

Laws in Retro Packaging

November 14, 2014

[Underoos are back!](#) Seriously – they are back! I know, right? And this time, they come in adult sizes. There are seven types (Superman, Wonder Woman, Batman, Batgirl, Harley Quinn, Captain America, He-Man, and Skeletor) and they are even branded in retro packaging to take you wayyyy back to a long-forgotten time when there were [Saturday morning cartoons](#) and you actually had to sit through commercials.

Dude, that's awesome. (What's not awesome is that a colleague that I work with has never heard of Underoos and can barely identify a Saturday morning cartoon. I believe I aged a decade just in that conversation alone.)

So you, too, can let your imagination run wild. You can have a secret, mild-mannered identity. You can pretend that you are Superman, where people around you say, "it's a bird ... it's a plane ... it's a Cessna that has a tool that allows the government to gather information about you!"

Wait, what?

Indeed, yes. Because today's news – under which the crucial Underoos news was lost – is this: the government is using airborne data collection techniques [to identify, locate, and apprehend fugitives](#). Specifically, the government employs planes that are "equipped with two-foot-square devices — sometimes called 'dirtboxes' — that mimic cell towers and trick cellphones into reporting their unique registration information and general location."

Go-Go-Gadget government!

Except that use of the technology involves [a broad sweep of devices](#) in order to identify the one or ones that the government is looking for. Let me explain: the "dirtbox" device tricks all of the cell phones in an area into thinking that there is a cell tower nearby, so the cell phones send their registration information and location to the dirtbox. In that way, there is a significant collection of "innocent" information to sift through before the government picks the information it actually wants.

And these devices allow the government to "[cut out phone companies as an intermediary in searching for suspects](#)." That's particularly interesting given that telecommunications and technology companies have increasingly become resistant to providing information to the government, some even going so far as to [sue the United States](#) for its surveillance rules. (Incidentally, the [iPhone and Android encryptions](#) have nothing to do with this. The encryption protects the *contents* of your phone, but not the *location* of your phone.)

What does that sound like? Well, for one, it sounds like the enormously controversial NSA “spying” program. For another, it sounds a lot like [the government is using hackers’ tools](#) – you know, rerouting people from where they originally wanted to go to someplace that they’d rather not be. [And there is an open question](#) as to whether or not the government needs a search warrant to obtain cell site records as opposed to requesting a 18 U.S.C. § 2703(d) order, which does not require a probable cause showing. But a judicial safeguard is only as effective as the information provided to the issuing judge.

So maybe it’s more of a Whoa-Whoa-Gadget government.

It’s either that law enforcement has gone wild, or it’s the government keeping us safe, right? Except that either choice one is just too simple; they’re both right. This is yet another example of the increasing tension between privacy and security and a demonstration of how laws that are on the books do not keep up with technology.

Best I can tell, the Underoos that are posted for sale today didn’t evolve at all. They are basically the same things that we saw in the 1980s. Technology, on the other hand, evolves every day. When 18 U.S.C. § 2703 was passed in 1988, it didn’t contemplate the era of the ubiquitous smartphone. A law in retro packaging just doesn’t sell well. And trying to match outdated laws with updated technology is a losing proposition.

If there were a catchy slogan to attach to today’s news, it would be this: We have the legal system of yesterday with the technology of tomorrow.

But what do we do about today?