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# Data Protection in Vendor Agreements

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ACC Charlotte Chapter



# Protecting Your Company's Data

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## What Data Has Economic Significance?

- Research and Development
- Operations and Administration
  - Procedures
  - Physical Structures
- Sales and Marketing Information
- Customer Information
  - IoT Data Retrieved From Your Company Products in the Field
  - Trends
  - Specific Personal/Company Data
- HR/Personnel Data



# Protecting Your Company's Data

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## What Data Has Legal Significance?

- Trade Secrets
- Patents, Trademarks, Copyrights
- Personally Identifiable Data/Sensitive Personal Information
  - HR
  - Consumers (personal and behavioral – IoT)
- Contractually Protected Information
  - Vendors
  - Partners/Retailers



# Protecting Your Company's Data

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## Who is Exposed to Your Company's Significant Data?

- Individual Contractors
- Software/System Developers
- Data Processors/Analytics Providers
- AI Vendors/Developers
- Retail Partners



# How A Transactional Data Lawyer Thinks

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## Is Any of Our Data Leaving Our Control?

- Do We Owe Obligations For/Around This Data?
  - ✓ Legal or Regulatory Obligations
  - ✓ Contractual Obligations
- What Is Our Internal Interest In Protecting This Data?
  - ✓ Is This Valuable To Our Business
  - ✓ IP Protections

## Are We Accepting/Using Anybody Else's Data?

- Do We Have Obligations For/Around This Data?
  - ✓ If So, How Will We Prove We Met Them?

# How Does The Law Protect Data?

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## **In General, Data Not Copyrightable**

- Most Data Is Description of Reality
- Certain Configurations May Earn Copyright
- Data With Special Economic Value Can Be Protected
  - News Value
  - Sports Cases
- May Allocate “Ownership” Rights Between Parties

# Legal Obligations To Protect Personal Information

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## US Laws

State Data Breach Notice Requirement

State Data Use Obligations

Sector Requirements – Financial, Health, Children

Specialized Laws – Biometric Collection/Use Requirements

In Illinois, Texas, Washington

# Legal Obligations To Protect Personal Information

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## Stricter Privacy Obligations in

- EU, UK, Canada, Australia, Japan, Israel, Singapore, Others
- More Concern with Geolocation, Sensitive Data
- Data Localization Laws: Russia, China, Iran, Nigeria, EU?

## Must Pass Privacy Obligations to Vendors Managing Your Personally Identifiable Data



# Personally Identifiable Data

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## The GDPR Definitions

- Data Subject
- Data Controller
- Data Processor



# Personally Identifiable Data

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## Under GDPR Requirements

- Data Processor
  - Data Processor May Only Use The Data In Manner Directed By Data Controller
  - Generally Only Exception: Keep for Internal System Testing, Security and Service Improvement
  - Otherwise
    - ✓ The Transfer May Be Considered A Data Sale/Legal Transfer (CCPA purposes)
    - ✓ The “processor” becomes a Data Controller for GDPR purposes
    - ✓ GPDR Recognizes Multiple “Controllers” Depending on Function

# Are You Accepting Third-Party Data in Contract?

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- What Data is Provided?
- What Are You Doing With It?
- Who Will Have Access To It?
- How Will You Protect It?
- How Will You Prove You Protected It?
- How Is Your Use Of The Data Limited In The Contract?
- How Are These Limitations Enforced?

# Will A Contractor Touch Your Significant Data?

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- What Will Be The Contractor's Role?
- How Will The Data Be Used?
- Will It Be Protected?
- Where Is It Held? (Party in Control; Physical Location)
- How Will The Data Be Protected?
- Does The Contractor Receive Any Rights In The Data?
  - What Are Those Rights?

# How Partners May Want to Use Customer Data

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- Retailers Want All Rights In All Data If Possible
  - Would Love to Have Insight Into Product Usage (IoT)
  - Would Love to Offer Product Servicing (Digital Support)
  - Voracious Appetite For Consumer Data of All Kinds
- Marketing Partners Generally Want to Share Access to All Data
- Product Development Partners Want to Share IP and Derivatives

# Partner Strategies: Planning

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Make Data Sharing Part of 'Partnership' or Promotional Agreements – **“Your Company Certified Support”**

Don't Share **Yours** Without Getting Some of **Theirs**  
Works for Retailers, Repair Techs, VARs

Terminate Uncooperative Data Relationships



# How Vendors May Want to Use Customer Data

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- To Build Their Own Databases
  - Individual Data
  - Aggregated/Anonymized Data
  - Metadata or Derived Data
- To Test, Develop and Secure Their Own Systems

# Data Priorities in Vendor Agreements

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- Protect my Data
  - Privacy/Non-disclosure
  - Security Protection
- Take My Data Back at the End
  - Usable Format
  - Reasonable Cost
  - Appropriate Timeframe
- Liability Limitations





# Special Case: Artificial Intelligence

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## How Can Your Data Be Used In AI?

