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TECHNOLOGY MAY-RATHON

NEVER A DULL MOMENT: NEW KINDS OF ESI KEEP DISCOVERY INTERESTING

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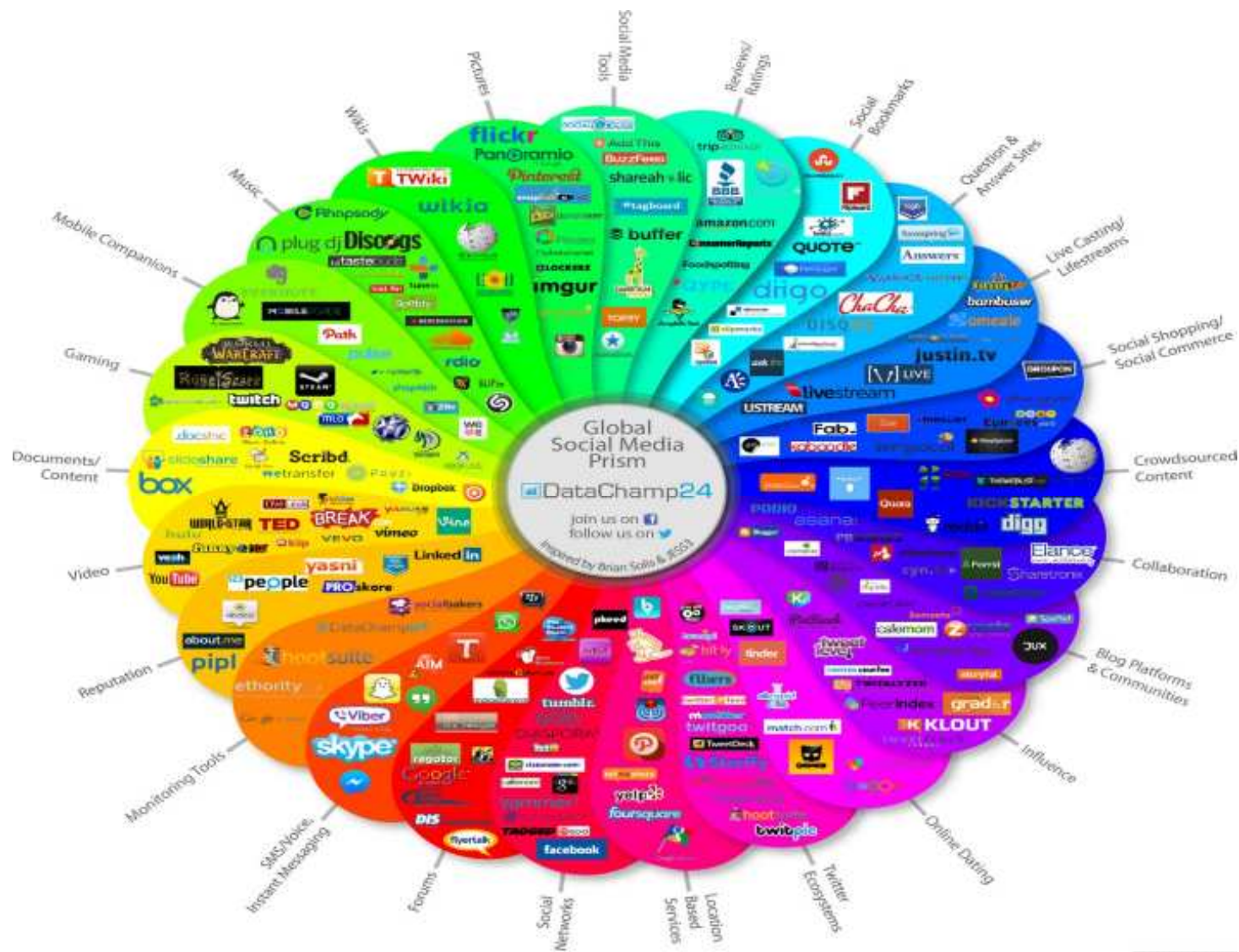
How we work and communicate is changing and so is discovery

The Good Ole Days

- Hard Drive
- Email
- Servers
- Databases
- Portable Media

The New Frontier

- Personal Cloud Accounts
- Enterprise Cloud Accounts
- Internet of Things
- GPS Data
- Text Messages
- Messaging Applications
- Social Media and Social Applications
- Wearables



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Rapidly Changing Technology & Information Sharing

- *Harleysville Ins. Co. v. Holding Funeral Home, Inc.* (W.D. Va. Feb. 9, 2017).

“The technology involved in information sharing is rapidly evolving. Whether a company chooses to use a new technology is a decision within that company's control. If it chooses to use a new technology, however, it should be responsible for ensuring that its employees and agents understand how the technology works, and, more importantly, whether the technology allows unwanted access by others to its confidential information.”



