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TECHNOLOGY
MAY-RATHON
AI and Data Privacy
June 9, 2021
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Presenters

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Overview

- AI and Privacy—Collision Course
- Privacy Rights
- Anonymization
- Collecting Data—Privacy Policies and Contracts
- Security practices

AI and Privacy—Collision Course

- AI magnifies the ability to analyze personal information in ways that may intrude on privacy interests
- Many of the most interesting data sets are those with lots of personal information
- Legal problems arise when AI projects fail to account for legal protections for privacy
- Business problems arise when people lose trust in AI
- To avoid legal trouble and ensure public trust, AI must take privacy interests into account

The New York Times Magazine

How Companies Learn Your Secrets

Antonio Bolfo/Reportage for The New York Times

By Charles Duhigg

Feb. 16, 2012

Andrew Pole had just started working as a statistician for Target in 2002, when two colleagues from the marketing department stopped by his desk to ask an odd question: "If we wanted to figure out if a customer is pregnant, even if she didn't want us to know, can you do that? "


AI and Privacy rights
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Europe v. US Privacy Regimes

GDPR

- One fairly comprehensive privacy law
- All industries
- All personal data, regardless of type or context
- Biometric data is a "special category of data" – restricted processing conditions

US Privacy law

Money: Gramm-Leach-Bliley Act etc.

Health: HIPAA

Kids: COPPA, FERPA, state laws

California: CCPA / CPRA

Others! Biometrics, state security regulations etc.

The General Data Protection Regulation

- The GDPR replaced European Data Protection Directive for commercial data privacy obligations in Europe.
- Expanded application of the EU and UK data privacy obligations.
- The GDPR applies to processors and controllers having an EU/UK-based establishment where personal data are processed in the context of the activities of this establishment.
- The GDPR also applies to controllers and processors based outside of the EU/UK territory where the processing of personal data regarding EU data subjects relates to:
    - the offering of goods or services (regardless of payment); and/or
    - the monitoring of data subjects' behavior within the EU/UK.
- "**Personal Data**" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.

The General Data Protection Regulation cont'd

- Right to request to be forgotten, have data rectified or deleted
- Privacy by design: privacy safeguarding technology built-in from the start
- Actively factor privacy considerations into the design and upgrade of all systems, policies, settings which process personal data
- Privacy by default: privacy-friendly default settings until user chooses otherwise
- Data protection impact assessment: prior to processing if high risk for individuals
- Notify data breach to DPA without undue delay/within 72 hours and to individuals without undue delay if there is likely to be high risk to individuals

The General Data Protection Regulation (cont.)

- Article 22 covered "automated individual decision-making, include profiling."
- Data subject has the right to object unless:
  - Necessary to entering or performing a contract between data subject and controller
  - Authorized by law governing controller and which lays down adequate safeguards for the data subject rights and freedoms and legitimate interests
  - Data subject provides explicit consent
- No processing of the special categories of data, including biometric data, unless there is explicit consent, or the processing is in the public interest and suitable measures to safeguard the data subjects' rights and freedoms and legitimate interests are in place.
- For AI: lawfulness, fairness and transparency are key requirements.

AI Ethics Framework Proposal

- It is a hot topic for Europe.
- EU Commission passed a vote in October 2020 for an ethics framework governing AI and privacy so future laws should be made in line with the following guiding principles:
  - a human-centric and human-made AI;
  - safety, transparency and accountability;
  - safeguards against bias and discrimination;
  - right to redress;
  - social and environmental responsibility; and
  - respect for privacy and data protection.
- High-risk technologies should allow for human oversight at any time so if the AI has a self-learning ability that may be dangerous and that may breach ethical principles, humans should be able to disable this function, to restore control back to humans.

European Commission Strategy on AI

- Proposal for a Regulation on Data Governance (Data Governance Act) – November 2020, addressing:
  - Making public sector data available for re-use, in situations where such data is subject to rights of others;
  - Sharing of data among businesses, against remuneration in any form;
  - Allowing personal data to be used with the help of a "personal data-sharing intermediary'" designed to help individuals exercise their rights under the General Data Protection Regulation (GDPR); and
  - Allowing data use on altruistic grounds.
- Strategy on AI is aimed to:
  - place Europe ahead of technological developments and encourage the uptake of AI by the public and private sectors;
  - prepare for socio-economic changes brought about by AI; and
  - Ensure Europe has an appropriate ethical and legal framework.

The first legal framework on AI

- In April 2018, many European countries, including the UK, signed a Declaration of co-operation on Artificial Intelligence (AI) and launched a plan. 3 years later, the Commission has published the first-ever legal framework on AI in its proposed "*Regulation Laying Down Harmonized Rules on Artificial Intelligence*":

The definition of AI systems is wide in scope:

"software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with".

