

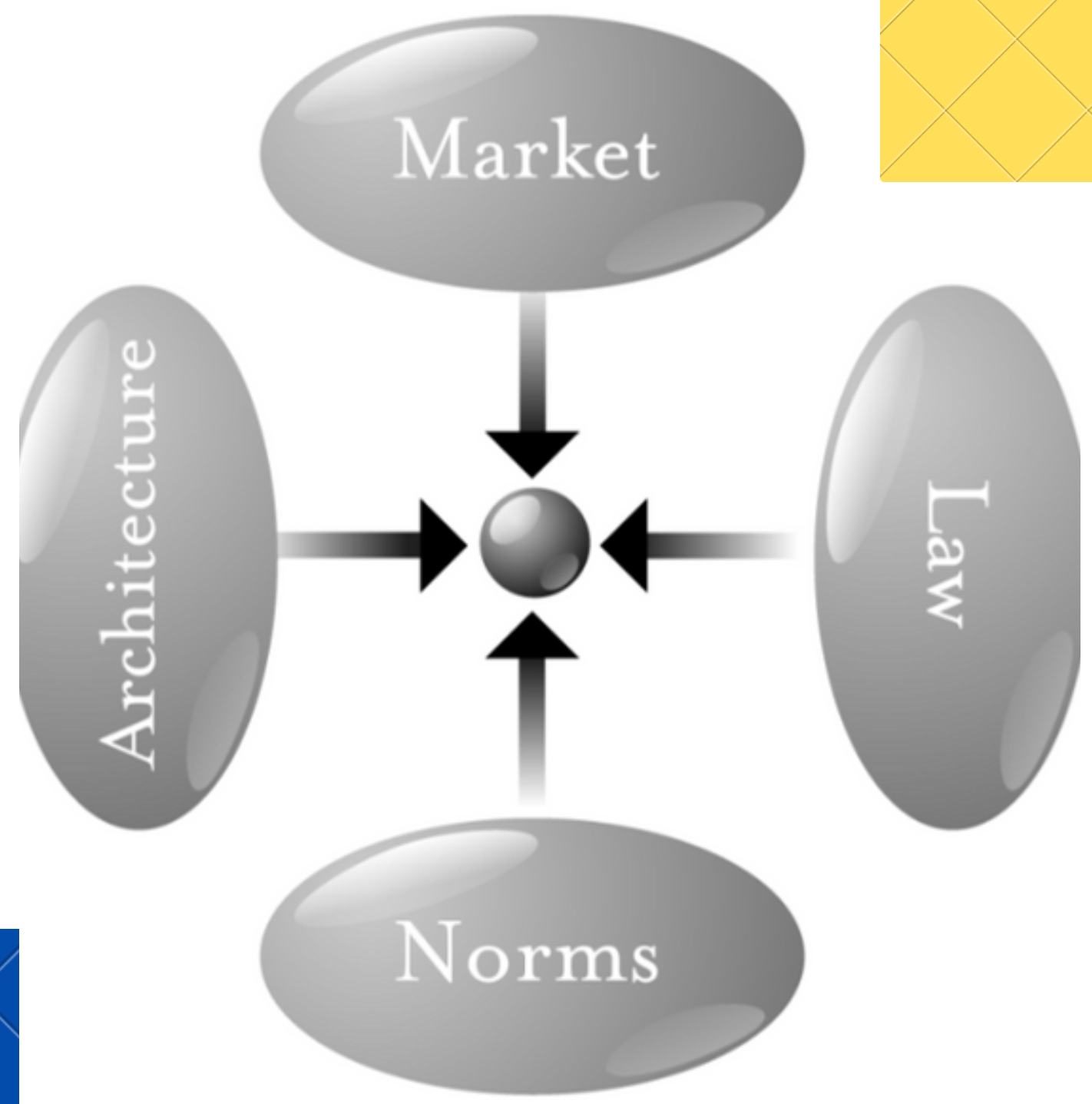
# DATA AS COPYRIGHT



presentation by: **Sharvani Mittal and Ahmed Ragib Chowdhury**



# CODE AS LAW



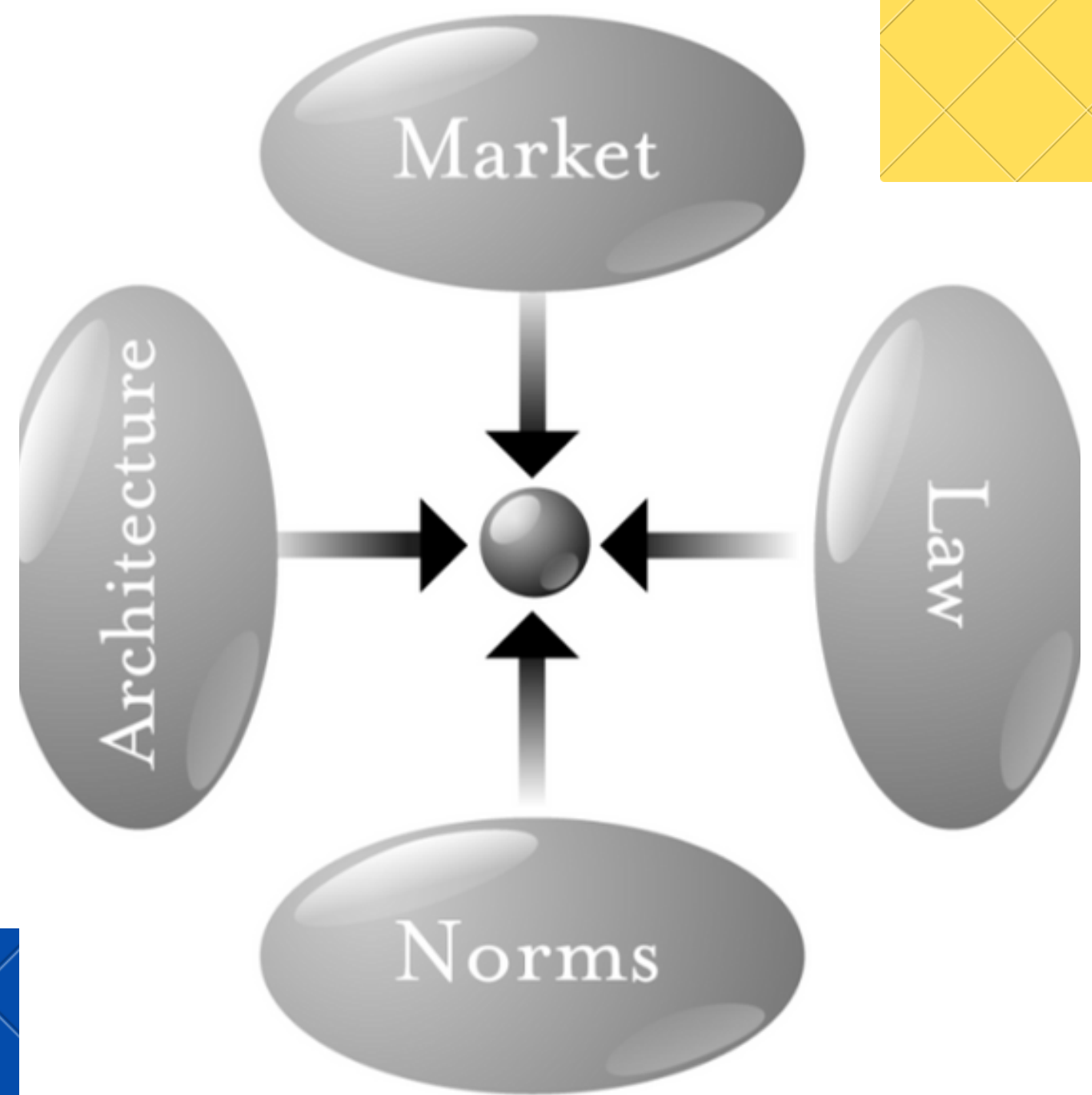
Lawrence Lessig in Code 2.0, argues that code is the law in cyberspace. He perceives code as (instructions embedded in the software that makes cyberspace what it is) the regulator that shapes and forms the very fabric of cyberspace.

The code-writer here is the architect (Ethan Katsh).

Lessig perceptualizes regulation by representing a person as a dot that is surrounded by different kinds of regulation impacting and shaping the dot's behaviour.



# CODE AS LAW



He identifies the following constraints,  
a) legal (e.g., laws regulate smoking geographically and/or by age),  
b) norms (e.g., one should not smoke in a private car or restaurant without asking for permission),  
c) market (e.g., price and quality of different kinds of cigarettes is also impacts behaviour), and  
d) architecture (e.g., how the type of the cigarette, nicotine-treated or otherwise impacts their supply, purchase and usage).

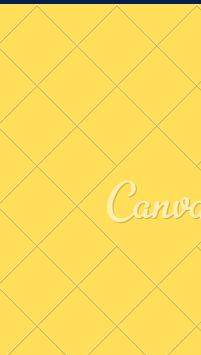
Lessig argues that all these constraints represent in summation, the regulation of the dot.

Lessig argues that code plays a similar regulatory role in the cyberspace but to a larger extent. Imagine what a couple of lines of code could do to our bank balances, credit scores and other personal information.





**Before we determine whether activity on social media can be copyrighted, we will first look at what user-generated content (UGC) is.**







# WHAT IS USER GENERATED CONTENT?

UGC is original content related to a product or service that is created by individuals and not by the brand itself.

