Considerations for Your Data Licensing Arrangement

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Agenda

- Data Licensing Basics
- Data Licensing and the Advertising Industry
- Key Considerations
  - Consideration 1: Rationale
  - Consideration 2: Complexity
  - Consideration 3: Compliance
- Best Practices

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Data Licensing – What Is It?

- A "**data licensing agreement**" is an agreement granting one party (the "<u>licensee</u>") permission to use the data of the other party (the "<u>licensor</u>"), subject to certain restrictions.

- A "**licensor**" is the party that grants permission to the other party to use the data.

- A "**licensee**" is the party that receives permission to use the data.

Data Licensing – What Is It? (cont'd)

- "**Data**" refers to either (1) raw information, which can take various forms (e.g., a list of text or numbers), or (2) an arrangement of the raw information that is unique to the owner/licensor.

- To be licensed to another party, "data" must quality for intellectual property protection.

  - *Copyright* – Most data compilations will qualify if the data was uniquely selected, organized, and arranged.

  - *Trade Secret* – Data may qualify for trade secret protection if

    - (1) the owner has taken reasonable measures to keep the information secret, and

    - (2) the information derives independent economic value from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from its disclosure or use. (Uniform Trade Secrets Act)

Data Licensing and the Advertising Industry

"**Advertiser**" = the entity with products or services it wants to promote to consumers (or the agency working on its behalf)

- Advertisers can use information about their consumers to target advertisements, among other purposes.

- Consumer data is valuable for advertisers and can be sold and licensed according to certain restrictions imposed by the owner.

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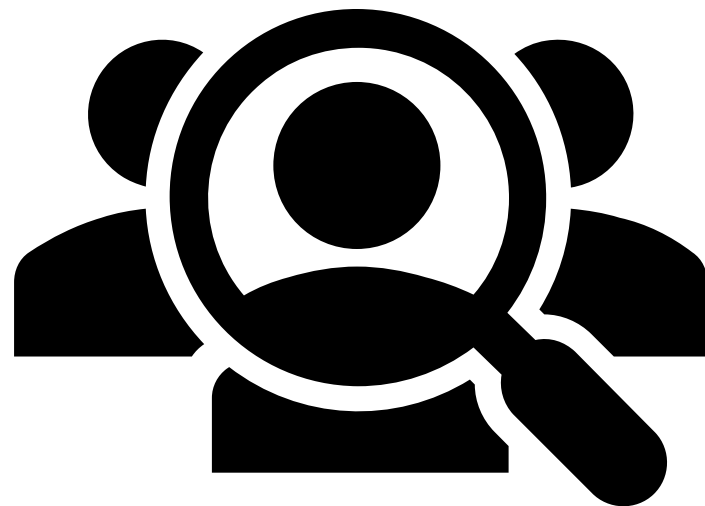
Key Considerations When Licensing Data

1.
RATIONALE

2.
COMPLEXITY

3.
COMPLIANCE

Consideration 1: Rationale

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Data License vs. Data Sale

Data Sale:

- "Sale" (of personal data) generally concerns transferring a consumer's personal information to a third party for monetary or other consideration.

- More specifically, a sale is the transfer of _ownership_ of the data.

- Generally, a quick transaction.

- Recipient may freely use the data, as an owner.

Data License:

- Licensing presents opportunity for _ongoing fees_. Usually subject to ongoing payments to the owner/licensor (which could ultimately be more profitable).

- Owner retains ownership of the data.

- Generally longer, ongoing relationship.

- Recipient may use the data subject to conditions, as a licensee.

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Use Cases

- Targeted advertising
- Online behavioral advertising
- Research and analytics
- Enhancement of an existing data collection
- Sublicensing to another party
- Creation of products and services in line with data trends
- Analysis of a previous ad campaign
- And more!

Licensor Motivations

- *Profit.* Licensor may receive a fee from the licensee as consideration for the data.

- *Brand visibility.* Licensor may want to establish reputation as a top data source, research collector, or other authority on a certain topic (which, in turn, would yield profit).

- *Strategic relationships.* Licensor may want to collaborate with another entity in its field or delve into an unexplored industry to seek collaboration opportunities.

- *Control.* Establishing a clear licensing scheme may reduce likelihood that third parties try to *infringe* and use the data without authorization.

