Data Breaches, Big Data, and FTC Oversight

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The FTC and data security

- Main federal agency re. data security
- Authority in FTC Act
  - 15 U.S.C. 45 ("Section 5")
- 60+ FTC settlements since 2002
- Key case
  - *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015)
    - Three breaches in 2008–10
    - 600,000 credit card; $10.6m in fraud
    - Holding: Section 5 authorizes FTC to regulate cybersecurity

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FTC v. Wyndham Worldwide Corp.

- It is inequitable to:
  - promise security to attract customers;
  - fail to deliver with poor security;
  - "expose unsuspecting customers" to harm;
  - and keep the profits.

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FTC Act Sections 5(a), (n)

- "[U]nfair or deceptive acts or practices in or affecting commerce, are . . . unlawful."
- Unlawful as unfair if "the act or practice
  - causes or is likely to cause substantial injury to consumers
  - which is not reasonably avoidable by consumers themselves and
  - not outweighed by countervailing benefits to consumers or to competition."

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In re LabMD, Inc., FTC No. 9357

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TIVERSA, INC.: WHITE KNIGHT OR HI-TECH PROTECTION RACKET?

In re LabMD, Inc. Complaint

- Complicated procedural history
- Initial Decision: ALJ dismissed the FTC complaint (Nov. 13, 2015)
- Full Commission reverses (July 29, 2016)
- Appeal to 11th Circuit Court
  - June 21, 2017 oral argument
  - "A tree fell and nobody heard it."
  - "The aroma . . . is that [Tiversa] was shaking down private industry with the help of the FTC."
  - Still waiting for a decision . . .

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LabMD: the FTC's arguments

- A company's lax computer security measures create a significant risk of concrete harm and are likely to cause substantial consumer injury.
- *Proof of actual identity theft is not required.*
- Under this argument, Section 5 liability can be imposed merely based on the risk that inadequate security measures will cause a data breach that will cause future harm.

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LabMD: The ALJ's arguments

- FTC had "proven the 'possibility' of harm, but not any 'probability' or likelihood of harm."
- Finding that consumers likely to suffer future harm "would require speculation upon speculation."
- FTC should concern itself with "substantial" injuries, and not "trivial or merely speculative harm."

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LabMD: Commission's arguments

- Release of 1718 File breached Section 5
- 11-month 1718 File exposure is a breach
  - Created ""significant risk" of substantial consumer injury
- Commission punts on whether inadequate security alone constitutes a breach
  - "[W]e need not address Complaint Counsel's broader argument."

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LabMD ten years after the breach

- 1718 File exposed for one year
- Only copied by Tiversa
- Not one complaint ever filed
- No evidence of harm
- LabMD is out of business
- LabMD principals filed *Bivens* action
- FBI raided Tiversa's offices in 03/16

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LabMD ten years after the breach

What's one to do?

- Commission Statement of Jan. 31, 2014
- FTC "does not require perfect security"
- Requires "reasonable and appropriate security" through "***a continuous process***"
- "[N]o one-size-fits-all data security program"
- "[M]ere fact that a breach occurred does not mean" a violation of the law
- FTC-published guidelines

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FTC publications re. data security

- Protecting Personal Information, 2011
- Start with Security; lessons learned from FTC cases, 2015
- Stick with Security FTC blog
- Cases that did not follow the guidelines:
  - *In re LabMD, Inc.*, FTC No. 9357
  - *In re Adobe Systems Inc. Privacy Litigation*, No. 13-cv-05226-LHK, 2014 WL 4379916 (N.D. Cal. Sept. 4, 2014)
  - *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015)

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Things LabMD did wrong

- No data purge (100,000 unneeded records)
- No access segregation
- No password policies ("labmd")
- No unauthorized access detection
- No effective antivirus and firewalls
- No risk assessments
- No security training
- No security program
- Haphazard, reactive, ineffective inspections

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Things Adobe did wrong

- Hackers stole and decrypted credit card nos.; code
- Quotes from the opinion:
  - "Adobe's security practices were deeply flawed"
  - "did not conform to industry standards"
  - "encryption scheme was poorly implemented"
  - "Adobe . . . failed to
    - employ intrusion detection systems,
    - properly segment its network, or
    - implement user or network level system controls."

