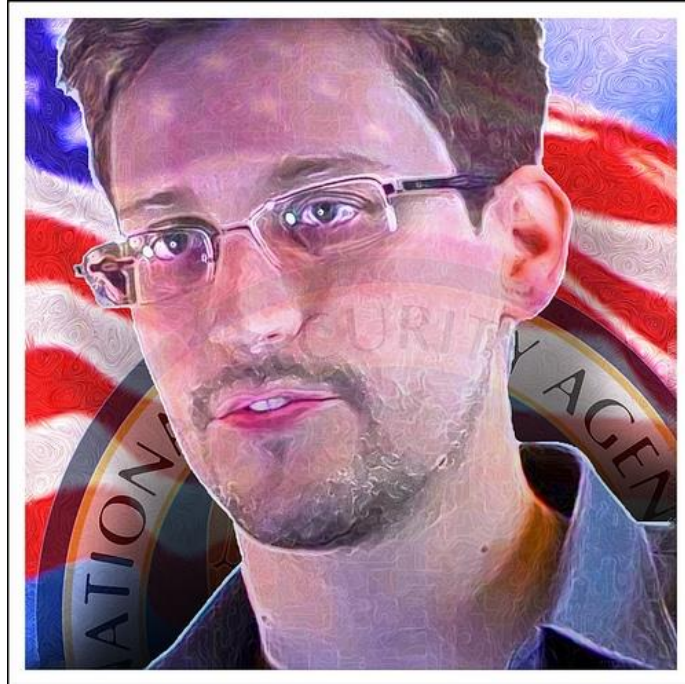# Big Data & The Law

Will Landecker & John Rake

Introduction

- Clients need data to solve problems or predict results.

- Attorneys need to know how to advise clients about (1) obtaining data, (2) using data, and (3) protecting data

Objective

- Help attorneys better understand "big data"

- Discuss potential legal issues for clients who deal with data.
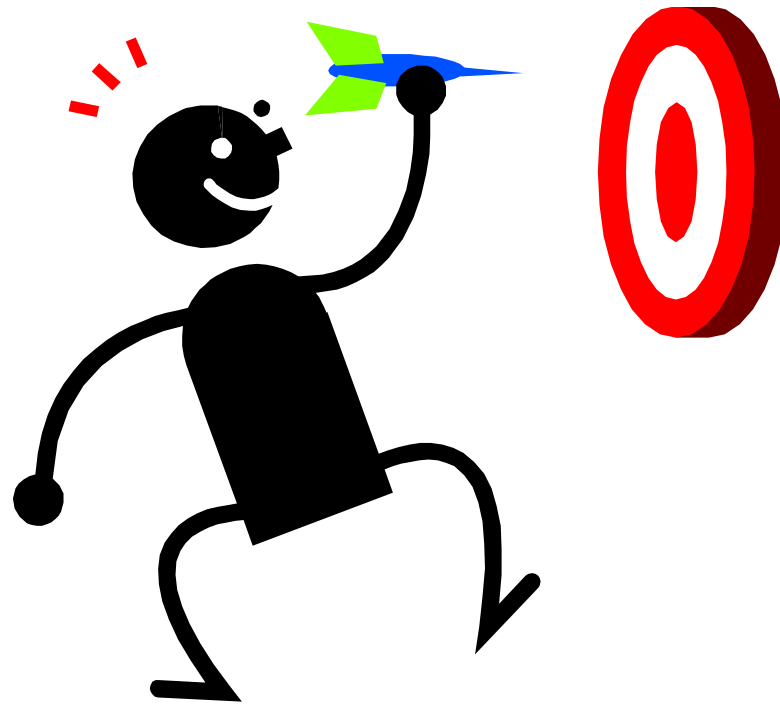
NOT

Licensed from Creative Commons, Attribution Generic License, http://creativecommons.org/licenses/by/2.5/

NOT

NOT

Overview

- What is Big Data and how big is it?
- Why do clients care about Big Data?
- What are some societal concerns about Big Data?
- How to protect investments in Big Data?
- Current regulations of Big Data
- Best practices for addressing client's legal issues related to Big Data

What is Big Data?