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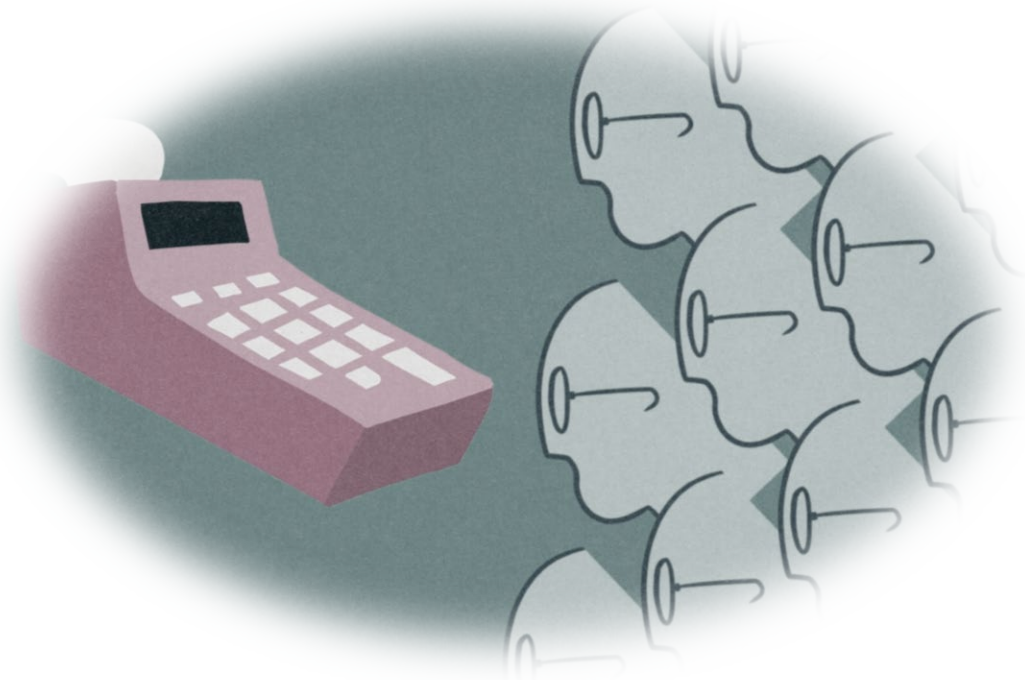
Licensee Motivations
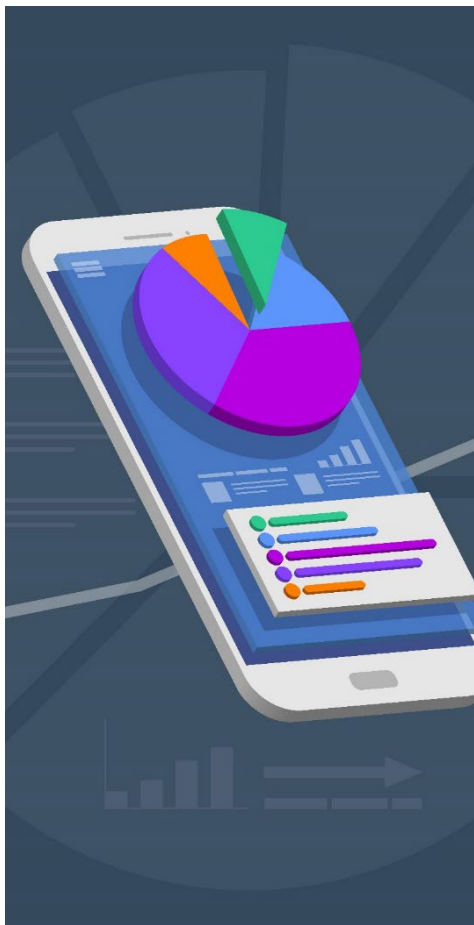
Easy access. Licensee can access quality data, but without doing the work to gather and assemble the data.

Internal data enhancement. Creation of licensee's own datasets, and ability to combine the data with other datasets to provide analysis.

Revenue. Licensee may be able to aggregate or combine the data with other data, to then license *that* data to its customers (if it is one of the licensee's service offerings).

Understanding consumer behavior. Licensee may want to better understand current and potential customer behavior.

Targeted advertising. Licensee may want to disseminate advertisements to consumers based on data trends.

Risk reduction. Some data protection compliance obligations may fall on licensor.

Types of Data Licensed

Social media posts	GPS location	Online purchases	In-store purchases	Physical address	Email address
Phone number	Name	Survey responses	Customer service records	Salary	Banking account
Account passwords	Gender	Race/ethnicity	Purchases	Returns	Subscriptions
Donations	IP registrations	Social media accounts	Product specifications	Pricing	Sales

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Consideration 2: Complexity

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The Five W's

WHO?

Who is the licensor or licensee?

WHAT?

What, and how much, data is being transferred?

WHEN?

What is the term of the data license?

WHERE?

