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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Emerging Technology Issues Shaping Your Business

March 28, 2019

Overview

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New technology is changing the way you do business. It is difficult to predict the startling impact that technology will have on your company in the next five years. How can you plan for the future?

- Drones
- 3D Technology
- Artificial Intelligence
- Biometrics

Our Speakers

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Drones

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3D Printing

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Biometrics

Drones

Michael Sievers

Drones – Introduction

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- Michael E. Sievers
  - Counsel – Richmond Office
  - Co-Founder of Unmanned Systems Group
    - Launched practice group in 2014
- Unmanned Systems Group
  - Represented clients in obtaining "Section 333" exemptions; developing and implementing R&D projects with UAS test sites and military sites; proposing R&D projects to the FAA; analyzing and commenting on proposed rules and regulations; participating in industry stakeholder working groups; undertaking Federal lobbying efforts; tracking, evaluating, and providing lobbying advice in connection with State legislative developments; assisting in the establishment of internal "UAS" departments; and advising with respect to privacy issues and updating associated internal policies.

Drones – Introduction

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- Audience Polls
  1. Has your company used drones in its business operations?
     a. Conducted drone flights internally?
     b. Outsourced/hired a vendor to conduct flights?
  2. If conducted internally…
     a. …did you previously have an "aviation department?"
     b. …how many qualified "pilots" do you have on staff?
  3. Does your company provide a service or product that is related to drones?

Drones – December 1, 2013

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SEE VIDEO FROM AMAZON AIR

Drones – Introduction

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- Drone use cases…
  - Is it really just package delivery?
- NO…
  - Aerial surveying and mapping (including, topography, LiDAR, oil and gas exploration)
  - Visual inspections of facilities and systems (pipelines, electrical lines, wind turbines, solar installations, flue stacks, etc.)
  - Photography and videography
  - Search and rescue
  - Fire detection and suppression
  - Crop inspection and spraying
  - Temporary telecommunication networks
  - Security
  - Scientific research
  - Pollution control and air sampling
  - Advertising

Drones – Introduction

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- What industries can benefit from the use of drones?
  - Regulated utilities
  - Traditional and renewable energy producers
  - Telecommunications and technology companies
  - Insurance companies
  - Owners of substantial infrastructure requiring periodic inspection
  - Film and television companies
  - Hospital systems
  - Agriculture producers
  - R&D companies
  - Marketing firms

Drones – Legal Landscape – 30,000 feet

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- Federal, State, and local jurisdiction
  - Federal –
    - Exclusive authority to regulate the "airspace"
      - At what altitude/height does the airspace begin? Alternatively, where does your private property end?
  - State and local –
    - Can regulate the use of the surface within their jurisdictions and the conduct of business, generally
    - Privacy laws and other crimes
    - Trespass and other torts

Drones – Legal Landscape – 30,000 feet

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- Federal
  - Federal Aviation Administration (Department of Transportation)
    - Mandate – Protect users of the airspace as well as people and property on the ground
    - Safety agency – Intentionally cautious and deliberate (slow)
      - Pace of innovation in this area of technology is incredibly fast
      - Necessarily, this creates a tension between industry and FAA

Drones – Legal Landscape – 30,000 feet

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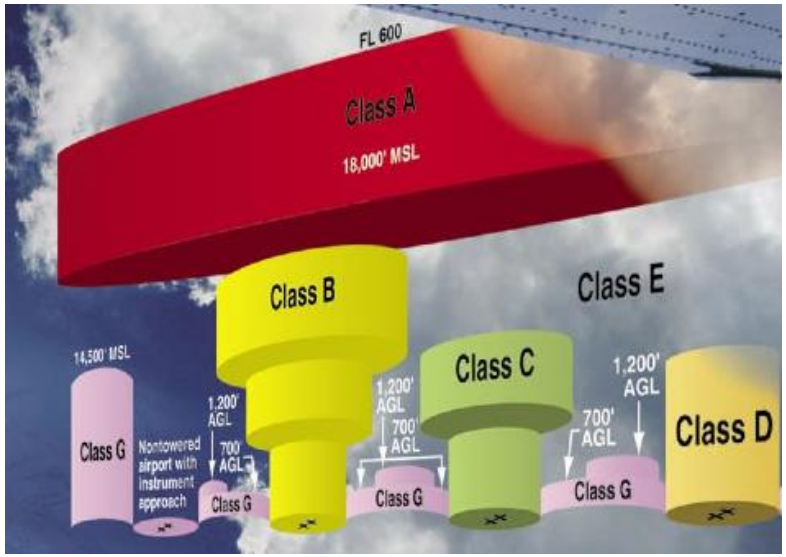
FAA Regulation

- FAA regulates the "navigable airspace" and operates the National Airspace System (NAS)
  - Navigable airspace for drones?
    - Anywhere outdoors and above ground
  - NAS – composed of infrastructure, personnel, and regulations



Art credit: http://www.faa.gov/regulations_policies/handbooks_manuals/aviation/pilot_handbook/media/phak%20-%20chapter%2014.pdf

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FAA Regulation

- Federal Aviation Regulations (FARs) govern all aircraft operations within the NAS (14 CFR Parts 1-199)
  - A drone, or "unmanned aircraft," is still an aircraft in the eyes of the FAA, and thus subject to the FARs

Drones – Legal Landscape – 30,000 feet

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FAA Regulation

- FARs were ill-suited to drones; had been developed with only manned aircraft in mind
  - "see and avoid" requirement, on-board crew and document requirements, etc.
  - Initially, it was practically impossible for drones to satisfy the FARs
    - Lawful commercial operation required obtaining an exemption from the rules, until new rules were developed to regulate drones

Drones – Legal Landscape – 30,000 feet

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Drone Regulations – Rulemaking

- FAA Modernization and Reform Act of 2012 (Pub. L. 112-95)
  - Charges FAA with responsibility for achieving safe integration of drones into the NAS by September 2015
  - Section 333 effectively authorized FAA to regulate drones separately from manned aircraft
  - Kicked off FAA's rulemaking efforts for drones

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Drone Regulations – Rulemaking