- Traditional definition:
  - Datasets whose size is beyond the ability of typical database software tools to capture, store, manage, and analyze.
  - Source: McKinsey Global Institute
- Form of Big Data:
  - 10% structured (in database tables),
  - 90% unstructured (emails, videos, social media interaction, CCTV footage, mobile phone calls, website clicks).

HL
GR

What is Big Data? (cont'd)

- Searches
- Recommendations
- Email
- Snail Mail
- Driving
- Transportation systems

- Using electricity
- Weather forecasts
- Smartphone apps
- World Cup models

Just How Big is Big Data?

- **1200 exabytes worth and counting…**
  - Source: Cukier & Mayer-Schoenberger, "The Rise of Big Data", Foreign Affairs (May/June 2013).   Kenneth Neil Cukier and Viktor

- **$114 billion spending on Big Data by 2018**

- **$8 million in Big Data-related initiatives for average businesses/year**
  - Source: ATKearney, Beyond Big: The Analytically Powered Organization

- **6000 data centers**

Big Data Bragging

- Datalogix data includes almost every U.S. household
- Acxiom has "multi-sourced" insight into approximately 700 million consumers worldwide.

HL
GR

Uses of Big Data

- Identifying Consumer Habits
- Identifying Patterns in Human Behavior
- Increasing Efficiency

Who are the "Players"

Figure 1: Typical Flow of Consumer Data through Resellers to Third-Party Users
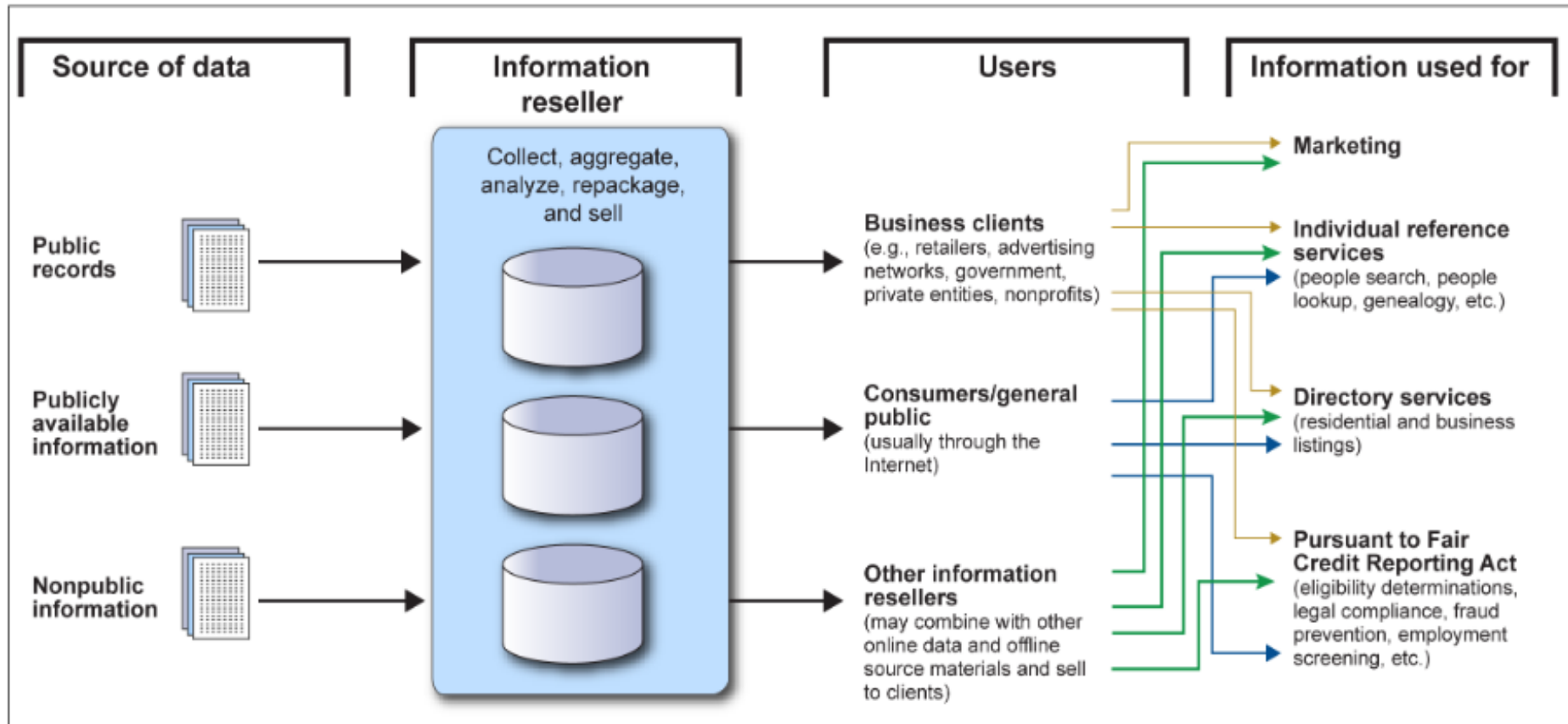
Source: GAO.