Where is the data going?

WHY?

Why is the data being shared at all?

The Five W's – *Who?*

- **<u>Who</u>** is the licensor or licensee?
- Also, to whom can the data be sent (other than the licensee)?
- "Licensor" does not always equal "owner" of the data.
- Licensor may permit assignment to another party.

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The Five W's – *What? and When?*

- ***What***, and how much, data is being transferred?
  - What theory of IP protects the data?
  - What form of data is being licensed?
  - How will the transferred data be specified in the agreement?
  - In what format will the data be delivered?

- What is the term of the data license? How long (***when***) will the license be in place?
  - Can the agreement be terminated early?
 - The term should align with the intended use for the data (the *why*).

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The Five W's – *Where?*

- An agreement should specify **_where_** and *how* the data will be delivered to the licensee.
    - Where will the data be delivered?
    - Where (and how) can the licensee store the data?
    - Where else can the licensee send the data? Territory restrictions?

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The Five W's – *Why?*

- Why is the data being shared at all?

- The *why* will inform "permitted uses" that are specified in the agreement.

- Based on the *why*, rights for the licensee to make derivative works of the data, distribute the data to other parties, publicly display the data, and other rights may or may not be appropriate.

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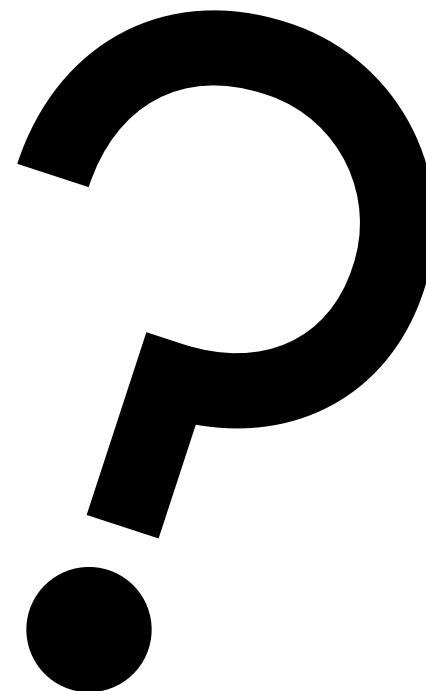
Additional Considerations

- How can the data be modified (if at all)?
- Does the licensee have the necessary means to transfer data in/out efficiently?
- How will data breaches be handled?
- Can the data be used to train AI models or other tools?
- Can the data be used or distributed outside of the United States?
- Can the licensor still use the data?
- Obligations when the agreement ends?

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Consideration 3: Compliance

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Data License vs. "Sale"?

From a privacy perspective, a "sale" is generally any disclosure of data to a third party such that the third party may use the data for its own benefit.

- An IP license, or any disclosure or transfer of data, may be a "sale" under applicable privacy laws.

- Regardless of the "sale" or "license" from an IP perspective, the seller/licensor must assess whether the data is being "sold," as that term is defined in applicable privacy law.

- E.g., if data about a California data subject is "sold," there are certain contractual terms that must be executed between the data seller/licensor and the recipient.

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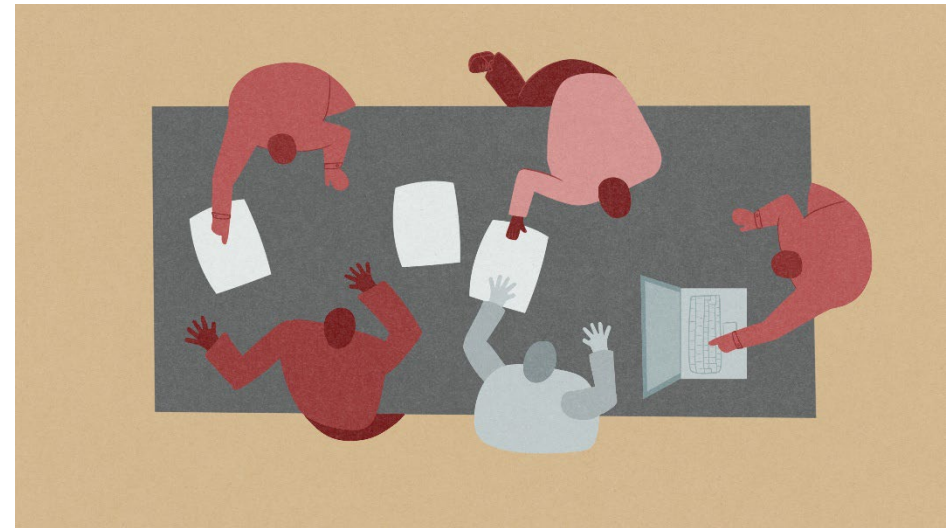
Definitions

Definitions vary by state, but generally, the terms below are seen in several state or international privacy laws, and resemble those used in the European Union's General Data Protection Regulation:

- **Controller**: Individual or entity that determines the purpose and means of processing personal data

  - A controller should anticipate carrying the same obligations imposed by state law, whether *selling* or *licensing* the data.