- System Development:
  - Training the Machine Learning System
  - Testing the Machine Learning System
- System Application:
  - Analyzed by the MLS

## NOTE:

FTC requires destruction of AI made with tainted data;  
Microsoft/Alphabet/Amazon were sued for information “wrongfully included” in AI Training Datasets

# Special Case: Due Diligence

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- Marriott Fine of €123 Million Arising From Poor Diligence on Starwood Acquisition – Currently Largest Fine Under GDPR
- Reps and Warranties
- Withholding Funds
- Insurance Requirement
- No Substitute For Forensic Investigation (At Least a Data Security Review) – The Sam Test

# Clauses to Watch For

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## In Confidentiality Provision:

Covered Information. The Recipient's duties under this section will apply only to (i) information which is **marked to clearly identify** it as the Owner's Proprietary Information, or, if disclosed orally, which is identified as Proprietary Information both at the time of disclosure and **again in a writing delivered by the Owner** within a reasonable time.



# Clauses to Watch For

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***Rights in Data.*** As between the parties, and except as expressly provided herein, (a) XXXXX shall retain all right, title and interest (including any and all intellectual property rights) in and to the XXXXX Data, and (b) ZZZZZ shall retain all right, title and interest (including any and all intellectual property rights) in and to the ZZZZZ Data. Subject to the terms of this Agreement, XXXXX hereby grants to ZZZZZ a non-exclusive, worldwide, royalty-free right to use, copy, store, transmit, modify, create derivative works of and publicly perform and display the XXXXX Data solely to the extent necessary for ZZZZZ to provide the Services to XXXXX and USC Operators. However, **ZZZZZ may not monetize the XXXXX Data**, without XXXXX's written consent, other than as expressly provided for in this Agreement in connection with the delivery of the Services to XXXXX and USC Operators. Subject to the terms of this Agreement, **ZZZZZ hereby grants to XXXXX a non-exclusive, worldwide, royalty-free right** to use, copy, store, transmit, modify, create derivative works of and publicly perform and display the ZZZZZ Data



# Clauses to Watch For

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- b. Ownership of Data: Each party shall own all right, title and interest in and to all data (including all passively-collected or machine- readable data, such as data based on browser type and device identifiers) that is collected on or through such party's servers or networks (as to each, "Collected Data"), and such ownership rights include (as to each party) the right to sublicense its respective Collected Data and to create derivative works or modeled data sets and analytics from such Collected Data. In the case of Taboola, Taboola's Collected Data shall include, without limitation: information collected from Visitors when interacting with Advertiser Content or Advertiser's websites (such as landing page or subsequent page visits, Clicks, hashed email addresses, or conversion data). The foregoing shall further include any reports created, compiled, analyzed, or derived by a party with respect to such data. Taboola's data collection practices are reflected in its privacy policy, which Taboola recommends that Advertiser review from time to time.



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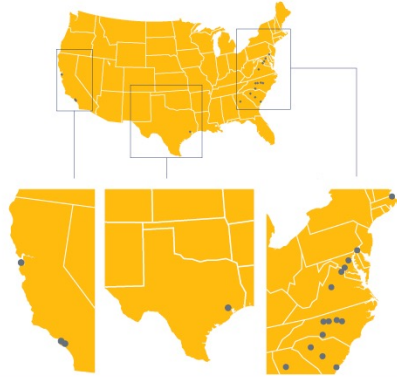
THANK YOU



# Womble Bond Dickinson at a glance



**26** Locations  
across the  
US and UK



## US

Atlanta  
Baltimore  
Boston  
Charleston  
Charlotte  
Columbia  
Greensboro  
Greenville  
Houston  
Irvine  
Los Angeles  
Raleigh  
Research Triangle Park  
Silicon Valley  
Tysons  
Washington, D.C.  
Wilmington  
Winston-Salem



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**1,100** Lawyers

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Companies  
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Chambers  
rankings



UK Top  
**20** Law firm



US Top  
**80** Law firm



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