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Things Wyndham did wrong

- Three attacks in three years
- Default user ID and password ("micros")
  - Micros Systems, Inc.
- No firewalls
- Out-of-date operating system
  - No security update in over three years
- No third-party access restrictions
- No unauthorized access detection
- No security investigations

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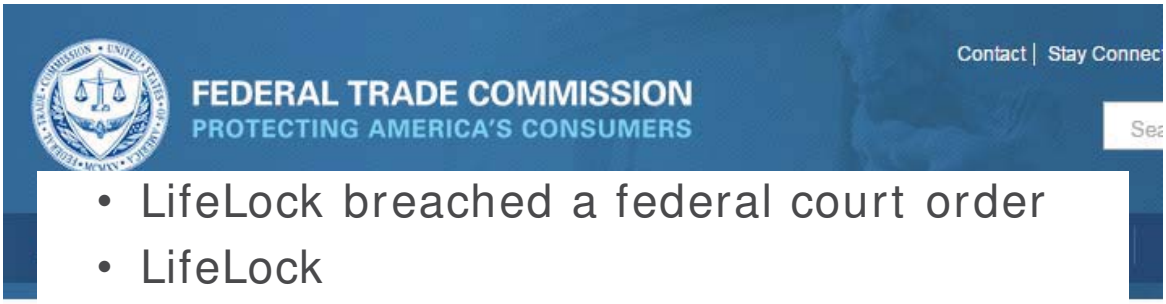
LifeLock FTC Penalty



- LifeLock breached a federal court order
- LifeLock
  - Failed to deploy a security program
  - Falsely advertised safeguards
  - Falsely advertised breach notices
  - Failed to maintain records
- ***$100 million***

Do not rest on your laurels

FTC Statement: "security is a *continuous process* of assessing and addressing risk."

Audit your system security
Get second opinion

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Have a data breach plan

- Security is now a Legal-IT joint effort

Data breach consequences & issues

- Huge, costly distraction
  - Forensic and legal investigations
  - Crisis management
- Class actions
  - Consumers
    - Target breach: 10¢ per consumer
  - Vendors
  - Shareholders
  - Banks
    - $8 per card replacement cost
- Data breach insurance policy terms?

Big Data

- Data stores
  - Internet footprints
  - Transaction history
  - Social media
- Information
  - Conclusions
  - Predictions
  - Decisions

Analytics

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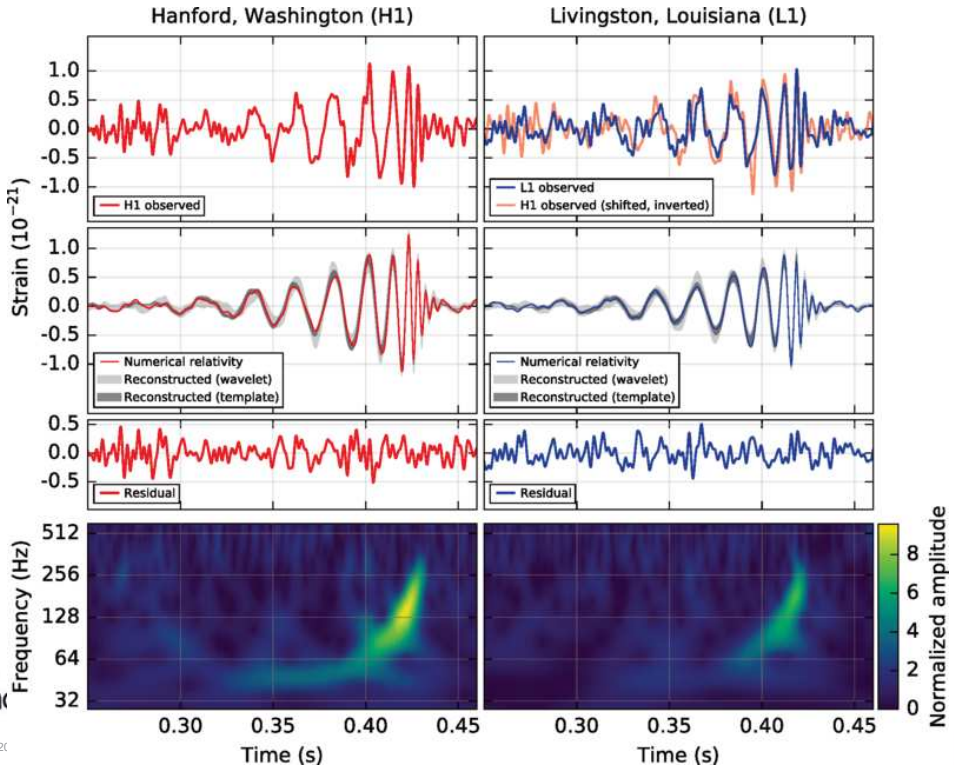
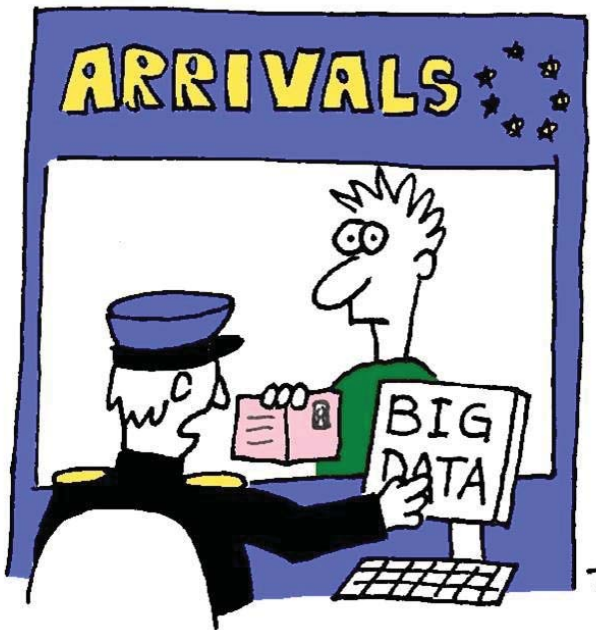
Data to information ex. (LIGO)



