price of its device, offering to deliver software updates without further charge for a defined period of time. Given the new consumer protection framework, they would want to consider whether they were obliged to ensure that their updates did not remove functionality that had been promised to users: the Consumer Rights Act 2015, s 40(2) requires that 'digital content [must continue] to match the description of it given by the trader to the consumer'.

If the device is Internet-connected (why, God, why?), I suspect that it is only a matter of time before users will find themselves needing to apply security patches, or else we will read about sextech being hacked. Could we see device manufacturers attempting to thwart malware which tries to stop a device from working at a critical point, or else which attempts to blackmail the user if personal data is successfully exfiltrated?

And what if your system requires more extensive maintenance than you might be willing to provide on a pre-paid basis? In the commercial context, support and maintenance agreements are commonplace — but for sextech?

Taking the example of the robot 'Roxxy', the manufacturer's website provides that '[e]very sex robot will need to have a current monthly subscription for updates and general support'. You may be paying \$10,000 or more for the device, but it looks as if there is a requirement for an ongoing subscription service too. Softbank's 'Pepper', discussed below, appears to require a services agreement too.

## **Virtual reality**

The Piu, described above, touted the synchronisation of device movement with on-screen pornography of one of its key features. In this case, it appears that the display mechanism is reasonably traditional: a screen of some sort. But it is inevitable that sextech manufacturers and pornography retailers will attempt to make use of more immersive technologies, including virtual reality. Indeed, in early 2016, an 'adult VR game controller', named 'VirtuaDolls' was launched on crowdfunding website Indiegogo and was subsequently relaunched — and successfully funded — as 'Girls of Arcadia - A VR Game'.

## **Rights licensing**

For content producers, things are likely to be pretty similar to content production today, albeit with an eye to ensuring that the rights which they obtain are sufficient to cover their intended use: making sure that licences expressly cover use in virtual reality content may be worthwhile.

## **Platform rules**

However, unless content producers control the virtual reality devices and marketplaces, they are likely to be at the whim of those who do. Will companies want their app stores to be full of apps for the display of pornography? As with application stores for devices today, different operators may apply different rules, but it is highly likely that they will remain

gatekeepers of their environments, particularly if they are trying to ensure a high quality experience.

Before committing to a substantial investment in VR content linked to a sextech device, a VR content developer will need to get comfortable that it will be permitted to distribute its work, or run it on its chosen platform. And, even if a platform's rules permit the distribution of such material today, there may be very little to stop the rules changing in the future, perhaps in the event of acquisition by a company with a different perspective, leaving a developer unable to make use of its investment.

## **Personalised robots and image rights**

In April 2016, various sources reported that a man in Hong Kong had made a robot at home which looked at least passingly similar to Scarlett Johansson. Although there is nothing to suggest that this was a sex robot, such a development would not be a quantum leap.

Companies engaging in this type of manufacturing on a commercial basis are likely to face challenges if they proceed without a celebrity's consent — and, let's face it, outside a relatively limited number of actors and actresses appearing in pornography, consent is unlikely to be forthcoming.

As protection of image rights is weak in the UK, a claim in passing off — that the manufacturer's use of the person's image amounts to a misrepresentation of endorsement — is a likely cause of action, along with a potential argument that the processing of a celebrity's photographs for the purpose of creating the model was an unlawful processing of personal data. Although the manufacturer might attempt to claim that the processing was necessary for its legitimate interests, the assessment of 'unwarranted harm' would make for interesting reading.

In other parts of the world, courts may take a firmer stance around image rights — a 'right of publicity' may give a celebrity sufficient basis to take action before a US court, for example.

## **Robots, laws and ethics**

If you, like me, were fortunate enough to hear Roger Bickerstaff's contribution to the British Academy's event 'Do We Need Robot Law?', you'll probably already be thinking about both the legal and ethical frameworks for the development, operation and control of robots. (For those who were not so lucky, an audio recording is available at: <http://www.britac.ac.uk/audio/do-we-need-robot-law/>.)

Perhaps unsurprisingly, given the general timbre of the 'robot law' discourse so far, killer robots and robots which cause injury formed the mainstay of the debate, but issues of robots and sex have been debated for quite some time. For example, David Levy, an expert in AI, wrote 'Love and Sex with Robots' in 2009, and discussion of 'virtual rape' in the virtual worlds predates that.

Fascinating issues around sentience or capacity remain to be explored. Could a sex robot commit rape, for example? Or be raped? Is a sex robot capable of giving consent, or is consent something which needs to be contemplated?

In contrast to 'Roxxy', and its male counterpart, 'Rocky', both designed exclusively as sex robots, not all robot manufacturers welcome the idea of their products being used for sexual gratification. For example, Softbank's 'Pepper' robot is described as a 'robot who understands your emotions' and 'is able to adapt his attitude to suit your own as closely as possible'. (Note the interesting use of language: 'his', and 'who', rather than 'which': not only does the robot have a humanoid form, it is marketed in personal, rather than object, terms.)

Softbank has published a list of rules for use of Pepper, one of which prohibits 'acts aimed at sexual acts or obscene acts'. (Put [http://cdn.softbank.jp/mobile/set/data/static/robot/legal/pepper\\_notes.pdf](http://cdn.softbank.jp/mobile/set/data/static/robot/legal/pepper_notes.pdf) through Google translate, and see point 4 under 'Prohibited items'.) Although I cannot be sure, given the translated nature of the text, it would appear that attempting to have sex with Pepper would be a breach of contract.

Others are less willing to leave prohibitions as a matter between buyer and seller. The Campaign against sex robots was launched in 2015, and argues that 'these kinds of robots are potentially harmful and will contribute to inequalities in society', on the basis that development 'further sexually objectifies women and children'. It appears — although I may be wrong — that the mainstay of the campaign relates to humanoid robots, and the risk that human users will be 'manipulated into thinking a robot is able to reciprocate or care about their feelings'.

And even if you are comfortable with the idea of a humanoid sex robot, how would you feel — and how should society handle — sex robots built to emulate children, or animals? Would such a robot fall within the scope of obscenity law, criminalising its sale? If not, and if no other rule exists, should there be a law specifically prohibiting the creation or sale of such a device? Uncomfortable things to contemplate, but perhaps areas which will need to be addressed.

There is clearly considerable work to be done on the topic of robots and their roles in society. Should robots be capable of forming (simulating?) emotional attachment, for example? Should it always be possible for a human to identify whether they are interacting with a robot or a person? Perhaps — sextech or not — there is an opportunity for members of the SCL to engage in this dialogue, building on a debate which so often focusses solely on liability.

## Concluding thoughts

The combination of digital technologies and sex toys represents a growing trend, and it brings with it a number of interesting legal issues. In most cases, these are limited to the application of existing principles and rules to the new products but, in the case of robots and artificial intelligence, it is more than possible that the frameworks which we have today are insufficient for the task at hand.

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