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Metadata – Hiding in Plain View

“Metadata” is not even in the 1988 edition of Webster’s computer terms dictionary,¹ published about the time PCs (then dumb terminals, now “thin clients”) were appearing on office desktops; but the term is now often being tossed about. The prefix “meta” means along with, between or among; so metadata is data that comes along with other data. That metadata is not what a sender intended to convey, but it is nevertheless there among the intended data. And, it can tell a story.

Metadata has embarrassed the Pentagon and the British Government when it demonstrated that private communications were inconsistent with public announcements. And, using metadata, lawsuit plaintiffs caught drug maker Merck & Co., Inc. changing data about the risks of VIOXX®.

Data Mining

“When I get an electronic document, the first thing I check is the metadata.” Who would be so forthright about their snooping? Is it unethical, dishonest, unlawful or even shameful?

Steganography

People send electronic messages and documents every day, often without thinking of the hidden messages within them. “Steganography” is the art and science of hiding messages within an obvious message. The intended recipient knows that the hidden message is there, but presumably unintended recipients do not. This ancient intelligence tradecraft, of course, still has relevance today as complex things like pixel manipulation and packet delay are used to hide messages within clear text. Much less complex, and more often risky, are the hidden “messages” that metadata reveal.

¹ WEBSTER’S NEW WORLD DICTIONARY OF COMPUTER TERMS (Prentice Hall Press 3rd ed. 1988).

VIOXX is a registered trademark of Merck & Co., Inc.

When one party sends information to another party, whether intentional or inadvertent, there is no general legal duty governing whether or how the information can be used. Absent some specific fiduciary relationship between sender and recipient, the recipient can use it for any lawful purpose.

In contract negotiations, for example, a party could disclose its strategies and even its bottom-line deal price in comments contained in metadata. As Carl Sandburg has said – “When you let proud words go, it is not easy to call them back.”² –, so too one may say that metadata cannot be easily recalled.

Professional Responsibility

If one were to check the metadata in the Microsoft® Word file for this document, one could see the author and when the file was created and last edited. Using the Word track changes tool, one could view the editing process and, if internal comments had been used in that process, one could follow the thought process and recommendations of editors. This can, in certain circumstances, be a lot of valuable data; and this is the “easy” stuff. More complex metadata also exists.

Lawyers have focused on metadata and their responsibilities with regard to its disclosure and use. In 2006 the American Bar Association (ABA) issued a formal ethics opinion that gave a “green light” to lawyer’s use of metadata, even if it was inadvertently sent.³ While a few states have followed suit, most have taken issue with the ABA’s conclusion and have issued contrary positions.⁴ Professional standards place lawyers in a unique position; they are required to take extraordinary actions supporting “the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship.”⁵

So, exchange documents in discussion or being negotiated through legal counsel. This provides the best protection from use of inadvertently disclosed critical data. Remember, your secrets are “hiding in plain view”.

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² Carl Sandburg, Primer Lesson, http://parkland.edu/library/newsletter/2005spring/page6_answers.htm (last visited Sep. 28, 2007).

³ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 442 (2006), available at http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/cpr/mo/06_442.pdf [hereinafter ABA Opinion].

⁴ Compare Md. State Bar Ass’n Comm. on Ethics, Op. 2007-09 (2006) (consistent with ABA position), with Ala. State Bar Ass’n, Gen. Counsel Op. 2007-02 (2007), available at <http://www.alabar.org/ogc/fopDisplay.cfm?oneId=412>, and Fla. Bar Op. 06-2 (2006), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument>, and N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 749 (2001), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_749.htm [hereinafter N.Y. Opinion]. See also N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 782 (2004), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Opinion_782.htm. All of these opinions, including the ABA Opinion, either require or strongly encourage lawyers to use reasonable care when transmitting electronic data so that client confidences, secrets and privileged information are not disclosed.

⁵ N.Y. Opinion.