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The Latest in Big Data and Cyber Security Contracts

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Presenters

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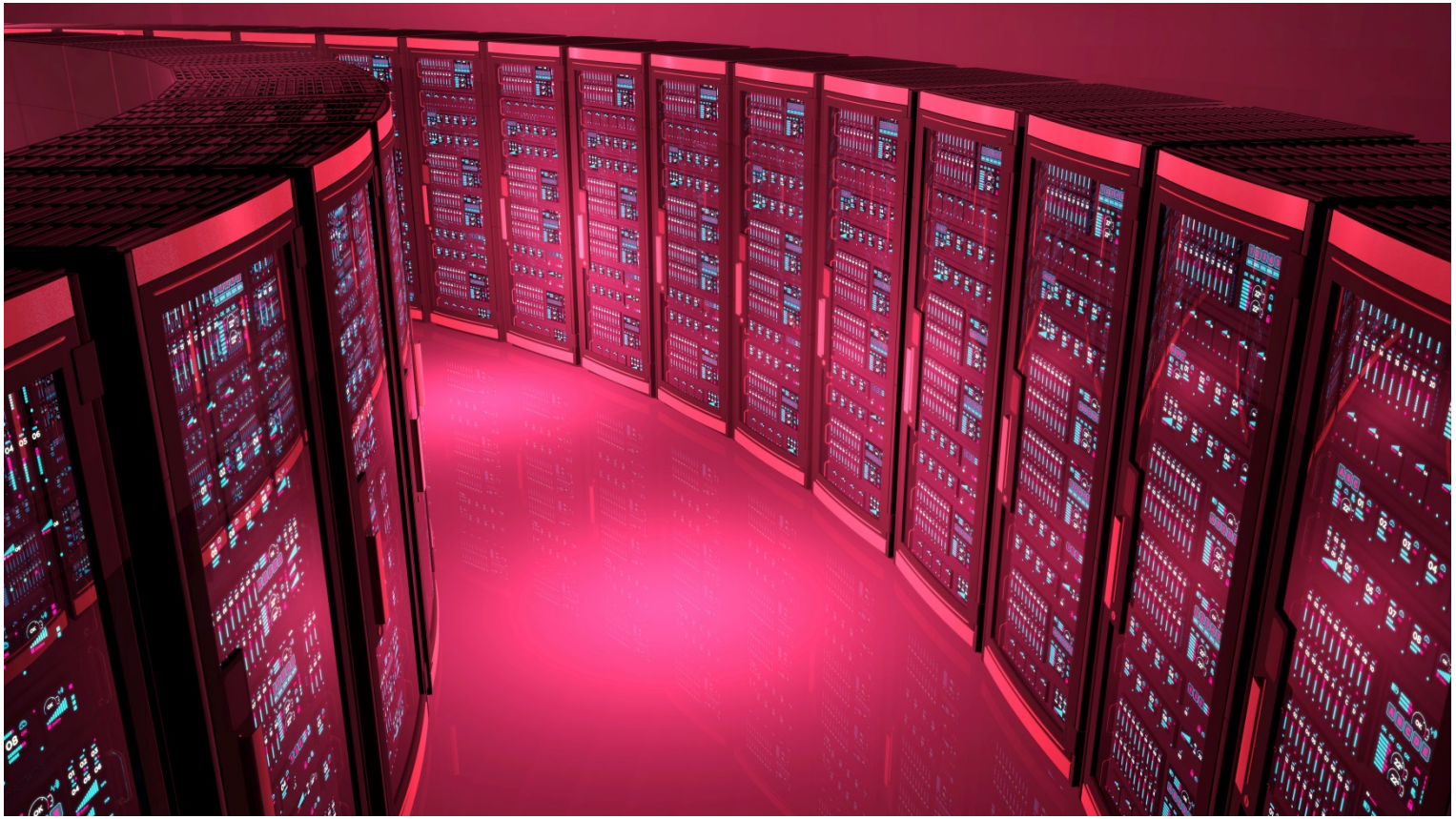
Agenda

- IP and Data Ownership + Usage Restrictions
  - Confidentiality, Trade Secrets, De-identification
- Privacy and Data Security
  - Privacy Law Overview
  - FTC Regulation of the IoT, Best Practices
  - IoT Enforcement Actions and Lawsuits
- Vendor Agreements
  - Key Contract Terms to Consider
  - Negotiation Strategies

