Big Data & The Law

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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.
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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).
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...

- $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.
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?
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

- Copyright for computer software, not for data generated by it.

- Copyright for user generated content?
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.
Trade Secrets

• Independent economic value
• Not generally known/ascertainable
• Subject to reasonable efforts to maintain secrecy
  – Contractual measures (NDA, etc.)
  – Technological
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

  - *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)
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
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
Current Regulation of Big Data: FTC

- FTC enforces “deceptive trade practices”
  - 15 USC 45
- FTC offers guidance
  - Privacy by Design initiative
  - Transparency
  - Simplify Choices
Current Regulation of Big Data: Industry Guidelines

- Direct Marketing Association - Guidelines for Ethical Business Practice.
- Digital Advertising Alliance – “Ad Choice”
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
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
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? ??
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
- Computer Fraud & Abuse Act – *U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012)
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Additional Reading/Resources

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