The following are the main types of user-generated content:

- Images
- Videos and live streams
- Social media content
- Blog posts
- Q&A forum
- Case studies
- Surveys

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# DOES USER-GENERATED CONTENT ON SOCIAL MEDIA AMOUNT TO COPYRIGHTABLE WORK?



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# ORIGINALITY

CCH Canadian Ltd. v Law Society of Upper Canada, [2004] 1 SCR 339-

1. The expression of an idea is an exercise of skill and judgement
2. Must not be so trivial that it could be characterized as a purely mechanical exercise
3. Creativity is not required for a work to be “original”



# LITERARY, MUSICAL OR ARTISTIC WORK

User-generated content posted on social media, are majority likely artistic in nature. (**Perfect 10, Inc. v. Amazon.com, Inc.**, 508 F.3d 1146, 1155–56 (9th Cir. 2007). **Flava Works, Inc. v. Gunter**, 689 F.3d 754 (7th Cir. 2012)).



# IN A FIXED/PERMANENT FORM

Fixed means the work may be ‘perceived, reproduced or otherwise communicated for a period longer than transitory duration’. Internet Data available for 1.2 seconds is not fixed (**Cartoon Network LP, LLLP v. CSC Holdings, Inc.**, 536 F.3d 121, 130 (2d Cir. 2008) while RAM is fixed (**MAI Sys. Corp. v. Peak Computer, Inc.**, 991 F.2d 511, 518 (9th Cir. 1993)





# SOCIAL MEDIA TERMS OF SERVICES: THE DEVIL IN THE DETAILS

ToU's are also called clickwrap agreements.

“[An] agreement [that] appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement, and purports to condition further access to the software or transaction on the user's consent to certain conditions there specified; the user “consents” to these conditions by “clicking” on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.”

(Kevin W. Grierson, Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions, 106 A.L.R. 309, 317 (2003).





# FACEBOOK & INSTAGRAM

Specifically, when you share, post or upload content that is covered by intellectual property rights on or in connection with our Products, **you grant us a non-exclusive, transferable, sub-licensable, royalty-free and worldwide licence to host, use, distribute, modify, run, copy, publicly perform or display, translate and create derivative works of your content** (consistent with your privacy and application settings).



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You retain ownership of the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook and other Meta Company Products you use. Nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want.

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You can delete individual content you share, post, and upload at any time. In addition, all content posted to your personal account will be deleted if you delete your account. Learn more about how to delete your account. Account deletion does not automatically delete content that you post as an admin of a page or content that you create collectively with other users, such as photos in Shared Albums which may continue to be visible to other album members.



# X (FORMERLY TWITTER)

You grant us a **worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content** in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating).

This **license includes the right for us to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, repost, promotion or publication of such Content** on other media and services, subject to our terms and conditions for such Content use.

Such additional uses by us, or other companies, organizations or individuals, **is made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services** as the use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein.



[1. Who May Use the Services](#)

[2. Privacy](#)

[3. Content on the Services](#)

[4. Using the Services](#)

[5. Disclaimers and Limitations of Liability](#)

[6. General](#)

# Your Rights and Grant of Rights in the Content

You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your incorporated audio, photos and videos are considered part of the Content).

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). This license authorizes us to make your Content available to the rest of the world and to let others do the same. You agree that this license includes the right for us to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, repost, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by us, or other companies, organizations or individuals, is made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services as the use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein.

We have an evolving set of rules for how ecosystem partners can interact with your Content on the Services. These rules exist to enable an open ecosystem with your rights in mind. You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.





This raises the question as to whether there is a dissonance between copyright law and the TOU aka Clickwrap Agreements provided by Meta and X.

While users may have consented to Facebook's use of their names and pictures, the TOU did not provide a blanket licence to exploit user content for any purpose. (**Cohen v. Facebook**, Inc., 798 F. Supp. 2d 1090, 1092 (N.D. Cal 2011); **Fraley v. Facebook**, Inc., 830 F. Supp. 2d 785, 805–06 (N.D. Cal. 2011))

The ToU provided by Facebook to users amounts to unconscionable contracts. (Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two - Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 842 (2008))





**CAN THE TOU'S ACTUALLY BE CONSIDERED  
AS UNCONSCIONABLE CONTRACTS?**





**Swampillai v. Royal & Sun Alliance Insurance Company of Canada**, 2019 ONCA 201- The Court of Appeals endorsed the following 4 elements of unconscionability

1. a grossly unfair and improvident transaction;
2. the victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party knowingly taking advantage of this vulnerability.

In **Uber Technologies Inc. v. Heller**, 2020 SCC 16, the SCC observed that a contract of adhesion is unconscionable when

1. There is inequality of bargaining power between the parties, and
2. In case of an improvident bargain (advantageous to one party or disadvantages the vulnerable party more).