New ESI in the Workplace

- The many ways that new ESI enters the workplace
 - Sponsored: includes O365, Box, Skype, Slack, WhatsApp, Yammer, etc.
 - Rogue: everything else
- How to identify new ESI
 - IT Security
 - Legal
- New ESI may trigger new duties

New ESI, Same Discovery Questions

- Is it relevant?
- Is it proportionate?
- Is it privileged?
- Is it unique?
- Is it within your organization's possession, custody or control?

Is it Relevant?

- Amended FRCP 26(b)(1):
 - Must be relevant to a claim or defense
 - Information need not be admissible in evidence to be discoverable
 - “Reasonably calculated” language is gone

Is it proportionate?

- Amended FRCP 26(b)(1)
- Six Proportionality Factors in Amended Rule 26(b)(1)
 1. The importance of the issues at stake in the action
 2. The amount in controversy
 3. The parties' relative access to relevant information
 4. The parties' resources
 5. The importance of the discovery in resolving the issues
 6. Whether the burden/expense outweighs the benefits

Is it privileged or Work product?

- Privilege:
 1. Communication
 2. Between privileged persons
 3. Made in confidence
 4. For the purpose of obtaining or providing legal assistance
- Work Product:
 1. Materials prepared by or at the direction of counsel
 2. In anticipation of litigation

Is it unique?

- *Zubulake v. UBS*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)
 - “A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches”
- Sedona Principle 8:
 - No need to produce redundant data
 - “If the producing party is aware that specific relevant information can only be obtained from a particular source, that data should be preserved for possible production.”
- Are there other, better sources for this data?



Do you have possession, custody or control?

- Three tests:
 - Legal right to obtain
 - Legal right plus notification
 - Practical ability

The Cloud

- Cloud computing is projected to grow 18% in 2017 to total \$246.8 billion
 - Gartner Press Release, available at:
<http://www.gartner.com/newsroom/id/3616417>
- 80% of Fortune 500 is on the Microsoft Cloud
 - Microsoft by the Numbers, available at:
<https://news.microsoft.com/bythenumbers/>

Contracting in the Cloud

- **Contracting in the Cloud is complicated**

- Types of clouds:

- SaaS: software as a service – Google Apps, Salesforce.com
 - PaaS: platform as a service – Google App Engine, Force.com (generally used for software/app development where basic programming apps provided)
 - IaaS: infrastructure as a service – Amazon Web Services, Microsoft Azure

- Key terms:

- “Location” of data
 - Security and privacy
 - Roles/responsibilities
 - Retention

Mobile Devices – What Data is Stored On Them?

I Knew That

- Messages (Text and iMessages)
- Email
- Photos and Videos
- Call Logs and Contacts
- Apps
- Music
- Notes and Tasks
- Calendar

Really?

- Location Information
 - Cell phone towers
 - Wi-Fi networks
 - Apps
 - Photos being geo-tagged
- Browsing History
- Deleted Content
 - Messages
 - SnapChat

Messaging Apps by the Numbers

- Facebook Messenger and WhatsApp handle over 60 billion messages per day
- 72% of US adults can choose from a variety of messaging apps
- 80% of the workforce uses messaging for business purposes
- 24% of Americans use messaging apps that automatically delete sent messages like SnapChat or Cyber Dust

Text Messages

- “Once it is clear that a litigant has ESI that is relevant to reasonably anticipated litigation, steps should be taken to preserve that material, such as printing out the texts, making an electronic copy of such texts, cloning the phone, or even taking possession of the phone and instructing the client to simply get another one”
 - *Shaffer v. Gaither*, No. 5:14-cv-00106-MOC-DSC, 2016 U.S. Dist. LEXIS 118225 (W.D.N.C. Sept. 1, 2016)

Do Discovery Obligations Extend to Texts on Employee Cell Phones?

Within Possession, Custody, or Control

- When party directed sales force to communicate with supervisors and managers via cell phones and texts, party had duty to preserve text messages not only on those phones issued by the company but also personal on cell phones
- Party had duty to preserve personal mobile devices that employees used for work even though custodians initially responded they did not use personal devices for work
 - *Small v. Univ. Med. Ctr. of S. Nev.*, 2014 WL 4079507, at *10–11, *28 (D. Nev. Aug. 18, 2014)

Not Within Possession, Custody, or Control

- Finding defendant did not have within its possession, custody, or control text messages sent or received by individuals on their personal cell phones because defendant did not issue cell phones and nothing evidenced that employees used cell phones for work-related purposes
 - *Cotton v. Costco Wholesale Corp.*, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013)

Corporate Usage of Social Media at a Glance

- 9 out of 10 U.S. businesses use social media
 - Ryan Holmes, Why Business Can't Survive Without Social Media, Fortune, November 18, 2015, available at <http://fortune.com/2015/11/18/businesses-cant-survive-social-media/>
- 76% of businesses regard communications on social media as formal business communications
 - Michael Riedyk, Collecting Social Media Records for eDiscovery Investigations, The Social Media Monthly, September 1, 2016

When Has Social Media Been Discoverable?

