

MAYER • BROWN

Key Legal Issues in Data Strategy

Dan Masur
Partner

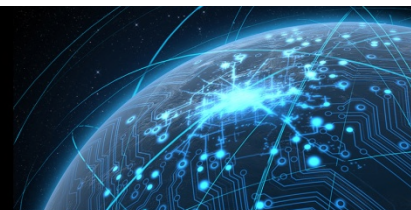
1 202 263 3226
dmasur@mayerbrown.com

Brad Peterson
Partner

1 312 701 8568
bpeterson@mayerbrown.com



Speakers



Daniel Masur
Partner – Washington DC



Brad Peterson
Partner - Chicago

MAYER • BROWN

Overview



- Larger volumes of data and better analytical tools are increasing business interest in new ways to use data
- Data strategy involves critical legal risks as you:
 - Use data that you create and/or collect
 - Use data licensed to you
 - Use cloud, robotic process automation (RPA), artificial intelligence (AI) and other digital age tools to process data
 - Monetize data through licensing and partnering
- You can reduce legal risk by understanding and addressing the risks associated with your data strategy



DATA STRATEGY

Traditional Focus of Data Strategy



Collect

- Devices
- Customers
- Suppliers
- Employees
- Investigation

Organize

- Identify
- Store
- Package
- Integrate

Govern

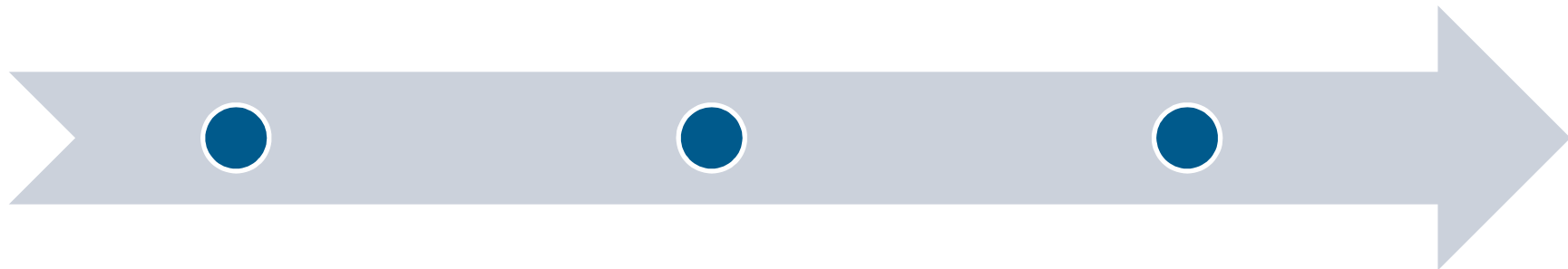
- Policies
- Compliance
- Security
- Destruction