- Notice of Proposed Rulemaking released February 15, 2015
  - "Small Drone Rule"
    - Drones under 55 lbs; subject to relatively restrictive operational parameters
- Public comment period expired April 24, 2015
  - More than 4,500 comments had been submitted by drone users, aircraft pilots, privacy advocates, etc.
- Final rule for "Operation and Certification of small Unmanned Aircraft Systems" published June 28, 2016
  - Creates "Part 107" of the FARs

Part 107 - Overview

- Select features of Part 107
  - Drones less than 55 lbs
  - Operation only within Visual Line of Sight (VLOS) of remote pilot in command
  - Operation only during daylight hours
  - May not operate over any persons not directly participating in the operation, not under a covered structure, and not inside a covered stationary vehicle
  - Maximum groundspeed of 100 mph
  - Maximum altitude of 400 feet above ground level (AGL) or, if higher than 400 feet AGL, then remaining within 400 feet of a structure
  - Operations within Class G airspace allowed without ATC permission
  - *Many of the above restrictions are "waiveable" if applicant demonstrates that operation can be safely conducted under the terms of a certificate of waiver*
  - Establishes "remote pilot in command" certification (like a license) which can be obtained by a person at least 16 years old, who passes a vetting by TSA, and who passes an aeronautical knowledge exam

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Drone Regulations – Where do we stand now?

- Part 107
  - Lots of “waivers” have been granted, allowing for select operations at night and over people
    - Several, but fewer, granted for beyond visual line of sight (BVLOS) operations

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Drone Regulations – Where do we stand now?

- Further Rulemaking
  - NPRM – Operation of Small Unmanned Aircraft Systems Over People
    - ***Comments due on or before April 15, 2019***
  - ANPRM – Safe and Secure Operations of Small Unmanned Aircraft Systems
    - Gathering information regarding public safety and national security concerns
    - ***Comments due on or before April 15, 2019***
  - Anticipated to be published circa May 2019 – NPRM – Remote Identification of Unmanned Aircraft Systems

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Factors to Consider as Corporate Counsel

- Planning to conduct your own drone operations?
  - Akin to standing up your own "aviation department," though on a less burdensome scale
- Outsourcing/Contracting with vendors for drone services?
  - Need to know how to vet a prospective vendor; review/develop tailored services agreements with appropriate insurance requirements and allocation of liability
- Risk management/Insurance
- Privacy and Data Security requirements
- Tracking and complying with State law requirements
- Do drones (of others) pose a security or other risk to your business or your property? Evaluate need for and availability of "countermeasures"

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Factors to Consider as Corporate Counsel (cont.)

- Do you have a sufficient interest in the emerging regulatory landscape for drones that you might like to participate in the legislative and/or rulemaking processes at the Federal and/or State level?
- How will you/your company stay abreast of developments in this rapidly changing legal/regulatory landscape?

Drones – What's Next?

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SEE VIDEO FROM AUDI

3D Technology

Maya Eckstein

3D Technology

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- Maya Eckstein
  - Partner – Richmond Office
  - Maya has successfully represented clients in a wide range of industries and matters.

  - Many of Maya's cases have focused on intellectual property matters, including patent, trade secrets and trademark matters. She has represented clients in matters involving various technologies, including cable television, hearing aid, electronic payments, wireless email, home construction, and other technologies, as well as in ANDA litigation.
  - Maya is the former head of the firm's Intellectual Property Practice Group, sits on the firm's Associates Committee, and is Co-Chair of the Richmond office's Pro Bono Committee.

What is 3D Printing?

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- Additive Manufacturing
- A process of making three dimensional solid objects from a digital file
- Objects are created by laying down successive layers of material until the entire object is created

What is 3D Printing?

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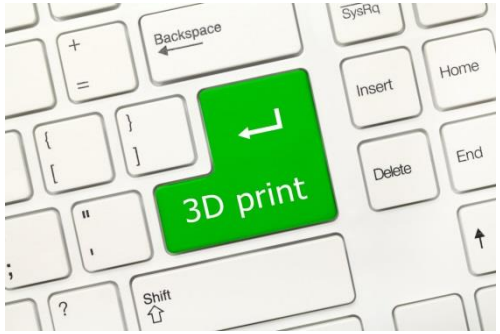
Different types of 3D printing:

- Stereolithography (SLA)
- Digital Light Processing (DLP)
- Fused deposition modeling (FDM)
- Selective Laser Sintering (SLS)
- Selective laser melting (SLM)
- Electronic Beam Melting (EBM)
- Laminated object manufacturing (LOM)



3D Printing: How Is It Being Used?

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Crossing threshold from “advanced” to “conventional”

- 2/3 of manufacturers have adopted 3D printing in some way
  - 31.4% using it for prototyping
  - 6.6% using it for end products
- 42% of manufacturers expect 3D printing to be used for high-volume production in the next 3-5 years.

3D Printing: How Is It Being Used?

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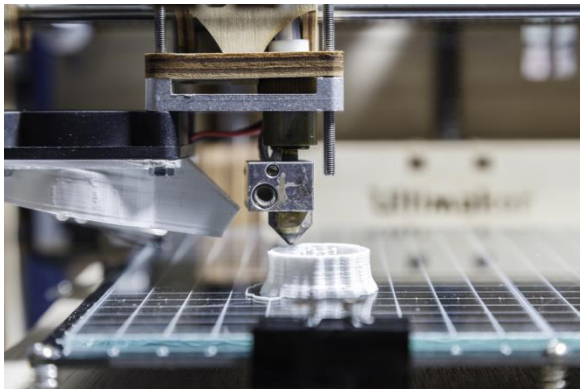
- 67% believe it will be used primarily for low-volume, specialized products
- 64% expect that 3D printing will be used to produce older, obsolete parts in next 3-5 years
- Most commonly cited barriers to adopting 3D printing among manufacturers are cost (41.3%) and lack of talent/current expertise (42.1%)



3D Printing: How Is It Being Used?

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- Aviation
  - GE Introduced 3D printed parts for aircraft engines in 2016
  - Expects to produce > 100,000 airplane parts using 3D printing by 2020
  - GE Purchased two 3D printing companies in Sept. 2016 for $1.4B
  - By 2021, 75% of new commercial and military aircraft will fly with 3D-printed engine, airframe and other components

3D Printing: How Is It Being Used?

