THE TANGLED WEB OF BIG DATA: Law, Ethics, and Innovation

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ABA Business Law Section Consumer Financial Services Committee – 2019 Winter Meeting
Bill Gates said, “People overestimate the change that happens in the next 2 years and underestimate the change that happens in the next 10 years.”
## Think About the Pace of Change

### Thirty + Years Ago
- 1982
  - CDs
  - Sendmail
  - “Mobile” phones
  - First desktop PC
  - Fax machines
  - Overnight letter

### Twenty Years Ago
- 1995
  - Mosaic browser
  - State Bars: Are email, mobile phone calls secure communications?
  - “Learning to Dictate”
  - No outside email services
  - No BlackBerrys

### Ten Years Ago
- 2007
  - Smart Phones
  - Cloud Storage
  - Wi-Fi
And the Pace of Change is Faster Today
BIG DATA
Extremely large data sets that can be analyzed to reveal patterns.
Big Data

Every day, we create 2.5 quintillion bytes of data

90% of the data in the world today has been created in the last two years alone
ARTIFICIAL INTELLIGENCE
Computers performing tasks that usually require human intelligence.

Machine Learning
• Spam filters, fraud detection systems, recommendation engines, facial recognition, optical character recognition, voice recognition systems, virtual assistants

Deep Learning
• Mimicking operation of the brain, e.g., neural networks
Internet of Things
Internetwork of devices that are able to communicate and connect with each other over the network.
We Know That…

- The law is always behind technology
“The courts will often choose to be late to the harvest of American ingenuity.” – Chief Justice Roberts in 2015

- "No one should be surprised that the same surge of creativity that pushed courts from quills to hot-metal type will inevitably propel them past laser printer and HTML files as new technologies continue to emerge."

**Illegal Acts**

- Potential employers cannot ask about religion, political affiliation, sexual preference, etc.
- No loan discrimination
- Social media allows for circumvention

**Pseudonymized and Anonymized Data**

- Privacy laws still define PII and personal information in the traditional sense
Legal Issues

- Obtaining the right to collect and use data
  - By Contract, i.e. privacy policies and terms of use/services; consent; legitimate interest; public interest; vital interest; and legal compulsion

- Complying with data protection laws
  - State laws (Various regulations, some industry specific; consumer protection statutes)
  - Data breach laws now in all 50 states
  - Federal laws (HIPAA-HITECH, Gramm-Leach-Bliley, COPPA, FTC Unfair Trade Practices)
  - European Union, Canada, et. al.; international law is increasingly important

- Impact on Litigation
  - Discovery
    - *United States v. Microsoft* (CLOUD Act Case)
Ethical Dilemmas

Identity and creation of profiles

Transparency

Secondary use/monetization

Confidentiality

Behavioral inferences

Bias
Recent Trends

Federal Legislation

- The Cloud Act
- “Consumer Data Protection Act” - Proposed By Oregon Senator Ron Wyden
Recent Trends

Federal Agencies

- SEC: Using big data to help in enforcement actions
- DOJ: Meetings with multiple AGs to discuss actions against big tech companies
- FTC: Embarking on Multiple Hearings, releasing reports on potential areas of enforcement under existing laws
Recent Trends

• FTC
  - Big Data Report: A Tool for Inclusion or Exclusion? Understanding the Issues, Fair Credit Reporting Act (FCRA), the Equal Credit Opportunity Act (ECOA), and the FTC Act

  - Hearings scheduled for fall and winter
## Recent Trends

### HEARINGS CALENDAR

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<td>#6</td>
<td>Nov. 6-8, 2018</td>
<td>Privacy, Big Data, and Competition</td>
<td>American University Washington College of Law, Washington, DC</td>
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<td>#7</td>
<td>Nov. 13-14, 2018</td>
<td>Algorithms, Artificial Intelligence, and Predictive Analytics</td>
<td>Howard University School of Law, Washington, DC</td>
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<td>Dec. 11-12, 2018</td>
<td>Data security</td>
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<td>Consumer privacy</td>
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Recent Trends- Increased Laws

**State Level**
- Criminal Justice
- Legislation:
  - CCPA- Volume of available data with opt out and right to deletion

**International Issues**
GDPR (Impacts profiling; Legitimate interest; Consent; Volume of available data)
Antitrust Issues
- Characteristics of the data, use, and whether volume can serve as a barrier to entry
Recent Events

Cambridge Analytica
- Improper use of consumer data to deploy targeted ads

Big Breaches
- Equifax
- Facebook