- Personal Injury/Disability – Often Discoverable
- Emotional Distress – Often Discoverable
- Misappropriation of Trade Secrets – Often Discoverable
- Copy Right/Trademark Infringement – Often Discoverable
- Harassment/Discrimination:
 - Plaintiff's Behavior Outside of the Workplace – Not Discoverable
 - Social Media Accounts of Supervisors – May or May Not Be Discoverable
- FLSA/Working Hours – May or May Not Be Discoverable

Internet of Things

- Industrial Applications
- Consumer Goods
- Driverless Cars
- Drones
- Fitness Trackers
- Police Body Cameras

**8.4 Billion Connected “Things”
Will Be In Use in 2017***

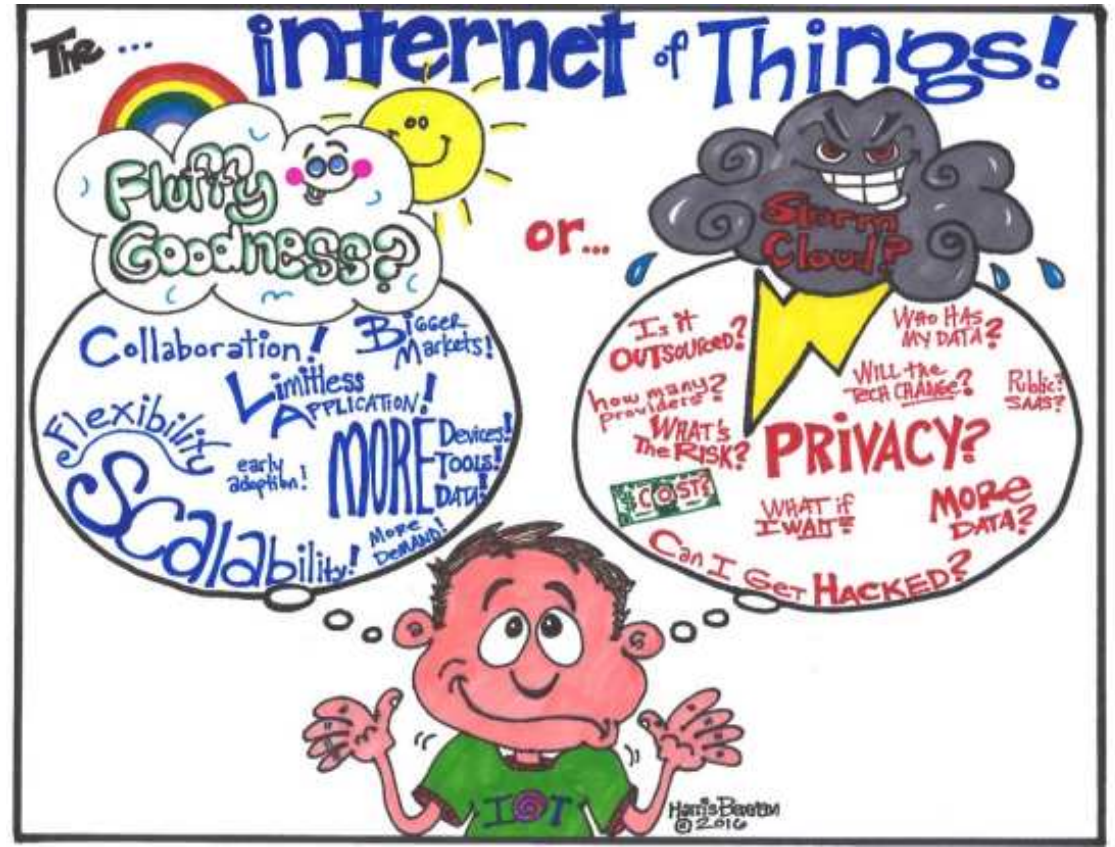
*Gartner Press Release, available at <http://www.gartner.com/newsroom/id/3598917>



"I HAVE TO TAKE THIS — MY FRIDGE IS
FIGHTING WITH MY TELEVISION."

Internet of Things

- **Key legal issues:**
 - Privacy
 - Hackability
 - Over-collection of data
- **Discovery issues:**
 - Preservation
 - Collection
 - Normalization
 - Analysis



What Else?!?!