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- Automotive: BMW using 3D printing to build hand tools for automobile assembly and testing
- Black & Decker: Reduced prototyping time from 3-5 days to hours
- Prosthetic/orthotic device manufacturers: producing standard implants and surgical guides for range of procedures (total knee, total hip, shoulder replacements, etc.)

3D Printing: How Is It Being Used?

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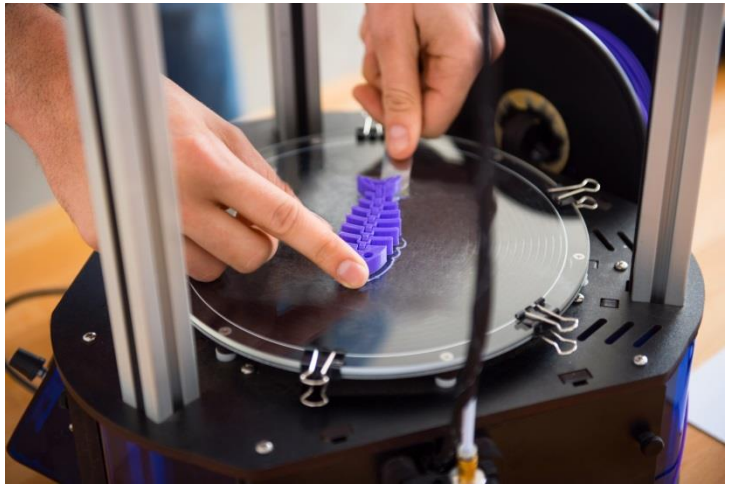
- Consumer Products:
  - New Balance, Adidas
  - Eyeglasses
  - Bicycles
  - Samsonite
  - Hearing aids



- By 2021, 20% of the world's top 100 consumer goods companies will use 3D printing to create custom products.

3D Printing: Various Legal Issues

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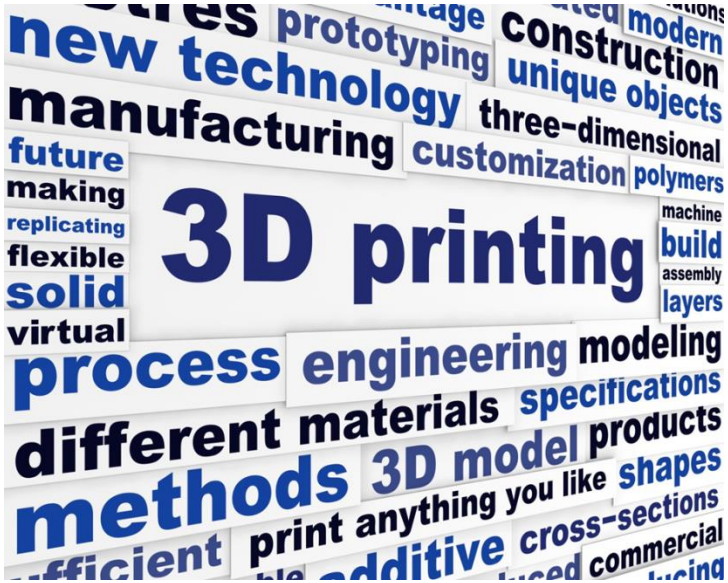
- Intellectual Property
- Product Liability
- Cybersecurity
- Regulatory



3D Printing: Intellectual Property

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- Traditional manufacturing/supply chain
  - Products manufactured in large factories, often abroad
  - Shipped to the U.S., then delivered to distributors/warehouses and retail outlets for sale to consumers
  - Consumers order products online or purchase at bricks-and-mortar locations
  - Manufacturers have extensive control over products' manufacturing and distribution and, thus, use of IP

3D Printing: Intellectual Property

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- 3D printing brings new manufacturing/supply chains with little control over use of IP
  - Personal Use: Consumers with desktop 3D printers or access to 3D print shops access digital files online and print products
  - Replacement Parts: Consumers seeking replacement parts obtain digital files and print products
  - Counterfeiters: Counterfeiters obtain pirated CAD files print products and sell directly to consumers or through unknowing retailers

3D Printing: Intellectual Property

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- Copyright:
  - Digital files for 3D printing become extremely valuable
  - Protected by copyright law, i.e. 3rd parties need permission to copy, modify, distribute, create derivatives of original works
  - But digital files are easily transferable and accessible
  - Pirate Bay
- DMCA anti-circumvention provisions → anyone circumventing them subject to civil/criminal remedies
- Copyrighted designs: www.thingiverse.com → 700+ downloadable digital files for Star Wars and 330+ for Disney

3D Printing: Intellectual Property

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- Trademark:
  - If challenging to protect your brand before, now doubly difficult
  - Unauthorized copies of your products being printed with company's brand name, logos and specialized designs, and passed off as authentic
  - Need actively-pursued brand protection monitoring program
  - Ensure all products placed in the market are fully protected with trademark registrations → means more than protection of brand names and logos, but also distinctive characteristics of products, external appearance and packaging

3D Printing: Intellectual Property

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- Patent:
  - Patent system ill-equipped to deal with 3D printing → allows common consumers (and sophisticated counterfeiters) to evade patents
    - Enforcement = patent holder aware of infringement
    - Enforcement = costly
    - Not feasible with individual consumers
  - Enforcement unlikely against file-sharing sites or others who provide digital files
    - inducing patent infringement?
    - requires knowledge/intent

3D Printing: Products Liability

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Legislative changes likely to protect "consumers"

- Result of changes to manufacturing/supply chain
  - Desktop 3D printers → printing at home
  - Replacement parts, original parts
- Strict Liability: Sellers of products held liable for injuries caused by defective products, regardless of degree of care
  - Who's the seller?
  - Did they sell a "product"?
- Negligence: Manufacturers liable based on degree of care
  - More difficult to prove
  - Who was negligent?