IP and Data Ownership and Usage Restrictions



Development of New IT/IP, Licensing of Third Party IP and EULA

- Device (design and IT)
- Mobile Apps
- User Interface
- Access and Use of Platforms and SDKs
  - E.g., Arrayent, Nest, Google, Apple, Alexa
- E-Commerce partners (e.g., Febreze refills, Oral B brush replacements)
  - Amazon
- Backend and ancillary operations
- End User License Agreements and Privacy Policies

Consider Data Types & Classification

- Types of data
  - Data provided by or for customers
  - Data resulting from vendor's processing of customer data
  - Usage data
- Information classification
  - Confidential
  - Trade Secrets
  - Personally Identifiable Information
  - Sensitive Personal Information
  - Protected Health Information
  - Payment Card Information

Vendor Data Usage Considerations

- Data includes
  - Raw data points
  - Database
  - Analytic tools
  - Output / analysis
- Data inputs vs. outputs
- Vendors may use data
  - To perform the services for client
  - To operate or improve vendor's own services
  - To create vendor derivatives (analytics, market intel, etc.)

Avenues of Protection

- License
  - Ability to restrict access to raw data = licensing opportunities
- Trade Secret
  - Data that can be kept from the public domain
- Copyright
  - Databases and reports
- Patent
  - Sensors, networking, and pathways

IP Considerations Regarding Data

- Is there copyright in the raw data?
- What rights in the databases?
- Who owns the tools used to analyze the data?
- Who owns the analytic reports?
- Who owns the insights gained from the reports?

Data De-Identification / De-Linking

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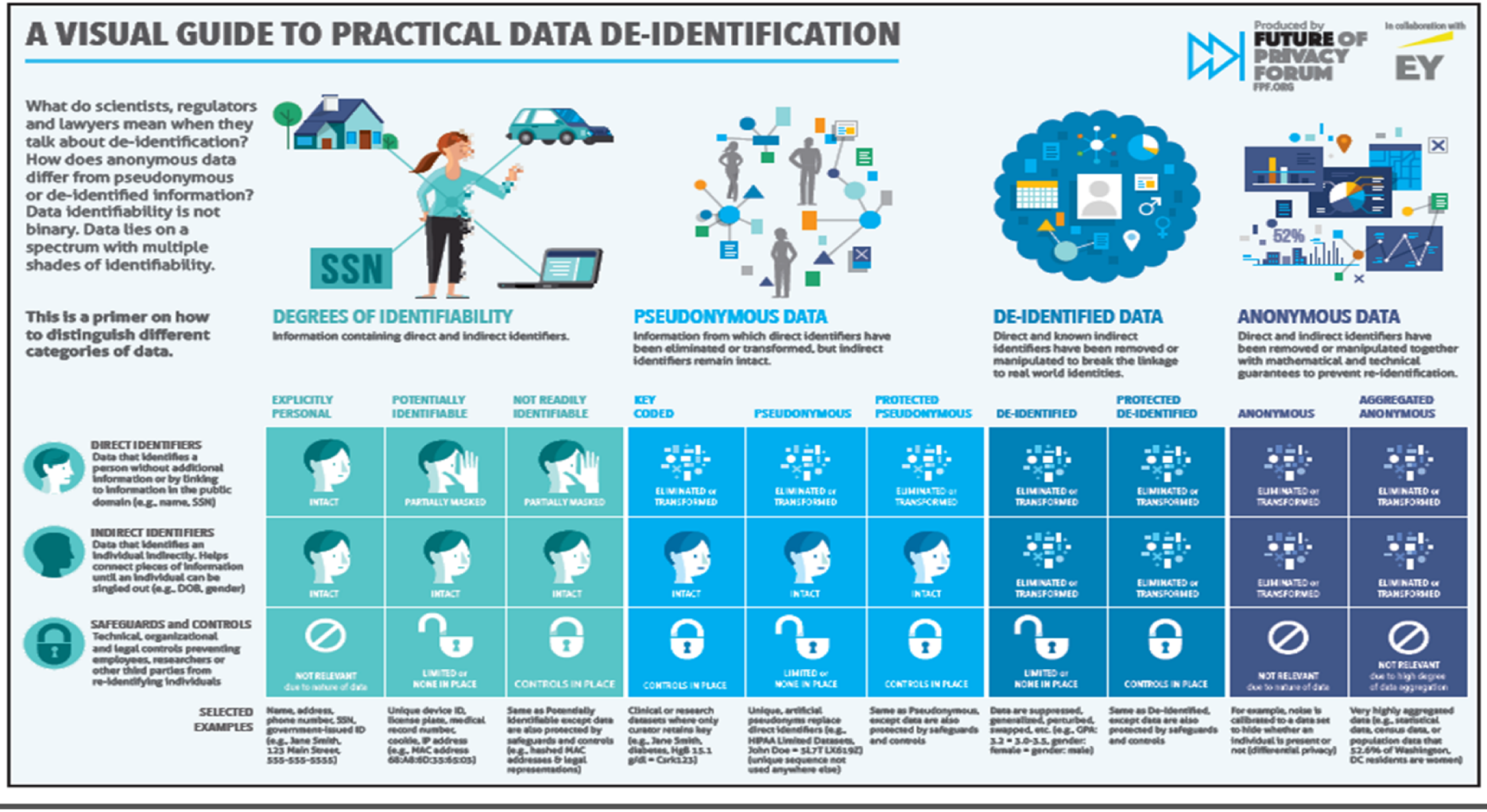