Societal Concerns about Big Data

- Re-identification of anonymized data
- Deduction of personally identifiable information
- Discrimination
- Increased risk of data breach
- Creep factor
- Big Brother & Big Data

Best Practices for Advising Clients Who Deal in Big Data

- What are your IP rights in and ownership of the data?

- What sector and what type of entity?

- From what source does the data derive, and do you need/have consent from that source?

- Is the data accurate, and who bears the responsibility for inaccurate data?

- Are you keeping abreast of changes in the law?

HL
GR

Big Data:
IP / Ownership Issues

- Copyright for compilations
  - 17 U.S.C. 102: subject matter
  - 17 U.S.C. 103: compilations and preexisting works
  - 17 U.S.C. 101: compilation defined
  - *Feist Publications v. Rural Telephone*, 499 U.S. 340 (1991) (independent creation plus a modicum of creativity
- Copyright for computer software, not for data generated by it.
- Copyright for user generated content?

HL
GR

- **Database Rights?**
  - EU → "sui generis" right for database producers, valid for 15 years, to protect time, money or effort, irrespective of whether database is innovative/original
  - UK → similar database rights.

HL
GR

- **Trade Secrets**
  - Independent economic value
  - Not generally known/ascertainable
  - Subject to reasonable efforts to maintain secrecy
    - Contractual measures (NDA, etc.)
    - Technological

HL
GR

Big Data:
IP / Ownership Issues (cont'd)

- Patents for algorithms that analyze Big Data

- Problems:
  - Patentable subject matter?
  - Patents pertain to specific algorithm, not updates or adaptations
  - Easy to patent around

Big Data:
IP / Ownership Issues (cont'd)

- Contract Law
  - Website Terms of Use
  - License Agreements

- Informed consent is key

Regulation of Big Data: Constitutional Protections of Privacy

- 4th Amendment and Reasonable Expectation of Privacy ("REP") – *Katz* (1967 phone booth) → *Riley* (2014 cell phone)
  - *U.S. v. Jones*, 565 U.S. ___ (2012) (Gov't needs warrant for GPS tracking; Sotomayer concurrence has concerns re: "sum" of one's movements)

- Third party doctrine - no REP in info turned over to third parties
  - But see *US v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (Gov't must obtain warrant to compel ISP to turn over emails)