3D Printing: Cybersecurity

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- Attacker could hack into printer(s) connected to Internet to introduce internal defects as components being printed
  - Connection could allow for remote control
  - Hackers could infiltrate and tamper with printing without detection
- Printing orientation → orientation of product during printing could make as much as 25% difference in its strength
- Insertion of sub-millimeter defects between printed layers
  - Defects undetectable by common industrial monitoring techniques (i.e. ultrasonic imaging)
  - Over time, materials can weaken with exposure to fatigue conditions, heat, light, humidity

3D Printing: Regulatory

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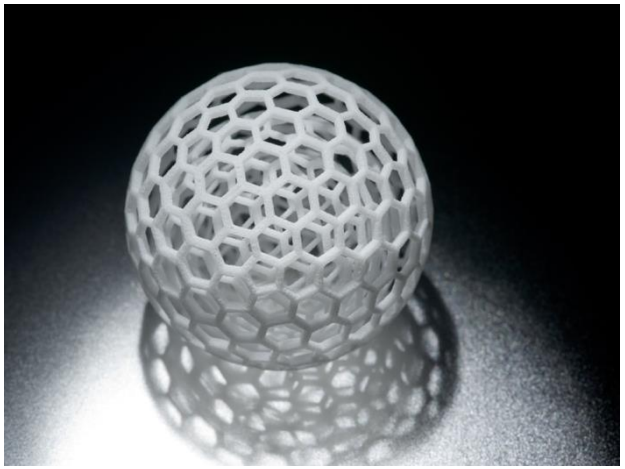
FDA – medical devices, pharmaceuticals

FAA – airplane parts

Standard-setting bodies

- ASTM, ISO, IEEE
  - File format
  - Materials and processes
  - Terminology
  - Test methods



Conclusion

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3D Printing (additive manufacturing) is crossing (has crossed?) the threshold from “advanced” to “conventional”

Widely used in the automotive, aviation, medical and consumer product industries

3D printing brings with it a host of new questions surrounding intellectual property, product liability, cybersecurity, and regulatory issues

Artificial Intelligence

Ondray Harris

Artificial Intelligence

HUNTON ANDREWS KURTH

- Ondray Harris
  - Special Counsel – Washington Office
    - Ondray is the former director of the Office of Federal Contract Compliance Programs (OFCCP) at the US Department of Labor (DOL). His practice includes employment advice, counseling and training regarding all aspects of labor and employment law, including regulatory compliance related to affirmative action and OFCCP, government investigations and crisis management.
    - Previously, Ondray was the president of the Center for American Racial Equality (CARE) in Washington, DC, and the executive director of the Public Employment Relations Board (PERB), a quasi-judicial, independent agency that resolves labor-management disputes between agencies and unions.

Overview of Machine Learning
AI has been the dream of computer scientists since the 50s

Digital Evolution:

AI – has been the dream of computer scientists since the 50's.
Alan Turing – 1950 The "Turning Test" is a test of a machine's ability to exhibit intelligent behavior equivalent to, or indistinguishable from, that of a human.

Neural Network – In the 80s we had computer system modeled on the human brain and nervous system and the math that underlies machine learning.

So what is the big difference? What has brought about this explosive grow in AI in the recent years?

Overview

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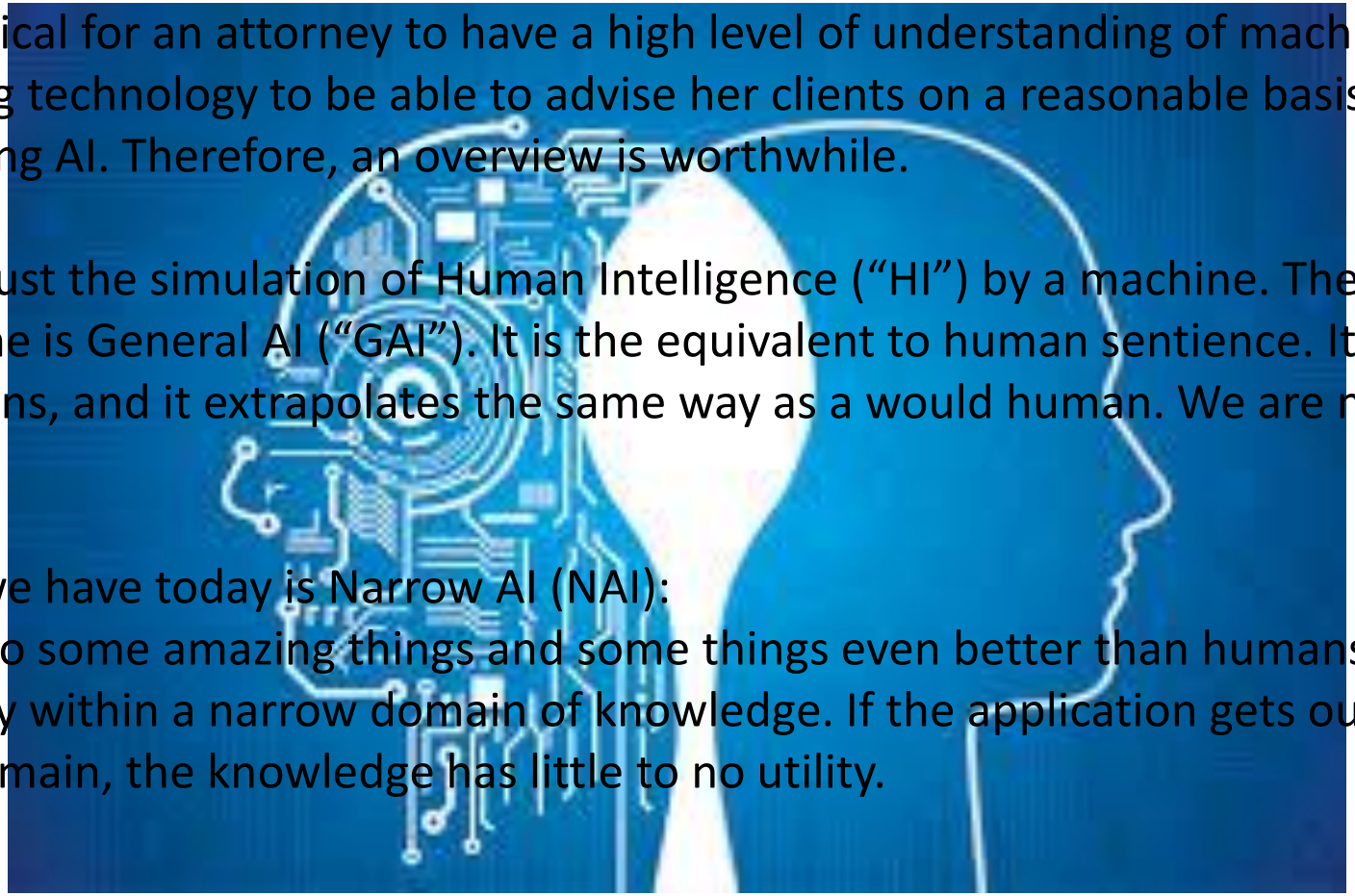
3 Things

1. The processors we are using today are tens of thousands times more powerful than those used in the 80s.
2. Throughput – the amount of material or items passing through the processor – this amount also has increased exponentially.
3. Big Data – the biggest enabler of machine learning has been the birth of "Big Data."