The Emerging Value Chain: Real-time Reaction



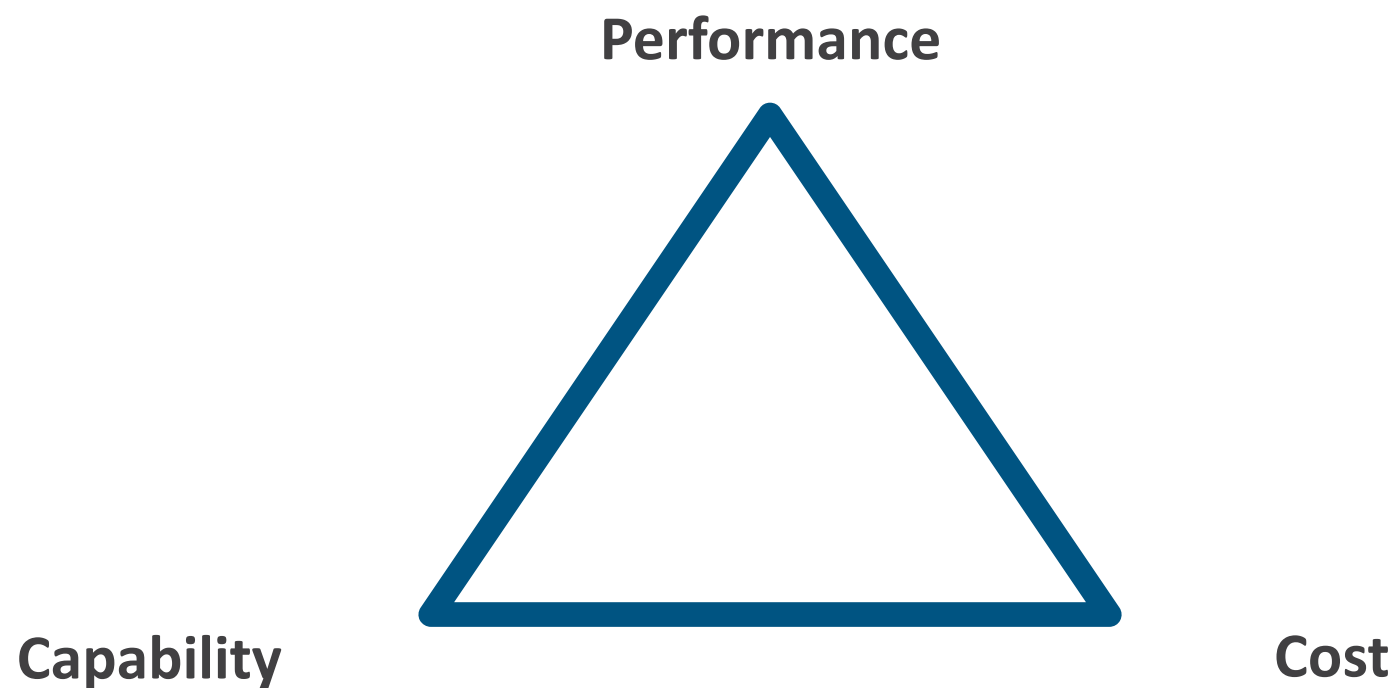
Sense

Act

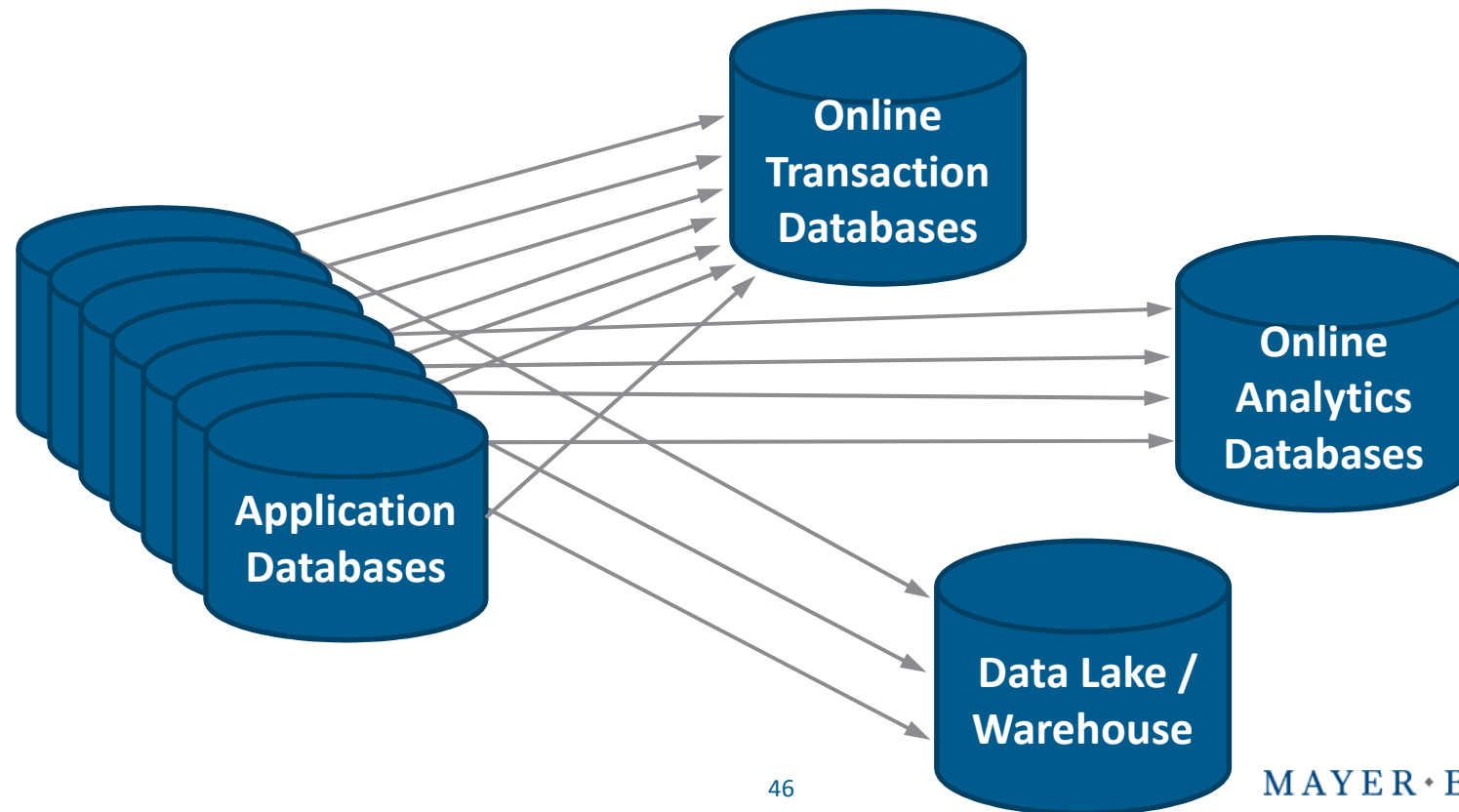


Analyze

Iron Triangle of Data Strategy



Structuring Data for Performance and Analytics





**LEGAL RISKS IN USING DATA THAT
YOU CREATE OR COLLECT TO RUN
YOUR BUSINESS ON YOUR SYSTEMS**

Compliance Risks



- Information Governance
- Data Privacy
- Data Security
- Cross-border Data Transfer
- Anti-Discrimination laws



Contract Risks



- Data has little protection under intellectual property laws
- Thus, strong contract rights are critical for preserving exclusive rights or competitive advantage
- Contracts with outsourcers, cloud providers and others who help to run your company may leak data rights
- Many contracts include stealthy out-licenses, such as:
 - “we may use data that you provide to use to improve our services and for other business purposes”
 - “you agree to provide us copies of any data that you possess regarding ...”



How These Issues are Changing



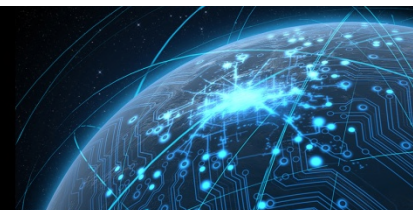
- Data flows are becoming harder to map
- Data integration is becoming more complex and failure-prone