- Fitness Trackers
 - Fitbit, Garmin, Apple Watch, numerous smartphone apps (Runkeeper)
 - Smart running shoes
 - Smart athletic clothing
- Personal GPS-enabled devices:
 - Smart phones and some fitness watches
 - Countless apps track location
 - Smart cars
- Connected Consumer Goods:
 - Devices monitor behavior, some by design, others inadvertently
 - IoT appliances, connected lightbulbs, remote climate control, security systems, Amazon dash buttons
- Myriad Others:
 - Drones
 - Google Glass
 - Gaming systems

To Be Afraid or Not To Be Afraid That is the Question



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Changing Landscape of Discovery

All these devices that record information are changing the landscape of discovery. It is no longer about asking questions of who, what, where and when, BUT actually looking at the data recorded on the devices to give us that information.

Extracting Value and Interplay of Data

- “Scientists are using cellphone data to track everything from depression and mood disorders to crowd behavior”
 - Source: https://www.hsph.harvard.edu/magazine/magazine_article/your-phone-knows-how-you-feel/
- Examples:
 - Comparing location data to other reported activity (i.e. call notes, project invoices)
 - Analyzing activity on mobile devices before and after a car accident
 - Arkansas Murder Case – smart water heater

The what-if scenario depicted on these pages offers just a hint of the capabilities of a world containing trillions of sensors connected to the Internet. This isn't science fiction; it's all technology that's available now, much of it already connected to existing Internet infrastructure, the rest just waiting to come online...



Agribusiness

A small glass tube housing a biologic transponder is embedded under the skin. It not only contains a unique identification number, but is also sensitive to biochemical signs. If the biologic detects anything untoward, the farmer will know and the vet informed automatically, even without any external signs of disease.

Data from the cattle is captured when they are in proximity to a scanner (hand-held or gate device). The signal from the scanning device provides enough energy for the transponder to send back its data, which then feeds into a herd management system.

The herd management system provides the farmer with a snapshot on herd trends for the herd overall and for individual cows, the data warning the system to email out potentially productivity-affecting changes. The Dashboard for each herd of cattle, in conjunction with apps such as Herd or DairyComp, can improve station processes, simplify herd management and stock traceability and therefore save time and money.



A vehicle equipped with internet access and a wireless local area network (WLAN) giving the vehicle its own internet access to other devices both helps as outside the vehicle.

Logistics 2

Apps are available to interact with a vehicle from any distance. Users can unlock a vehicle, check the status of batteries on electric vehicles, find the location of the car, or remotely activate the climate control system.



Inside the micrograph, the equipment's online—if a component is exhibiting sub-optimal performance, a fault is logged. If an on-site visit is unnecessary, a service representative is able to log on to the alarm, remotely access diagnostics and make software adjustments.

Automatic notification of crashes, notification of speeding and safety alerts increase efficiency for road transport vehicles and the packages they carry are dynamically tracked. Vehicles receiving data from a traffic light network can automatically alter their speed to time the most efficient run through a traffic

For the first time, the information flow of a logistics system can be combined with the material flow. This creates an internet of things for transport logistics in which the logistics objects are capable of processing information, communicating with each other and making their own decisions. (Hübner et al. 2010)

Supermarket **3**

The cost of radio frequency identification (RFID) tags, approaching a point at which it will be economical to include one on every piece of packaging. When every package has a unique identifier, inventory management and transaction processes in physical retail are revolutionized.

Beacons dotted around a physical environment running on low-energy Bluetooth (BLE) can recognise a device, such as a customer's smartphone, when it comes within range. A 'smart store' can therefore track and interact with customers, moving their precise location – data from which can help space planning. These have already been trialled at stores, banks, supermarkets, department stores, such as John Lewis in the UK and Cado in Sweden.

If a customer has downloaded the retailer's app, it can use push messaging to deliver contextual offers and messaging. If it is also linked to the customer's loyalty program account with purchase history, behavioral profile and preferences, the intelligence, and therefore the effectiveness, of that messaging increases significantly.

All electronic equipment has commands in binary between the uses: the machine, smart electricity system, and the use phone from any location, but also to the manufacturer. Just like the machinery back on the farm, if a component is supplying sub-optimal performance, a boost is logged and a service representative is able to log on to the system remotely, access diagnostics, make software adjustments, minimizing

Spots on
saddles by
the Progs, a
penny reader
who could track
its inventory
and lifespan.

Home 4

RFC tags on products interact with readers and feed data into an appliance's computer system. Your fridge would show exactly how many bottles of formula and how long each bottle has been there. When you're driving past the supermarket on the way home from work not far from now, expect a text message from your fridge telling you that you need to pick up some milk. Or reminding you that tub of yogurt right at the back is about to expire (see first picture).

The trailer is connected, the products are connected and the customer is connected to the store's system. It is therefore entirely possible for the exact products placed in the trailer to be identified, invoiced and paid without the customer taking a receipt or phone out of their bag, all done seamlessly around a check-out system.

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