The way that machine learning works is that an "Algorithm" goes through a large amount of data to find patterns. Based on those patterns, it builds a predictive model to apply to future data.

So what that means is that data is the fuel for all of the innovation that we are seeing in machine learning to AI.



It is critical for an attorney to have a high level of understanding of machine learning technology to be able to advise her clients on a reasonable basis regarding AI. Therefore, an overview is worthwhile.

AI – is just the simulation of Human Intelligence ("HI") by a machine. The optimal outcome is General AI ("GAI"). It is the equivalent to human sentience. It thinks; it reasons, and it extrapolates the same way as a would human. We are not there yet.

What we have today is Narrow AI (NAI):
It can do some amazing things and some things even better than humans can, but only within a narrow domain of knowledge. If the application gets outside of that domain, the knowledge has little to no utility.

Traditionally:
NAI was developed using traditional software (*i.e.*, humans coded the logic that told the system what to do).

In contrast:
With machine learning a human is not coding logic that tells the system what to do. A learning algorithm scans the data looking for patterns and builds a predictive model going forward.

Instead of a computer scientist, data scientists have taken the important role in AI because machine learning is data driven.

Conceptual Depiction

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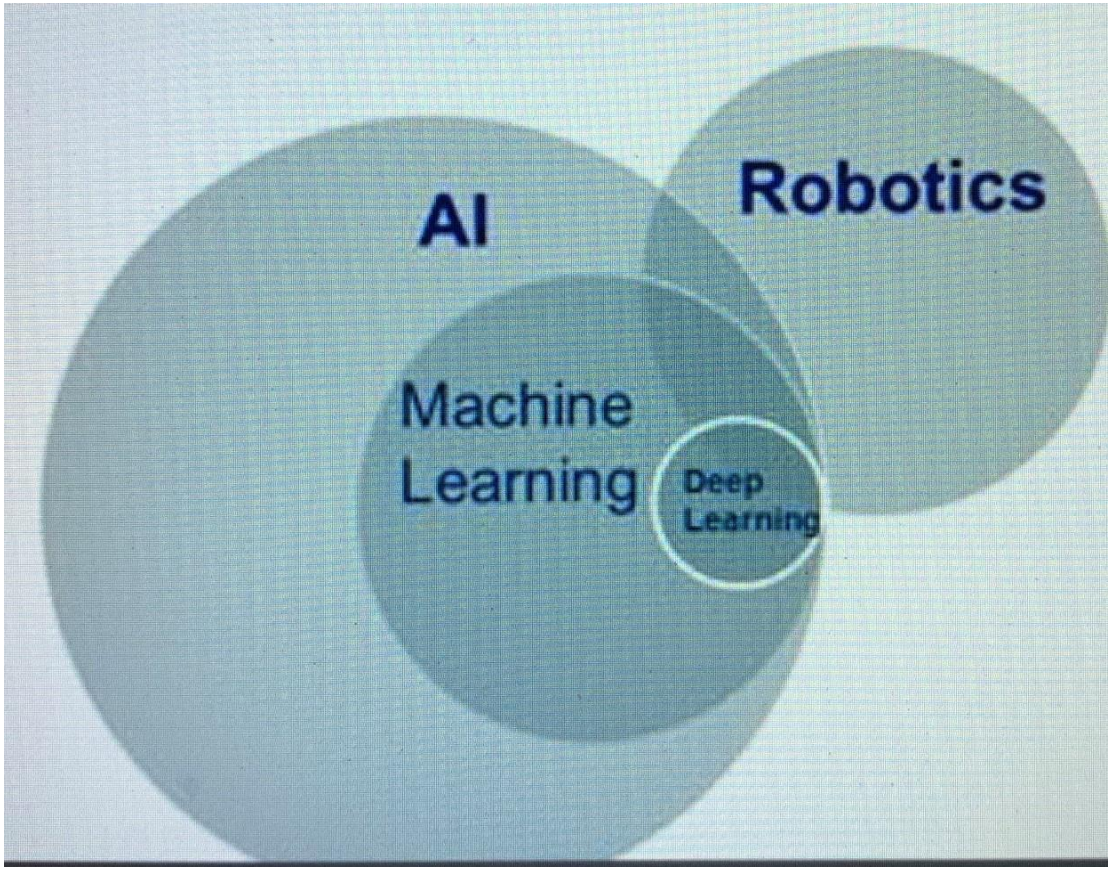

The Law and AI

When reading articles from *Forbes*, HR magazines and *Business Journals*, etc., it is clear the writers believe AI is going to revolutionize HR. Notwithstanding, changes in the law and legal requirements are not controlled by technological advancements. In fact, the maxim *natura non facit saltum ita nec lex* (*i.e.*, nature does not make a leap, thus neither does the law) stands for the principle that the law and legal responsibilities—while not static—should not change quickly. Therefore, from the legal compliance and enforcement perspective, some AI experts are misguided regarding the near-future decision making allowed by AI.

If the tools a company or a government agency uses create illegal biases, FTC, OFCCP & DOL, DOJ, EEOC and other regulatory and enforcement bodies do not care if the disparities were created by a human or an algorithm. Intent is irrelevant.

Notice and Consent:

Privacy
Do your public representations adequately disclose how you will use data for machine learning? Have you obtained any required consumer consent?

FTC ACT – Companies must consider whether they are violating any material promises to consumers or whether they have failed to disclose material information. Companies must reasonably secure consumers' data, and companies must keep the promises they make.

Antitrust - "Tacit" Collusion

Algorithmic Discrimination – a model is only as good as its data. If it is given biased data, you will end up with a biased model. It can be completely unintentional but still harm.