HL
GR

Regulation of Big Data: Historic Context for Statutory Scheme

- Fair Information Practice Principles (1973)
- Privacy Act of 1974

Regulation of Big Data: Current Statutory Scheme

- Segmented approach, based on industry and data collector/handler
- E.g., FCRA, HIPAA, COPPA
- See appendix for list of applicable statutes

HL
GR

Current Regulation of Big Data: General Themes/Assumptions

- Regulate the point of collection
- Treat data differently based on private use versus public use
- Protect privacy via anonymization or aggregation of private information

HLGR

Current Regulation of Big Data: FTC

- FTC enforces "deceptive trade practices"
  - 15 USC 45
- FTC offers guidance
  - Privacy by Design initiative
  - Transparency
  - Simplify Choices

HL
GR

Current Regulation of Big Data: Industry Guidelines

- Direct Marketing Association - Guidelines for Ethical Business Practice.

- Digital Advertising Alliance – "Ad Choice"

HL
GR

International

- EU Data Protection Directive & 2014 amendment
  - See: http://ec.europa.eu/justice/data-protection/

- US-EU safe harbor privacy framework – 7 principles
  - See: FTC website

HL
GR

International (cont'd)

- *Google Spain v. Gonzalez*: "Right to Be Forgotten"
  - Broad territoriality of EU rules
  - Broad applicability to search engines
  - Enforces directive's Article 12 Right to be forgotten

HL
GR

Future Regulation of Big Data

- Executive
  - Continued regulation/guidance from FTC
- Legislative
  - Federal protections of consumer privacy, particularly with regard to data on mobile devices, geolocation
  - Data Broker Accountability and Transparency Act (referred to committee 2/2014)
  - Updates to ECPA and CFAA
  - State laws, e.g, California.
- Judiciary? ? ?

HL
GR

1st Amendment: Constitutional Limitation on Regulation of Big Data?

- *Sorrell v. IMS Health*, 564 U.S. ___ (2011)
  - 6-3 majority strikes down Vermont law that sought to restrict data miners' ability to use prescription data to market drugs to prescribers on free speech grounds.

- *Ostergren v. Cuccinelli,* 615 F.3d 263 (4th Cir. 2010)
  - Strikes down Virginia law prohibiting intentional communication of unredacted SSNs

Data Disputes: Legal Theories

- Privacy torts (for individuals)
- IP theories
- Breach of contract
- Unjust enrichment
- Hot News Misappropriation – *Barclays Capital Inc. v. TheFlyontheWall.com,* 2011 WL 2437554 (2d Cir. June 20, 2011)
- Trespass to Chattels – *Ebay v. Bidder's Edge*, 100 F.Supp.2d 1058 (N.D. Cal. 2000); *Ticketmaster Corp v. Tickets.com*, 2003 WL 21406289 (C.D. Cal 2003)
- Computer Fraud & Abuse Act – *U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012)

HLGR

Best Practices for Advising Clients Who Deal in Big Data

- What are your IP rights in and ownership of the data?

- What sector and what type of entity?

- From what source does the data derive, and do you need/have consent from that source?

- Is the data accurate, and who bears the responsibility for inaccurate data?

- Are you keeping abreast of changes in the law?

HL L
G R

Additional Reading/Resources

- White House Report, Big Data: Seizing Opportunities, Preserving Values, http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

- GAO Report on Information Resellers, http://www.gao.gov/assets/660/658151.pdf.

- Senate Staff Report on Data Broker Industry (2013), http://consumercal.org/wp-content/uploads/2013/12/senate_2013_data_broker_report.pdf.

- Future of Privacy Forum / Stanford Law School paper: Big Data and Privacy: Making Ends Meet, http://www.futureofprivacy.org/wp-content/uploads/Big-Data-and-Privacy-Paper-Collection.pdf.

- FTC Recommendations for Businesses & Policymakers http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf

HLGR

Contact for Questions

John Rake

john.rake@harrang.com

Will Landecker

will.landecker@gmail.com