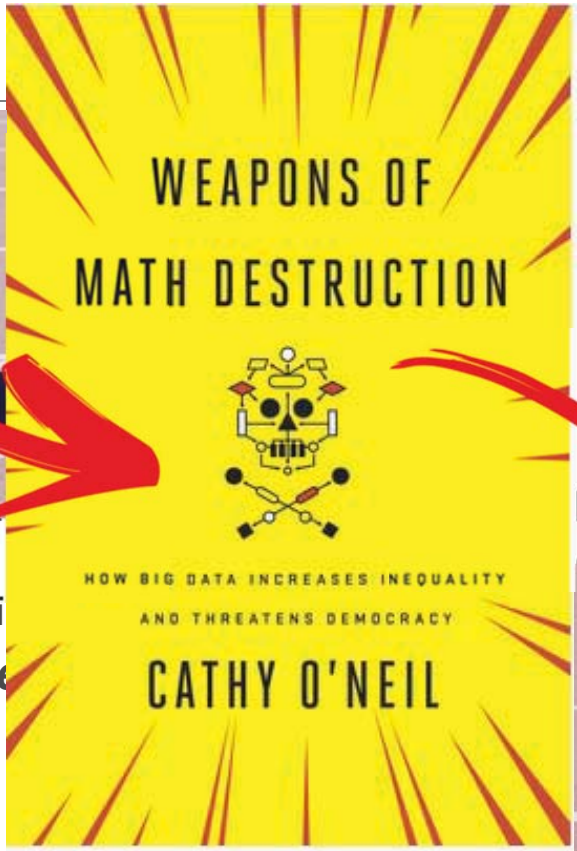
Big Data

- Applications
  - Targeted advertising
  - Customer selection



"Your recent Amazon purchases, Tweet score, Internet browsing history, and Facebook 'Likes' make you 17.3% desirable in this country. Your return flight home is at Gate E23. TY & GB."

The FTC … g data



… Exclusion?

… re, and

– Misuse … protecti…

• ***Fact-spe…***

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Four BD issues to keep in mind

- Data set representativeness
  - Bias toward Internet users
- Model bias
  - Model incorporates embedded biases
- Model errors
  - Google Flu Trends did not work
  - Correlation does not mean causation
- "Ethical or fairness concerns"
- *Reminder: concern is the exclusion of "low-income and underserved populations"*

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Potentially applicable statutes

- Fair Credit Reporting Act
- Equal Credit Opportunity Act
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Fair Housing Act
- Genetic Information Nondiscrimination Act.
- Federal Trade Commission Act

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Fair Credit Reporting Act

- Big data use to prepare and sell reports that are used to make consumer-related eligibility decisions might be considered credit reporting agencies subject to the FCRA
  - employment, credit, housing
- Even companies that merely purchase and use this information might have their own FCRA obligations that are intended to protect consumers

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FCRA Safe harbor

- FCRA does not apply to companies when they use data derived from their own relationship with their customers for purposes of making decisions about them
- *Other federal statutes might apply*

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FTC Act

- Risks of
  - Misrepresenting big data use
  - "Big data" data breach
  - Selling data to fraudsters or identity thieves

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Takeaways

- Data security
  - Take data security seriously
  - Joint effort between Legal and IT
  - Have a data breach plan
- Big data
  - Think through the use of big data
  - Understand the analytics
  - Protect the data

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Title search: Data Breaches, Big Data, and FTC Oversight

Also available as part of the eCourse
Answer Bar: Global Data Security Considerations for the Corporate Client

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"Data Breaches, Big Data, and FTC Oversight"