Annex I includes machine learning approaches, logic, knowledge-based and statistical approaches.

The proposed AI Regulation applies to:

i) providers of AI systems in the EU;
ii) users of AI systems located within the EU; and
iii) providers and users of AI systems that are located outside the EU if the output produced by the system is within the EU.

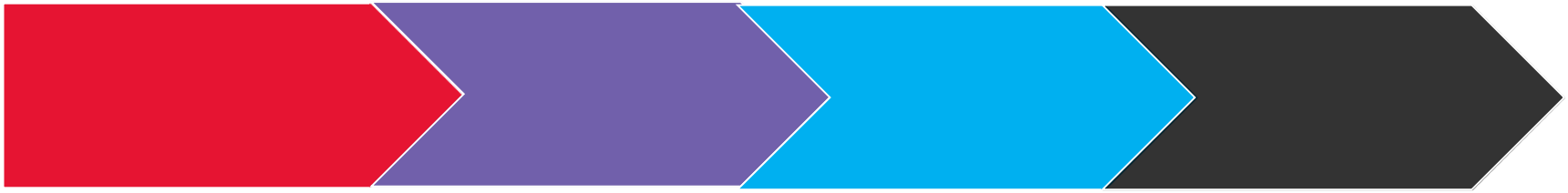
The following AI systems are identified as "*high-risk*":

(i) Safety components of products (such as toys, machinery, medical devices); and
(ii) Systems used to evaluate creditworthiness, biometric identification and critical infrastructure.

The first legal framework on AI

- Certain AI systems are prohibited under the AI Regulation, including those that:
  - Deploy subliminal techniques beyond a person's consciousness to materially distort the person's behaviour and cause harm;
  - Exploit any of the vulnerabilities of a specific group of persons to materially distort the person's behaviour and cause harm;
  - Evaluate/classify the trustworthiness of natural persons, i.e., social scoring; and
  - Use "real-time" remote biometric identification systems in publicly accessible spaces for law enforcement.

The AI Regulation: next steps



Impact

The proposed Regulation has potentially far-reaching impacts across a wide range of sectors.

Review by EU Parliament and EU Council

The European Parliament and the Council of the EU will have to agree on the text of the Proposed Regulations in order for them to become EU law. Both may propose amendments. This legislative process may take a year or more.

Regulation becomes directly applicable (if adopted)

Once adopted, the Regulation will be directly applicable across all EU Member States. This no longer includes the UK.

Member States have 2 years to implement the Regulation

The Regulation will enter into force 20 days after its publication in the Official Journal of the European Union, and Member States have two years to ensure that it is fully implementable in their countries.

The UK

- The AI Regulation no longer applies to the UK, yet it is still relevant to UK businesses as a result of its extra-territorial reach.
- The UK is also set to publish its new strategy on AI later this year, and the government has confirmed that "*unleashing the power of AI is a top priority in our plan to be the most pro-tech government ever*" (Oliver Dowden; Digital Secretary).
- In a post-Brexit world, it remains to be seen whether the UK will seek to align its strategy with the EU, its biggest trading partner, and reduce the burden of compliance for businesses on both sides of the border.

Information Commissioner's Guidance

- In July 2020, the ICO issued a framework for auditing impact of AI comprising:
  - auditing tools and procedures that ICO will use in audits and investigations;
  - The ICO detailed guidance on AI and data protection; and
  - a toolkit designed to provide further practical support to organisations auditing the compliance of their own AI systems.
- This year the ICO issued its toolkit which acts as a practical checklist of the key data protection issues that need to be considered by organisations from the outset of any project that they are planning. The ICO acknowledges that the toolkit is not "a *pathway to absolute compliance with data protection law*" - but is a strong starting point.
- The ICO has also recently published the first chapter of its draft guidance on anonymisation, pseudonymisation and privacy-enhancing technologies.

FTC Guidance on AI

- FTC has issued a series of reports on AI and related consumer and privacy issues, with report with most recent on April 19, 2021
  - Be transparent with consumers about how you use automated tools (e.g., chatbots, Ashley Madison "engager profiles")
  - Be transparent when collecting sensitive data (e.g., Facebook Complaint, facial recognition)
  - Look out for automated decisions, which can prejudice unfairly and raised issues under the FCRA
  - Decisions based on algorithms must be explained to customers / consumers

California Consumer Privacy Act (CCPA)

- California passed into law the California Consumer Privacy Act (CCPA) on March 28, 2019.
- The law started on January 1, 2020.
- Enforcement began July 1, 2020.
- Failure to comply could result in significant penalties and reputational harm.

CCPA Overview (cont.)