- **Processor**: Individual or entity that "processes" personal data on behalf of the controller.

- **Process(ing)**: Acts performed on the data, such as collection, use, storage, analysis, or modification.

- **Personal data**: Information relating to an identifiable natural person (the "data subject").

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State Data Transfer Requirements

At least 17 states limit (or will be limiting) how businesses transfer in or out (via license or sale) the data of state residents, including:

- **Required security procedures**: E.g., in Connecticut, a data controller must establish appropriate data security practices to protect the personal data.

- **Notice to data subjects**: E.g., in California, a business must notify consumers whose data is used, shared, or sold; in Florida, the business must notify data subjects that the data *may* be sold.

State Data Transfer Requirements (cont'd)

- **Risk assessment**: E.g., in Colorado, a business cannot process data in a way that risks harm to a consumer (incl. sale) without conducting a data protection assessment of the activities.

- **Data subject opt-out rights**: Several states require businesses to provide an "effective mechanism" enabling data subjects to opt out of certain uses of their data (such as for targeted ads or sale); e.g., in Virginia, a controller must disclose how a consumer may opt out of the sale of their data to third parties.

- **Restrictions for certain categories of data**: E.g., data re: children, data intended for targeted ads or sale, or data from licensed financial institutions.

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State Data Transfer Requirements – Trends

- ✓ **Data subjects have rights**. Consumers are given rights concerning the right to access, delete, transfer, and correct their data, and rights to opt out of use of the data for certain purposes.

- ✓ **Give notice and receive consent from data subjects before licensing out their data**. State definitions of "notice" may vary.

- ✓ **Maintain and keep record of reasonable data security practices**.

- ✓ **Data controllers limited in data that can be collected**.

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State Data Transfer Requirements – Trends (cont'd)

✓ **Opportunities to cure** potential violations, but within a specified number of days.

✓ Requirements for **how data controllers must respond** to consumer requests.

✓ Data sharing requirements do not (generally) apply when the data sharing is via **a merger, acquisition, or similar transaction**.

✓ **Limits on data collection from minors.** All states impose some limits on collection/processing of data for minors under a certain age.

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State Data Transfer Requirements – Changes in Law

- Parties should prepare for a potential change in the law.
- In addition to restrictions on data transfer, additional statutes re: data use, security, and sourcing, are likely to emerge.
- Counsel can assist in drafting and counseling on ensuring compliance with evolving statutes.

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Compliance Logistics
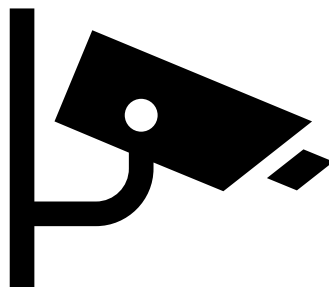
- Licensee should ensure it has means to comply with any compliance obligations placed on it under law and under the license agreement.

- Should also prepare for auditing of security and compliance measures by the licensor.

Best Practices

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Summary of Best Practices

- Consider if data *sale* is preferable over a *license*. And if a data license, then...

- Identify applicable IP protections.

- Identify the rationale, and draft accordingly.

- Determine what state and federal laws apply to the data license.

- Stay abreast of emerging data protection laws.

- Assess security systems to ensure support and security of the shared data.

- Set boundaries limiting (or permitting) the use of the data in unique contexts.

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Summary of Best Practices (cont'd)

Don't ignore the "boilerplate"!

- **Definitions.** Confirms identity of the parties, specifies the data, can outline "permitted uses," "confidential information," the "term," and other terms.

- **Confidentiality.** Obligates the parties to maintain a level of care when handling the data, among other sensitive information exchanged.

- **Indemnification**. Assigns liability to either party in the event of a harm or loss caused by specified events.

- **Reps and warranties**. An assertion of fact (representation) and a promise that the representation is true (warranty) given by one party to the other. If proved false, may constitute a material breach of the agreement.

- **Notices**. Clarification of how the parties will communicate with each other (e.g., where to send messages re: breach, proposed amendments, etc.)

- **Governing law**. Confirms what state law will govern interpretation of the agreement should any of its terms be contested in court.

- ... and more.

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Questions?

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