Data Privacy and Security Requirements and Breach Notification

"ongoing forensic investigation has indicated that the intruder stole a vendor's credentials which were used to access our system"

- Molly Snyder, Target spokeswoman

Source: Wall Street Journal, *Target Hackers Use Stolen Vendor Credentials* (January 29, 2014)

The Privacy Law "Patchwork"

- Federal & state laws govern the handling of personal information
  - GLBA/HIPAA/FCRA/COPPA/DPPA/VPPA/ECPA/SCA
  - Laws protecting SSNs / disposal of PII
  - Employment-related privacy laws
  - FTC Act enforcement
  - Marketing privacy issues (TCPA, CAN-SPAM, CASL…)
  - State-specific (e.g., IL BIPA, MA Regs, NYDFS, CA "RTBF")
- State breach notification laws
- Industry standards and guidance
- International data protection regulations

Federal Trade Commission

- Section 5 Enforcement Authority
  - Concerns “unfair” and “deceptive” trade practices
  - FTC: de facto privacy law regulator in the U.S.
- Consumer data protection in many contexts
  - Sale of data (e.g., in bankruptcy, M&A)
  - Misleading claims about online tracking
  - Cross-device tracking concerns
  - Recently: increased interest in the Internet of Things
- The FTC enforces a variety of consumer protection statutes (e.g., FCRA, COPPA, Do-Not-Call, FACTA, CAN-SPAM) that prohibit specifically-defined trade practices

IoT: FTC and NTIA = P-b-D

FTC's recommended best practices:

- Build privacy and security into devices and software at the outset
- Train employees on good practices
- Ensure downstream privacy & data protections via vendor contracts and oversight
- Apply defense-in-depth strategies that offer protections at multiple levels and interfaces
- Employ reasonable access controls
- Limit the amount of data collected/retained
- Securely dispose of data when no longer needed
- Where practicable, provide info to allow consumers to decide if and how their data will be collected and used

Enforcement & Litigation

- TRENDnet, FTC Settlement (9/13)
- Aaron's Rent-to-Own, FTC Settlement (10/13)
- Hello Barbie, Class Action Filed (12/15)
- D-Link, FTC suit (filed 1/17)
- VIZIO, FTC/NJ joint enforcement (2/17)
- We Vibe, Class Action Settled (3/17 - $3.75m)
- Advocacy Groups Challenge Children's Smartwatches (10/18)

Data Protection Management

- Conduct privacy and security due diligence when developing tech, selecting vendors and throughout commercial operations
- Ensure each third party agreement contains appropriate protections
- Monitor vendors and other third parties to verify that they comply with their privacy and security obligations throughout the life of the relationship

Key Agreement Data Protection Terms

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- Appropriate administrative, technical, and physical safeguards to protect data and comply with all applicable laws (specify for certain industries)
- Definitions (“Personal Information” “Information Security Incident”)
- Employee training and enforcement of policies
- Notification of potential and actual incidents; government requests
- Indemnification/Limitations of Liability/Cyber Insurance
- Restrict further use or disclosure of company data by vendor (other than what is necessary to perform the services)
- Impose requirements concerning data retention, and destruction (or return of all data) at termination of the agreement

Dealing with Vendor Pushback

- Use the law for leverage
  - Especially if a regulated industry
- If the vendor resists, seek quotes from other vendors (include in RFP process)
- If they all resist, document the problem to improve defensibility (evidence of "reasonableness") including:
  - Due diligence protocol
  - Attempts to locate alternate/cooperative sources

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