Example:

Data scientist builds a machine model for credit worthiness, and as part of the data feature, she trains the model to note geographical locations, and she includes zip codes. Let's say there is a particular zip code with a high rate of defaults. The algorithm is going to see that and add a negative weighted parameter to that zip code, and say that applicants from that zip code have a higher rate of default. Thus, the AI will predict that the applicants from that zip code are bad credit risks. Location data is often a proxy from race. If the zip code has a majority of historically disadvantaged racial groups, the argument is that the model is being leveraged in a way that denies credit to some people based on a proxy for race.

Types of Biases

Interaction Bias:
Example: Tay the teen Bot (19 year old girl)
Microsoft published a paper – AI bot was created to imitate a 19 year old American female.
Trolls got together engaging in conversation with Tay using racist and sexist terms. Tay took the conversation in, and updated its model and began repeating the terms. The model was poison.

Latent Bias:
Example: Amazon – using machine learning to evaluate resumes.
They used the resumes of successful people as samples of people they would like to hire. It turned out that most of those resumes were of men. The AI learned this and started excluding women.

Selection Bias:

Data Scientists introduce the bias
Example: Face recognition technology companies need a lot of data, so they use their employees. Often, their employees do not represent the demographics of the country or the world. So when people of different races started using the product, it does not work.

You have to select broadly and have a big enough pool.

FTC's Guidance on Big Data 2016 Report: Review, Correlation vs. Causation, Ethics, and Equity.

Some Governing Laws

Executive Order 11246 (EO 11246), as amended
EO 11246, covers employers with Federal contracts, subcontracts, and federally assisted construction contracts that exceed $10k within a 12-month period.

Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503") Under Section 503, a business with a federal contract of more than $10,000 is required to treat qualified individuals with disabilities without discrimination on the basis of their physical or mental disability in all employment practices, and to take affirmative action to employ and advance in employment individuals with disabilities.

Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("VEVRAA")

Under VEVRAA, a business with a federal contract of $100,000 or more is required to treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, and to take affirmative action to employ and advance in employment protected veterans. VEVRAA itself has not been amended, but the jurisdiction threshold has been adjusted to $150,000 for inflation.

- Title VII of the Civil Rights Act of 1964, as amended
- Title VI of the Civil Rights Act of 1964, as amended
- Title IX of the Civil Rights Act of 1964, as amended

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AI is constantly learning. So it can learn a bias/mirror human bias.

Amazon scraped its internal AI recruiting tool since the tool had a bias/discriminated against women. The program actually penalized in points applications that contained the word “women’s.” The AI favored men as it learned the tech field is dominated by men. So things that indicated female—such as girls’ school, women’s college, female sport team, etc., downgraded the applicant. Amazon quickly said the program was never used in an official capacity. Interestingly, in the STEM world, some argue AI biases prove that the biases are determined neutrally and thus accurate and fair. However, this is a dangerous doubling- down approach that will not impress government enforcers or private litigants.

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Moreover, there is a “Catch-22” here: leaving decisions concerning hiring, terms and conditions **solely** up to AI that causes disparities can be argued to be negligence. However, not using technology to improve diversity in your workforce and to decrease pay gaps and race and sex disparities can also be used against you. Compliance is results orientated. From an enforcement stance, the outcome is all that matters. If AI creates a disparity, a corporation’s HR under the guidance of legal counsel must review and rectify the illegal bias. Enforcement agencies will not be lenient because a corporation’s AI created a impermissible bias as opposed to a person.

Tech and the law do not always see eye to eye

Human resources leaders of retail companies and many in the organizational process world believe that AI will revolutionize how HR functions. At least for the near future, they are only partly right. In the HR context, AI typically refers to data that is processed by algorithms to make decisions regarding employees. The HR world believe this "cognitive computing" will transform HR's decision-making process and improve the employee's experience.

However, remember, a corporation is always responsible for the decisions it makes regarding consumers and employees. That responsibility sometimes turns into legal liability. Corporate decisions made that are more adverse to legally protected groups such as women, minorities, veterans or the disabled create legal compliance issues. Compliance problems lead to lawsuits, legal expenses, branding concerns and decreased work output efficiencies.

Biometrics

Bennett Sooy

Biometrics

- Bennett Sooy
  - Associate – Washington Office
    - Prior to joining Hunton Andrews Kurth LLP, Bennett served as an intern in the criminal division of the US Attorney's Office for the Eastern District of Virginia in Alexandria, as a judicial intern to the Honorable Ketanji Brown Jackson of the US District Court for the District of Columbia, as an intern in the civil division of the Office of the Attorney General for the District of Columbia, and as a law clerk with a plaintiffs' firm in DC.

What is biometric data?

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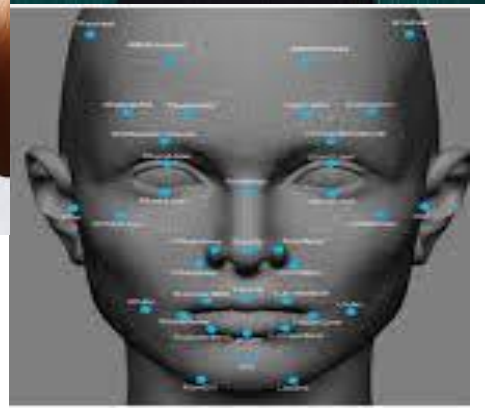
An individual's physiological, biological or behavioral characteristics that can be measured and used to establish identity.