- Technology often overcomes barriers designed for compliance
- Regulation is increasing
- Others increasingly want access to your data
- Contracting for outcomes is becoming more difficult





USING LICENSED DATA TO RUN YOUR COMPANY

Data Licenses are Surprisingly Common



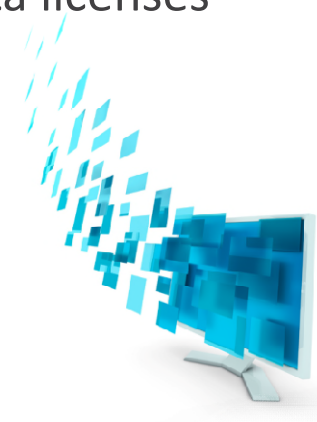
- Contracts with data aggregators or resellers
- Customer contracts
- Supply agreements where data accompanies products
- Strategic alliance and joint venture agreements
- Research and development agreements



Additional Key Risks in Using Licensed Data



- Data provenance is easy to lose
- Data is hard to trace in systems
- Derived data and metadata are grey zones
- Data scientists are trained to find data and use it, not to find data licenses and comply with them
- Data licensors are often more sophisticated than data licensees



Top 10 Issues in Data Licenses



1. Scope

2. Users

3. Purpose

4. Term and Termination

5. Retention

6. Restrictions

7. Confidentiality, Privacy
and Security

8. Quality

9. Rights

10. Liability



PROCESSING DATA USING DIGITAL AGE TOOLS

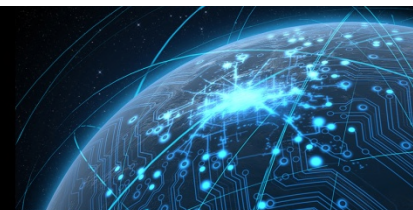
Additional Key Data Risks with Digital Age Tools on Your Network