- Requirements around Personal Information (PI) include:
  - Notice about collection and use of PI
  - Responding to Requests. Four types:
    - To Know Categories of PI
    - To Know Specific Pieces of PI
    - To Delete PI
    - To Opt Out of Sale of PI (any transfer to third party for monetary or other consideration)
  - No discrimination or retaliation for exercising rights
  - Under CPRA, starting January 1, 2023, cannot retain personal information for longer than reasonably necessary for the stated purpose for which it was collected

Very Broad Definition of "Personal Information"

- Personal information includes any information that "that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."
  - Much broader than the definition of personal information under CA's security breach notification law and historic definitions in US
  - More like GDPR
- Extremely broad definition intended to include the sort of robust consumer profile and preference data collected by social media companies and online advertisers

CCPA Definition of Personal Information

1) Name, address, personal identifier, IP address, email address, account name, Social Security number, driver's license number, or passport number
2) Categories of PI described in California's customer records destruction law
3) Characteristics of protected classifications under CA or federal law
4) Commercial information, including records of personal property; products or services purchased, obtained, or considered; or other purchasing or consuming histories or tendencies
5) Biometric information
6) Geolocation data
7) Internet or other electronic network activity, such as browsing history, search history, and information regarding a consumer's interaction with a website, application, or advertisement
8) Audio, electronic, visual, thermal, olfactory, or similar information
9) Professional or employment-related information
10) Education information that is subject to the Family Educational Rights and Privacy Act
11) Inferences drawn from any of the information listed above to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes


Anonymization
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Anonymization / Deidentification

- Privacy laws focus on personal information—if you can do AI without personal information, most of the privacy issues evaporate
- GDPR: Anonymisation/Pseudonymisation distinction
  - **Anonymisation** is the process of permanently removing personal identifiers that could lead to an individual being identified
  - **Pseudonymisation** is a technique that replaces or removes information in a data set that identifies an individual, but it can be re-identified
- US CCPA: Under "Personal Information" does not including "consumer information that is deidentified or aggregate consumer information."
  - **Deidentified data**: Information that "cannot reasonable identify, relate to, describe, be capable of being associated with, or be linked directly or indirectly to a particular consumer."
    - Must have technical safeguards to prevent reidentification
  - **Aggregate data**: "Information that relates to a group or category of consumers, from which individual identities have been removed, that is not linked or reasonably linkable to any consumer or household."
  - **Publicly available**: Information that is lawfully made available from federal, state, or local government records.
- So, is it a solution?


Collecting Data for AI—Privacy Policies and Contracts
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Privacy Policies—US

- GDPR / FTC / and State Laws (e.g., CA, NV & DE)
- Self-imposed regulation
- Basic principles
  - What information is collected
  - How it is collected
  - Purpose of collection
  - To whom is it shared
  - Choices and rights
- Must notify regarding material, retroactive changes
- Other public statements about privacy and security?

Privacy Notices - GDPR

- GDPR includes mandatory transparency obligations
- Privacy policy or notice provided by controllers (only):
  - the identity and contact details of the data controller and where applicable, the data controller's representative) and the data protection officer
  - the purpose of the processing and the legal basis for the processing
  - the legitimate interests of the controller or third party, where applicable
  - the categories of personal data
  - any recipient or categories of recipients of the personal data
  - the details of transfers to third country (e.g. US) and method of transfer such as model clauses or other data transfer agreements
  - the retention period
  - the data subject's rights relating to the processing such as the right of access and rectification
  - the right to withdraw consent at any time, where relevant
  - the right to lodge a complaint with a supervisory authority
  - the source of the personal data and whether it came from publicly accessible source
  - whether the provision of personal data part of a statutory or contractual requirement or obligation and possible consequences of failing to provide the personal data
  - the existence of any automated decision making, including profiling and information about how decisions are made, the significance and the consequences

Processing Agreements - GDPR

- Processors must execute processing agreements with controllers under Article 28:
  - Specify categories of data and data subjects
  - Follow controller's instructions
  - Duties of confidentiality
  - Security of processing obligations
  - Assist controller with GDPR compliance
  - Restrictions on engaging sub-processors and data transfers
  - Assist controller with subject rights (access, deletion etc)
  - Notify controller of data breach
  - Return/delete data on termination
  - Controller right of audit
- NB: direct liability for processors

Contracts

- Often data will come from another source, in which case there are often contract requirements that also may impact use of data for AI
- Confidentiality clauses
- Privacy clauses
- Data use / rights language
- Data protection addendums, exhibits
- Retention requirements
- Breach notice obligations
- California: acquisition of data for AI may be a "sale"


Data Security
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Data Security

- US Sector-specific laws may apply; state laws require reasonable security
- MA Security Regulations
  - Have a written information security plan
  - Additional administrative discipline
  - Social security numbers
  - Encryption
  - Training
- GDPR requirement for technical and organisational measures to protect personal data
- Contracts may require certain security standards – NB GDPR data processing agreements must include security obligations


Questions?
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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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Ezra D. Church counsels and defends companies in privacy, cybersecurity, and other consumer protection matters. He helps clients manage data security and other crisis incidents and represents them in high-profile privacy and other class actions. Focused particularly on retail, ecommerce, and other consumer-facing firms, his practice is at the forefront of issues such as biometrics, artificial intelligence, location tracking, ad tech, and blockchain. Ezra is a Certified Information Privacy Professional (CIPP) and co-chair of the firm's Class Action Working Group.

