

Profit from the dynamic of licensing data

Most people see the growth of the Internet and networks as primarily a story of technology, but it's just as much a story about amassing and exploiting data — you need both technology and data to succeed. Some examples include Amazon.com, whose core business is built with data consisting of book covers and page images of tens of thousands of books, text descriptions of book content and comments and ratings; and Google, whose web site doesn't actually search the Internet, but instead searches its warehouse size buildings of data servers and hard drives that hold, index and analyze the data that comprises billions of web pages.

GUEST COLUMN



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There are countless other examples on the web. These are in addition to the traditional data businesses, such as the stock market data vendors, the credit bureaus and the marketing databases — and the traditional content vendors such as the Associated Press.

In your business (or in your planned business), you may generate data, use it or sell it. You might be a data licensor or a data licensee, or both. This means that legal issues and deals regarding data can be just as important to you as those affecting your technology.

GETTING DATA BY JUST TAKING IT

One way to get valuable data for further exploitation is to just take it without permission. Search engines of various kinds do that by spidering the web and copying just about everything. So far the courts have mostly approved this practice as a socially beneficial “fair use” and therefore defended it against copyright law attack.

Is Google's project to scan libraries of books without author or publisher permission also fair use? Pending publisher lawsuits against Google will (unless settled) soon let us know. This is an issue to watch.

THE BROWSEWRAP

When data is merely factual, the rule is that the data has no copyright protection. For that reason, there is a temptation for other businesses to use automated “spiders” to take data from competitors. Is systematically downloading your rival's online factual data an illegal ripoff — or just good business? It turns out that protecting non-copyrighted data depends on the enforceability of form web site terms of use, sometimes known as “browsewraps.”

Court rulings appear to indicate that companies can offer uncopyrighted factual information and stop rivals' systematic downloading. In this way, uncopyrighted data can get protection under U.S. law in the online world that it would never have had in the physical world.

GETTING DATA FOR FREE

Much of the most valuable data on the Internet comes free from users. For example, eBay Inc. is based on user-contributed auction information. User-contributed content is also the essence of video sites such as Youtube.com. User-generated data, created in the course of game play, is a key asset of the successful massively multiplayer online games such as Blizzard Entertainment's monster hit “World of Warcraft.”

Two points about user-contributed data: First, it may infringe someone else's copyright. Youtube.com has already been sued for displaying uploaded TV content without permission. If you have a “social” web business that allows user-contributed data, you should protect yourself by implementing the safe harbor “notice and take-down procedures” under the Digital Millennium Copyright Act. Second, remember that your users will own the copyrights to their own contributed data. Your web terms of use therefore should include the license grant, from your users to your company, that allows your company to store, copy, archive and display user-contributed data.

GETTING DATA THE OLD-FASHIONED WAY

One way to exploit data and content is to pay

for it — in a licensing deal — and then sublicense it to others. We can view data and content licensing as a combination of four action items:

- Obtain the data or content that you want to commercialize (including any required intellectual property rights).
- Secure the data against unauthorized access or use.
- Distribute the data in a way that gains you revenue.
- Obtain payment in connection with the authorized use of the data.

There are many legal, contractual, technical and business angles to each of these items. Here are just a few tips:

- Commercial content such as movies and songs have complex rights-clearance requirements. It is best to deal with parties that have all the relevant rights and can sell them as a package.
- Try not to give — and don't expect to get — guarantees of data accuracy.
- Get any data supplier to indemnify you in case supplied content gets you sued for copyright infringement. Expect that you will have to indemnify your data customers.
- Consider licensing data to others one data item at a time — on demand — rather than licensing entire databases. It can be more profitable and much more secure to sell data “by the drink” rather than “by the barrel.”
- Consider using strong digital rights management and encryption to protect your data as it is distributed.
- Any personal data carries a burden of privacy issues. You can be exposed for misuse under both federal and state law. You may also be subject to laws in effect in many states to notify consumers if there is a data security breach.

Your plan for success on the Internet, wireless, or other networks may include taking advantage of the “scale and dynamism of the data.” If so, don't hesitate to get legal help to guide you through this complicated space.

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