- Inability to extract derived data, metadata, and “learning” from the tool
- Lack of commitment by tool provider to maintaining the tool
- Exceeding your rights in the data by using the tool
- Information governance risks, including:
 - Inability to preserve, produce and timely destroy data stored in the tools
 - Tool being used by counterparties to demonstrate your knowledge
- Inadequate controls over use of tool or output data



Additional Key Data Risks with Digital Age Tools Delivered through the Cloud



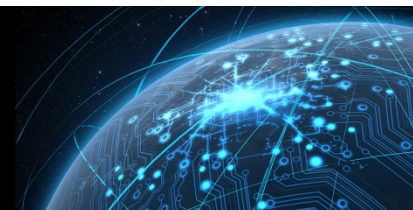
- Digital services not complying with laws applicable to you
- Digital services not complying with your obligations to your data sources
- Data security breaches by tool provider
- Losing value by granting licenses or ownership
- Tool provider “learning” from your data or activity on the tool
- Your data auctioned in provider’s bankruptcy





RUNNING A DATA LICENSING BUSINESS

Legal Due Diligence Before Licensing Data



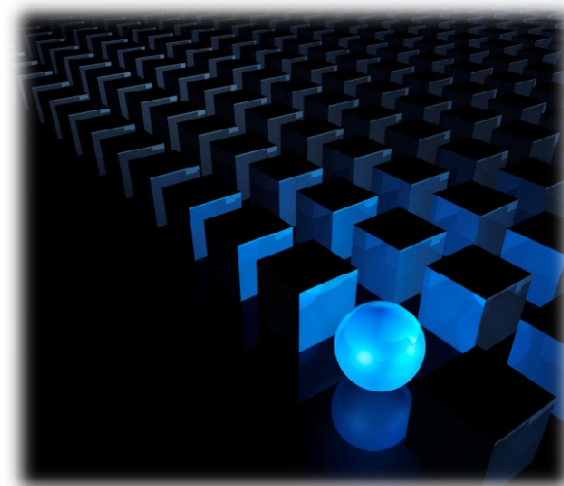
- Do any laws limit or prohibit the intended license?
- Would selling this data subject you to laws governing certain data providers, such as the Fair Credit Reporting Act?
- Do you have the rights that you need from your data sources?
- Do you need the right to be able to destroy the data?
- Are you able to manage a data business?



Additional Legal Risks from Licensing Data



- Breach by licensees of your promises to your data sources
- Breach of the data license
- Deliver more data than you intended to deliver
- Confidentiality, privacy or data security breaches by licensees
- Your data auctioned in licensee's bankruptcy





PARTNERING IN A DATA BUSINESS

Reasons for a Large Company to Partner in a Data Business



- Partnering with a fintech, insurtech, edtech, proptech, medtech or other similar startup to:
 - Leverage its access to private capital, access to talent, or technology
 - Share on an equity basis in the value created
- Partnering with an established technology company to develop useful new commercial products
- Partnering with competitors to create a type of “industry utility” to leverage technologies and data that benefit from industry scale, such as:
 - Distributed ledgers
 - Responses to threats from outside the industry

Possible Partnering Deal Structures



- Services arrangements (“powered by”)
- Alliance
- Joint venture
- Investment
- In-house accelerator
- Acquisition or in-house start-up



Additional Legal Risks



- Risks of collaborations generally
- Giving up your source of value in the pilot phase or otherwise losing the “race to learn”
- Giving up not only data access but also domain knowledge
- Exclusive relationships that limit your agility
- Responsibility for partner’s violation of laws
- Responsibility for partner’s breaches of your promises to data sources



MAYER • BROWN



WHAT TO DO NOW?

Today's Data Strategy Requires New Legal Advice



- The data team is not inclined on its own to the optimal legal result
- The efforts to monetize data or data-enabled services are turning data strategy from a back-office technical function to a mission-critical driver of legally complex transactions and customer experience



Steps to Take



1. Be part of the data strategy team
2. Know your legal and contractual obligations
3. Learn your data flows and anticipate future strategies/uses
4. Gain consents and licenses as needed for future intended uses
5. Understand the legal and contractual risks and address them proactively
6. Bolster compliance measures for future growth
7. Review and update information governance and records retention
8. Treat data integration and analysis contracts, deals and ventures as high-risk and strategic



QUESTIONS?

Dan Masur
Partner

1 202 263 3226
dmasur@mayerbrown.com

Brad Peterson
Partner

1 312 701 8568
bpeterson@mayerbrown.com