Examples:

- Fingerprint
- Face geometry
- Iris
- Vasculature
- DNA
- Odor
- Voice
- Gait
- Keystroke
- Signature



Common applications

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- Logical access control

Gaining access to a computer network

- Physical access control

Gaining access to a secure facility

- Timekeeping and attendance

Automated recordkeeping with authentication

- Surveillance and security systems

Recognition and tracking of individuals

Innovative applications

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- Predictive photograph tagging

Recognition of individuals from templates based on prior tags

- Cashierless stores

Recognition of individuals who enter and exit store to charge items to associated account

Soft biometrics

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- Information that does not explicitly identify a person, e.g. facial expression,
  size and build, voice features

- May be used in combination to narrow range of possibilities and identify a specific person or simply to identify class of persons

- Hot area for development of commercial applications without same privacy concerns

Overview of biometrics laws

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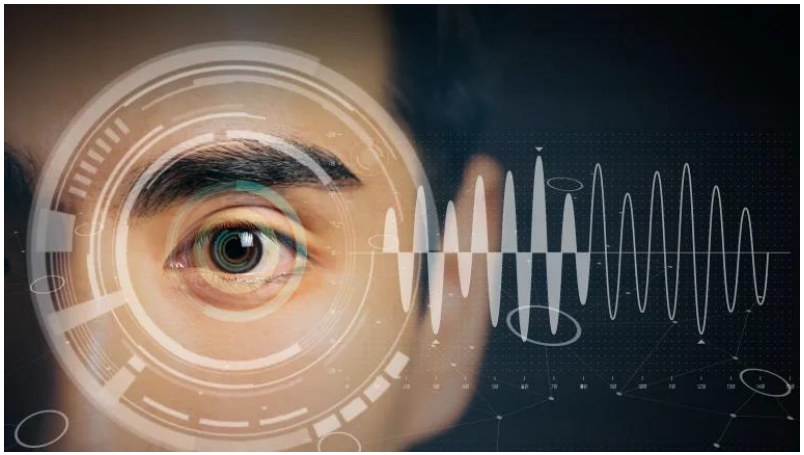
- Federal level

No laws governing collection, storage, and use
5 laws proposed in House and Senate since 2014

- State level

3 laws governing collection, storage, and use
10 laws proposed in state legislatures
14 laws governing data breach notification



Congress has failed to act on proposed bills

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House

Biometric Information Privacy Act (H.R. 4381)
- Requires permission to share collected biometric data with third parties
- Introduced 2014, no action taken to date

Secure and Protect Americans' Data Act (H.R. 3896)
- Requires notice prior to collection of biometric data
- Introduced 2017, no action taken to date

Data Accountability and Trust Act (H.R. 1282)
- Requires notice prior to collection of biometric data
- Introduced 2017, no action taken to date

Senate

Consumer Online Notification for Stopping Edge-provider Network Transgressions Act (S. 2639)
- Requires notice and consent to collect, use, and share personal data
- Enforcement by FTC and state attorneys general
- Introduced 2018, no action taken to date

Social Media Privacy Protection and Consumer Rights Act (S. 2728)
- Requires notice and consumer election of privacy preferences regarding collection of personal data
- Safe harbor provision may apply to biometric data if "privacy-enhancing"
- Introduced 2018, no action taken to date

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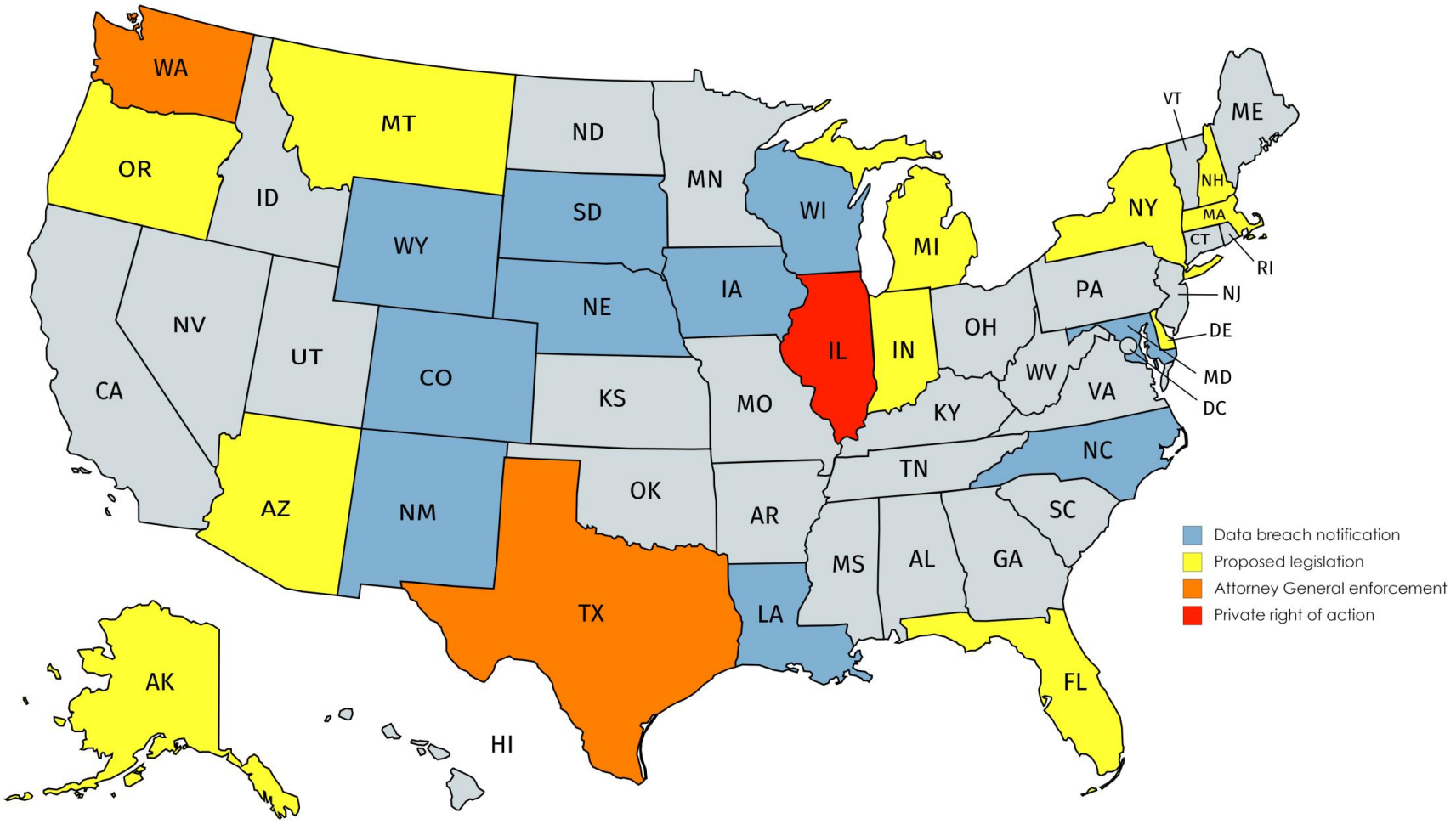
- State level