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Pulina Whitaker's practice encompasses data privacy and cybersecurity as well as employment matters. Co-head of the firm's global privacy and cybersecurity practice, she manages employment and data privacy issues on an advisory basis and in sales and acquisitions, commercial outsourcings, and restructurings. Pulina manages international employee misconduct investigations as well as cross-border data breach investigations. She has been appointed as a compliance monitor for the United Nations and for USAID. She is also a trustee of Hostage International. She acts for employers in defending against employment and data privacy allegations and claims, including for bullying/harassment, unfair dismissal, discrimination, whistleblowing, breach of data processing, and employment contract claims. She has experience working with international and European clients to help them comply with the General Data Protection Regulation, including advising on audits of data processing activities and data security incidents.

Our Global Reach

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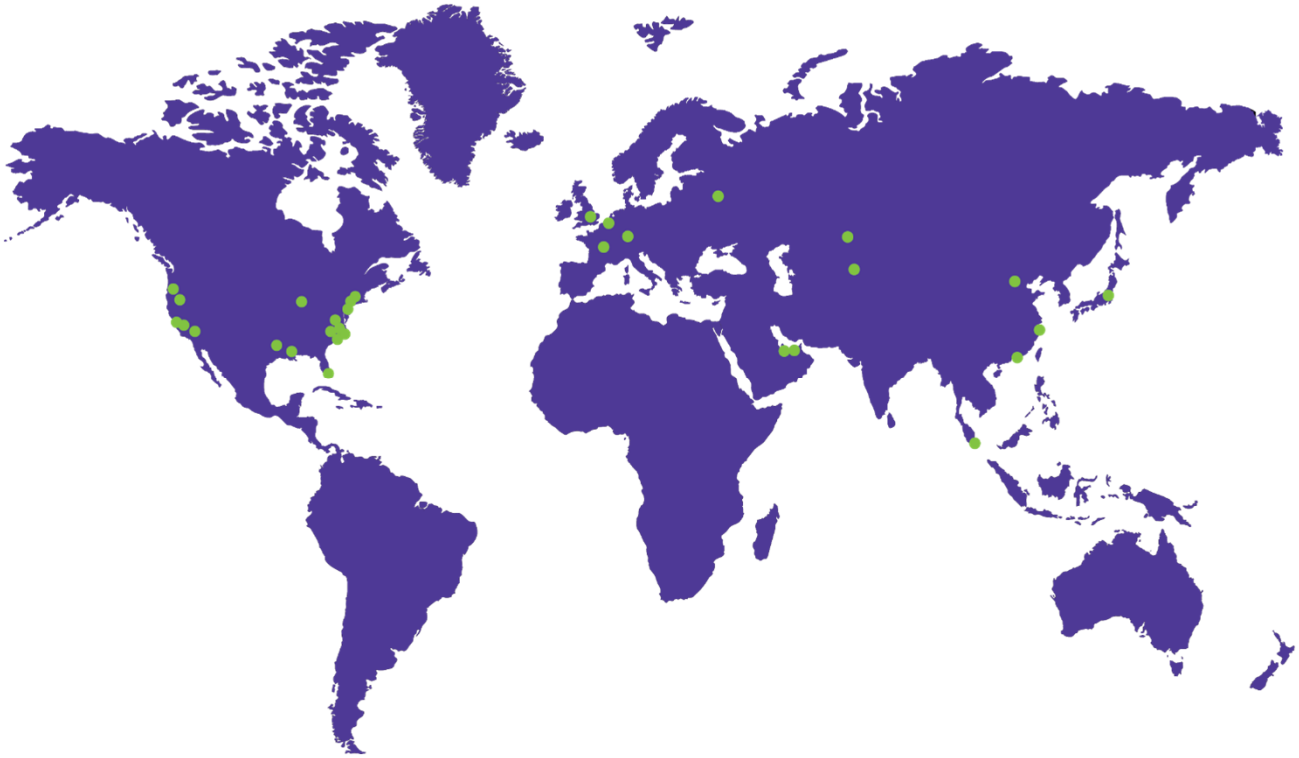

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THANK YOU