When Big Data Discriminates: How to Avoid Legal Pitfalls in Online Marketing

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Big Data Analytics—An Overview

- Analysis of large amounts of data
- Concept is not new (i.e. spreadsheets)
- Technology now allows a review of larger and more diverse data sets in real time
- Enhanced customer experience
- Expectation of personalized services and products
- Business Advantage

Why is big data analytics important?

Collecting the Data
Data Collection: Active and Passive

• Active: Voluntarily provided by the end-user
  • Demographics
  • Interests

• Passive: Browser tracking, third-party applications
  • Behavior
    • Automatic software logs
    • Cookie placements
      – FTC: 57% of busiest e-Commerce sites allow third-party cookie placement, but only 22% disclose the practice
Data Collection: Active v. Passive

A notice that Android users saw when theScore, a sports app, asked for access to their location data.

The Weather Channel app showed iPhone users this message when it first asked for their location data.
Lisa Magrin is the only person who travels regularly from her home to the school where she works. Her location was recorded more than 800 times there, often in her classroom.

A visit to a doctor’s office is also included. The data is so specific that The Times could determine how long she was there.

Ms. Magrin’s location data shows other often-visited locations, including the gym and Weight Watchers.

In about four months’ of data reviewed by The Times, her location was recorded over 8,000 times — on average, once every 21 minutes.
A device arrives at approximately 12:45 p.m., entering the clinic from the western entrance.

It stays for two hours, then returns to a home.
Have you searched online or visited websites recently on any of these topics? (please select as many as appropriate)
- Auto
- Financial information
- Retail
- Travel
- Gossip
- Gaming
- Food
- Education
- Cooking topics
- Social influencers
- Movie information
- Political and governmental topics
- Telecom and television purchase research

Do you hold any store loyalty cards, at a grocery store or pharmacy, for instance?
- Yes
- No

Are you looking to buy any of these products? (Select as many as appropriate)
- Car(s)
- Consumer packaged goods such as soap, shampoo, toilet paper etc
- Education
- Financial products or services
- Other vehicles
- Clothes
- Travel

Are you looking to buy a mobile phone?
- Yes
- No
Using the Data
An Example: Facebook Advertising

- Facebook generates revenue through the sale of advertising targeted at its users
- Advertisements placed alongside individual’s “News Feed”
- Facebook harvests information that users voluntarily post on their profile pages, share or receive from friends, or unwittingly reveal about themselves (i.e. web browser activity or geolocation data)
- Facebook creates a “Pre-populated List” of users that share demographics, behaviors and interests
  - Nearly 50,000 unique categories in which Facebook placed its users
- Facebook prompts advertisers to define the audience
An Example: Facebook Advertising

- Targeted Advertisements
  - If you wanted to sell a particular product in Charlotte, you could specifically target who you want to purchase your product, for example, middle-aged mothers with children who live in the Myers Park zip code.

- Sometimes Permissible
  - While some targeted advertisement is permissible, federal civil rights laws prohibit targeted ads for housing, employment, and loans based on protected characteristics such as race, gender, age, or disability.
MACHINE BIAS

Facebook Lets Advertisers Exclude Users by Race

Facebook’s system allows advertisers to exclude black, Hispanic, and other “ethnic affinities” from seeing ads.
Detailed Targeting

INCLUDE people who match at least ONE of the following:

Behaviors > Residential profiles
- Likely to move

Interests > Additional Interests
- Buying a House
- First-time buyer
- House Hunting

Add demographics, interests or behaviors

Narrow Audience

EXCLUDE people who match at least ONE of the following:

Demographics > Ethnic Affinity
- African American (US)
- Asian American (US)
- Hispanic (US - Spanish dominant)

Add demographics, interests or behaviors
Ad Discrimination

- Facebook sued for alleged discriminatory advertising practices
  - 3 Civil Rights Cases
  - 2 EEOC Complaints

- Fair Housing Complaint alleged that Facebook’s classification of its users and its ad targeting tools permit discrimination
Legal Issues

• **The Fair Housing Act of 1968**
  - Illegal "to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin."
  - Violators can face tens of thousands of dollars in fines.

• **The Civil Rights Act of 1964** also prohibits the “printing or publication of notices or advertisements indicating prohibited preference, limitation, specification or discrimination” in employment recruitment.
FACEBOOK CHANGES ITS AD TECH TO STOP DISCRIMINATION
Breaking News

• Facebook has agreed to:
  – Create a separate portal for such ads with a much more limited set of targeting options
  – Implement a system of automated and human review
  – Require all advertisers creating such ads to certify compliance with anti-discrimination laws, and provide education for advertisers on those laws
  – Study the potential for unintended biases in algorithmic modeling on Facebook
  – Meet with plaintiffs and their counsel every six months for three years to enable them to monitor the implementation of the reforms that Facebook is undertaking.

• How will this affect ad-targeting platforms and on-line advertising?
The Landscape of Online Marketing and Advertising Is Changing
Testimony of David Lopez in March 2019

- Longest serving GC of the EEOC from 2010 to 2016
  - Now Of-Counsel at largest Plaintiff-side employment firm and Co-Dean at Rutgers Law School—Newark
- Titled: “Inclusion in Tech: How Diversity Benefits All Americans”
  - Demographic profile of the Tech Industry lacks diversity; particularly at the executive level
  - The critical importance of diverse teams
  - The power of algorithms and machine learning to bolster or deprive opportunity
- Highlighted some of the uses of big data and related privacy concerns
Big data knows you’re pregnant (and that’s not all)

Machine Bias
There’s software used across the country to predict future criminals. And it’s biased against blacks.
by Julia Angwin, Jeff Larson, Surya Mattu and William Paulson

Amazon scraps secret AI recruiting tool that showed bias against women

Employers Are Quietly Using Big Data to Track Employee Pregnancies
What about privacy?