Several laws governing collection and storage

More laws proposed in state legislatures

State biometrics laws



One state with a private right of action

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Illinois Biometric Information Privacy Act, 740 ILCS 14

- Defines "biometric identifier" as retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry
- Only applies to private entities
- Entities in possession of biometric information must develop a written policy
- Notice to subject is re
  prior to acquiring inform
- Written consent must be
  obtained prior to
- Prohibited to sell, lease,
  otherwise profit from inf

Statutory Damages
$1,000 per Negligent Violation
$5,000 per Reckless Violation

Two states with attorney general enforcement

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Washington Business Regs. - Bio **9.375 RCW**

- Defines "biometric identif measurements of an individual's biological char logical patterns
- Only applies to sale o the purpose of marketing other goods/services and urity purposes
- Requires notice and co to collection or a mechanism to prevent subsequent use (such as contractual promise from third party not to disclose further)

WA: Statutory Damages Up to $500,000 Total

Texas Bus. & Com. Code 503.001 - Capture or Use of Biometric Identifier

- Defines "biometric identifier" as re a or iris scan, fi d
- losure of biometric information other than for specific, limited transactions

TX: Statutory Damages Up to $25,000 per Violation

11 states with proposed or pending laws

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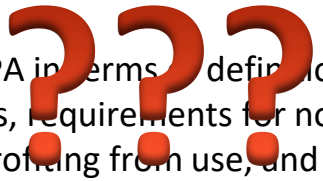
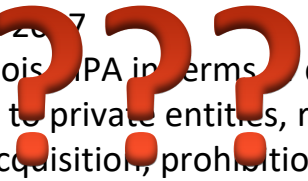
New York Biometric Privacy Act (A01911; S01203)

- Introduced January 2019
- Nearly identical to Illinois BIPA in terms of definition of biometric identifiers, application to private entities, requirements for notice and consent prior to acquisition, prohibition on profiting from use, and private cause of action for statutory damages



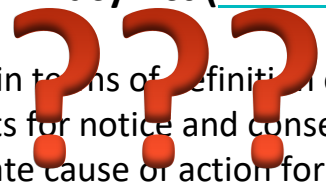
Michigan Biometric Information Privacy Act (HB 5019)

- Introduced September 2017
- Nearly identical to Illinois BIPA in terms of definition of biometric identifiers, application to private entities, requirements for notice and consent prior to acquisition, prohibition on profiting from use, and private cause of action for statutory damages



Florida Biometric Information Privacy Act (HB 1153; SB 1270)

- Introduced February 2019
- Nearly identical to Illinois BIPA in terms of definition of biometric identifiers, application to private entities, requirements for notice and consent prior to acquisition, prohibition on profiting from use, and private cause of action for statutory damages



14 states have breach notification laws that apply to biometric data

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California Consumer Privacy Act of 2018

- Signed June 2018, effective January 2020
- Applies to for-profit businesses that meet certain thresholds
- Includes biometric data in definition of personal information
- Does not have a pre-collection notification requirement – general notification must be available in online privacy notice and individual disclosures available upon request
- Does not have a consent requirement – provides for opt-out rights and right to deletion
- Enforcement by Attorney General – has a limited private right of action only for certain actions that result in data breach
- Bills proposed in February 2019 (SB 561 & AB 1130) would modify the CCPA's private right of action and add biometric information to the state's data breach notification law

Illinois Biometric Information Privacy Act ("BIPA")

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- Enacted in 2008 in response to payments company that considered selling biometrics database during bankruptcy
- Cases did not start to appear until 2014
- Since 2014 there have been hundreds of cases filed including many putative class actions

Rosenbach v. Six Flags Entertainment Corp.

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- Case of first impression in Illinois Supreme Court with decision rendered January 2019
- Allegation of "actual injury or adverse effect" is not required for a plaintiff to state a claim under BIPA
- Mere collection without compliance with notice and consent requirements constitutes a "real and significant" injury within meaning of BIPA and authorizes action for statutory damages

Will federal courts agree?

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Some do

- In 2018 a California federal court found that plaintiffs in a putative class action against Facebook have standing

- Court found that BIPA vested in Illinois residents the right to control their biometric information by requiring notice before collection and the ability to withhold consent

- Violation of procedural rights amounts to concrete injury because it infringes on privacy rights protected by statute

Some don't

- Immediately prior to the *Rosenbach* decision, an Illinois federal court dismissed a putative class action against Google on standing grounds

- Court found that plaintiffs alleging a procedural violation of BIPA and resulting harm from privacy concerns regarding retention of data had not demonstrated they suffered an injury-in-fact

Spokeo's impact on privacy claims

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- Plaintiff does not automatically satisfy the injury-in-fact requirement of the standing analysis whenever a law grants a person a statutory right and purports to authorize that person to sue to vindicate that right

- Standing requires a concrete injury even in the context of a statutory violation

1. Does statute create an intangible injury that is sufficiently concrete by articulating a chain of causation that will give rise to a case or controversy where none existed before?

2. Is intangible harm closely related to a harm that has traditionally provided a valid basis for a lawsuit?

Privacy claims have traditionally been channeled into 4 causes of action

- Appropriation of name or likeness
- Intrusion upon seclusion
- False light
- Public disclosure of private facts

Recent skepticism from Supreme Court re standing for privacy claims

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- Last week the Supreme Court remanded a class action settlement involving Google
- Court said it could not address fairness of settlement because of questions over whether the plaintiffs can plausibly claim to have suffered concrete harm under *Spokeo*
- Claim was based on alleged violation of the Stored Communications Act, whereby Google shared user search histories with third parties
- Class of 129 million users was certified, but $8.5 million settlement did not provide any direct benefit to class members
- Instead, $2.15 million was designated for class counsel, and $5.3 million was to be distributed to nonprofit organizations promoting internet privacy

BIPA's future in federal court uncertain

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- Standing may be a toss-up in federal court
- No problem with standing in state court
- Same remand rules apply to CAFA
- Defendants may lose ability to remove
- Other statutes modeled on BIPA will face similar issues if they become law

Topical biometrics

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