**Specht v. Netscape Commc'n Corp.**, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001), aff'd, 306 F. 3d 17 (2d. Cir. 2002)- lack of negotiating power on the user's end renders user contracts for social media accounts and websites unenforceable.

**Bragg v. Linden Research, Inc.**, 487 F. Supp. 2d 593 (E.D. Penn. 2007)- A district court found the ToU for Second Life, an online virtual world, to be unconscionable and unenforceable against a user's claim to virtual property rights in the site.

**Douez v. Facebook, Inc.**[2017] 1 SCR 751- Here, the SCC held that Facebook's TOU was an online consumer contract of adhesion requiring a consumer to accept all the terms of the contract without any bargaining or adjustment. Thereby fulfilling the elements of unconscionability.

# DATA AND USER-GENERATED CONTENT







# HOW CAN YOU EFFECTIVELY COLLECT DATA FROM USER-GENERATED CONTENT?

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1. Define your goals and metrics
2. Choose the right tools and platforms
3. Clean and organize your data
4. Analyze and interpret your data





# HOW DOES THIS TIE-IN WITH PERSONAL DATA, AND WHAT IS METADATA?

As discussed in the previous section on how to extract data from user-generated content, it is evident that any and all of our interactions online, generate some data that is hidden behind the pictures we post, comments we leave, things we like, people we follow, and even things we click on. This generated data is known as metadata.


Often referred to as data that describes other data, metadata is structured reference data that helps to sort and identify attributes of the information it describes. It has been described as "both a universe and DNA."

Metadata summarizes basic information about data, which can make it easier to find, use and reuse particular instances of data.


**Example: Politics, Businesses, Health apps.**

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**GIVEN THE FACT THAT THE DATA COMES FROM  
US AND OUR INTERACTION WITH SOCIAL MEDIA,  
DO YOU THINK WE HAVE ANY COPYRIGHT  
PROTECTION?**



# IS THERE COPYRIGHT PROTECTION OVER THIS DATA?

Unfortunately, as of date, there is no copyright protection over data. Data and factual information are not protected by copyright (e.g., rainfall or temperature measurements, mortality rates, population numbers, currency values, chemical structures, historical facts and dates, the number of Twitter followers someone has). These things exist without having been “created” by anyone.

While it is possible that if you post a photo you took or an article you wrote on social media, you could have copyright in it, the metadata contained in that post is not copyrightable.





# SHOULD THERE BE COPYRIGHT PROTECTION OVER THIS DATA?

Park, Jyllian, “*Better protection needed for individual rights to human biomaterials, argues Maeghan Toews*”, Faculty of Law, University of Alberta, 04 March 2024.

A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things

Metadata and Privacy, Office of the Privacy Commissioner of Canada



# WHAT ABOUT ADTECH DATA?

Adtech data or online advertising data is data generated by mobile phones and other devices, obtained through digital advertising exchanges present in every ad-supported mobile app and website where ad space is sold in an instantaneous auction process named real-time bidding.

It all began with an individual named Yeagley, who used adtech data from Grindr to draw geofences (creating virtual boundaries in geographical data sets) around government buildings to track Grindr users who worked there and their associated movements.



# HOW DOES ADTECH DATA WORK?



An “anonymized” advertising ID by Apple or Google on each possessor of an iPhone or Android. On android, it is called AAID, on Apple, its called IDFA.

Utilized to track the possessor/ user’s real-world movement, internet browsing behavior, including the apps they have on their phone.

Example: Imagine, you are outside on the way to Allard. You see that the sky is overcast. You decide to check the weather on your phone by clicking on the app icon for the Weather App. The tap generates a plethora of digital activity that ensues an advertising exchange, i.e., a marketplace where billions of devices notify a centralized server whenever they have an open ad space. The app shares the following data with the ad exchange

- Your IP address
- The OS version
- The carrier details
- Battery percentage
- Screen resolution
- Precise GPS coordinates

However, this exploitation will not take place if

- Users reset their advertising ID
- Exercise specific control over their app settings
- Do not allow widespread app-level access to GPS.
- Minimal due diligence by ad exchange bidding platforms on the entities that have access to their servers.
- The use of geolocation obtained through adtech data also has significant surveillance potential.





**QUESTIONS TO CONSIDER:**

**SHOULD THERE BE COPYRIGHT OVER IT? CAN IT SATISFY THE REQUIREMENTS OF ORIGINALITY AND FIXATION TO ENJOY THE PROTECTION OF COPYRIGHT?**

**IS THERE SCOPE FOR OVERLAPPING PROTECTION OF PRIVACY LAW AND COPYRIGHT LAW OVER ADTECH DATA?**







**matt**

@computer\_gay

Follow

co-worker asked how I was doing today. yet another third party trying to harvest my data



**THANK YOU!**