• A fundamental right?
  or
• A tradable commodity?
New Focus--Data AND Privacy Rights

- Focus on the collection, use, storage, disposal, sharing and selling of data
- Focus on individual rights and ownership of data by individual
- Expansion of the scope of applicability and extra-territorial
- Heavy fines and private rights of action
The Changing Landscape of Privacy Regulation

• **General Data Protection Regulation (GDPR)**
  • Took effect on May 25, 2018
  • Expanded the Data Protection Act of 1996
  • Concerns data protection and privacy for all individuals in European Union (EU)
    • Regulates export of personal data from EU
    • Gives control of personal data back to citizens and residents of EU
  • Imposes fines of up to 4% of global revenue, or €20M

• **California Consumer Privacy Act (CCPA)**
  • Originally a ballot initiative
  • Subject to technical amendments
  • Effective January 1, 2020
EU’s General Data Protection Regulation

- High-level requirements:
  - Lawfulness, fairness, and transparency
  - Individual rights
  - Accountability and governance
  - Information security
  - Records management
The Extra-Territorial Nature of GDPR

• Additional **guidance** issued on November 23, 2018, added further nuance to determining whether GDPR applies, including:
  • What processing the business does of data subjects in the EU
  • Whether that processing relates to the offering of goods or services or the monitoring of data subjects’ behavior
• This guidance is available here: https://edpb.europa.eu/our-work-tools/public-consultations/2018/guidelines-32018-territorial-scope-gdpr-article-3_en
California Consumer Privacy Act

- Applicability

- Buys, sells, or shares personal information of 50,000 ‘consumers’ or devices
- Gross revenue is greater than $25 Million
- Derives 50% of annual revenue from sharing personal information
California Consumer Privacy Act

• High Level Overview
  • Individual Rights
    • Notices to data subjects
    • Right to access data
    • Right to be forgotten
    • Right to opt-out of sale of information
    • Right to receive services on equal terms
  • Security required
  • Service provider contractual requirements
  • Private right of action for data breach
California Consumer Privacy Act--Considerations

Individual Rights
- Information notices
- Data subject request protocols
- Review of marketing practices

Security
- Written information security policy (‘WISP’)
- Incident response plan (‘IPR’)

Service Providers
- 3rd party vendor management
California Consumer Privacy Act

• Carve-Outs and Exemptions
  • HIPAA and CMIA
    • Exemption for PHI and MI, if:
      – Covered entity or Business Associate, (or provider of health care under CMIA and maintain on behalf of health care provider) and
      – PHI or MI
  • Other information may not be exempt
    – Marketing/Advertising
    – General communications
    – Employee data
California Consumer Privacy Act

• Carve-Outs and Exemptions
  • Clinical Trials
    • Exemption for personal information collected “as part of a clinical trial” if the clinical trial is subject to the Federal Policy for the Protection of Human Subjects
  • Other information may not be exempt:
    – Non-government funded clinical trial and research
    – Personal information collected not “as part of a clinical trial” such as eligibility determinations or referrals
    – Employee data
California Consumer Privacy Act

• Carve-Outs and Exemptions (Examples)
  • Gramm Leach Bliley Act (GLBA) and California Financial Information Privacy Act (CFIPA)
    • Exception for personal information collected, processed, sold, or disclosed pursuant to GLBA (does not apply to data breach obligations)
  • Not Exempt:
    – Employees, Business contacts, Commercial contacts
    – Customer prospects and leads
    – Website visitors
## Comparing Privacy Laws

<table>
<thead>
<tr>
<th>Business Requirements</th>
<th>U.S. Federal Laws</th>
<th>Most U.S. State Laws</th>
<th>GDPR</th>
<th>CCPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applies to a broad range of companies and not limited to distinct industries (e.g. health care or finance)</td>
<td>✗</td>
<td>✗</td>
<td>✅</td>
<td>✅</td>
</tr>
<tr>
<td>Applies to the collection of personal information online and offline</td>
<td>Depends on the State</td>
<td>✗</td>
<td>✅</td>
<td>✅</td>
</tr>
<tr>
<td>Provide detail information on how they use and process the personal information collected</td>
<td>Depends on the State</td>
<td>✗</td>
<td>✅</td>
<td>✅</td>
</tr>
<tr>
<td>Notify individuals about the right to access information held about them</td>
<td>Depends on the State</td>
<td>✗</td>
<td>✅</td>
<td>✅</td>
</tr>
<tr>
<td>Notify individuals about a right to have their information deleted</td>
<td>Depends on the State</td>
<td>✗</td>
<td>✅</td>
<td>✅</td>
</tr>
<tr>
<td>Include a “Do Not Sell” my personal information link on websites and privacy notices</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✅</td>
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<tr>
<td>Describe the information that they share with service providers</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✅</td>
</tr>
<tr>
<td>Describe the types of entities to whom they sell information</td>
<td>✗</td>
<td>✗</td>
<td>✅</td>
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Questions?

Thank You!

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