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Pivot.  
Accelerate.  
Transform.

## Welcome

Welcome to the inaugural issue of **Pivot. Accelerate. Transform.**, the Digital Transformation and Data Economy team's newsletter. Across the economy, businesses are using digital technology to **pivot** into innovative service lines, **accelerate** growth and **transform** their businesses altogether. These businesses' digital strategies and data assets play important roles in their success.

The launch of this newsletter months into the COVID-19 pandemic is more than coincidental. In March, society reacted to the immediate challenges of the pandemic. There was hope that the world could quickly "get back to normal." Eight months in, businesses are redefining "normal" and are at different stages of building long-term success. For many, digital transformation is that new normal.

With such an increased focus on digital transformation and the data economy, it is important to track the various legal and business issues that arise. Privacy, data rights, intellectual property, open source, antitrust, employment, corporate, M&A and contracting issues are just a few of the challenges that arise during a company's digital transformation. Learning from others' experiences can make your digital transformation journey a little smoother.

In each issue, we will spotlight different team members and how their practices intersect with digital transformation and the data economy.

## Spotlight



### Theresa Weisenberger addresses IP protection in agile innovation.

Agile development emphasizes quick innovation, advocating incremental and continual improvement that encourages flexible response to change. Agile is particularly suited for a pandemic economy, where requirements and needs are constantly changing. Agile development also encourages collaboration, which means that clients are often working alongside vendors, independent contractors and even their own customers to develop new technology. The collaborative relationships can yield the best technological results, but agile development's deemphasis of software documentation can be difficult to properly identify and allocate intellectual property (IP) between internal and external collaborators. This uncertainty can leave companies unnecessarily entangled with co-developers or, worse, inadvertently sacrificing their IP rights. A strong IP governance program can mitigate these concerns without disrupting the quick, flexible approach of agile development. (see page 2)

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## Spotlight (cont'd.)

Collaboration in digital transformation changes business relationships. Vendors can become customers, customers can become competitors and competitors can become co-developers. For example, vendors can pivot to sell the same (or modified) technology they developed for one client to a broader market. Open innovation encourages competitors to share know-how, data and resources to solve a common problem, such as [COVID-19](#). Clearly contracted IP terms in development agreements act as guardrails to allow parties to decide what they are willing to share and how IP ownership will be defined. These terms should address, at a minimum, IP rights (including ownership) pertaining to the developed technology and the parties' respective obligations to assist in acquiring or perfecting IP rights of one another. At this early stage, it is not necessary to know exactly what IP will be shared by the parties, and a flexible approach allows agile development to naturally unfold.

Technology is rarely developed from scratch, so deliverables created under a development arrangement (whether that arrangement is a joint development arrangement or a traditional services agreement) frequently include preexisting IP (including third-party IP and background IP the parties bring to the relationship) as well as prospective IP (IP created pursuant to the development arrangement). From a legal perspective, the key is being able to easily determine which components fall into which bucket, so compliance with licensing requirements can be quickly resolved.

For preexisting IP, the primary concern is ensuring that the appropriate licenses are obtained and that the planned use of the deliverables complies with such licenses. Under a traditional waterfall methodology, at least for the parties' own preexisting IP, this exercise was done at the launch of the project, when all the parties involved knew what, if any, preexisting IP would be incorporated into the deliverables. For agile development, this is not practical. Often, the usefulness of preexisting IP only becomes apparent as deliverable requirements

evolve under the natural course of agile development. We have developed an approach in which the developer is obligated to regularly identify their own preexisting IP that ended up incorporated in the deliverables. Failure to do so can result in ownership of preexisting IP being dictated by the same terms as those dictating the prospective IP. For third-party IP, failure to recognize the incorporation of such IP can have more dire consequences. Again, the burden of identifying third-party IP should rest with the entity that incorporated such IP in the deliverables, but forfeiture of ownership rights is obviously not a solution. Instead, IP indemnification clauses and liability insurance requirements can shift the burden to the party that should have known—namely, the one that incorporated such third-party IP into the deliverables.

For newly developed IP, particularly if certain rights in that IP are shared among the parties (as opposed to exclusively owned by one party), routinely identifying IP at certain touchpoints throughout the relationship is imperative. Some IP rights, particularly patent rights and the ability to enforce copyrights, depend on the timing of perfecting such IP ownership.

I recommend that development teams regularly advise their technology leadership and IP counsel of the technological advances they have made. Incorporating this process (in whatever form best fits the team) into the company's culture allows IP strategy to operate in tandem with agile development. For some teams, we have found the best approach is to regularly (e.g., quarterly) meet with lead developers to discuss their recent innovations; generally, what excites the developers is also what the IP strategy needs to protect. For others, we have found that first educating the developers and business leaders on IP strategy in general kick-starts the conversation. Ultimately, our goal as IP counsel is relationship building; the more engrained I am in your business needs and the more familiar I am with your technologists, the better I can identify and protect your IP as you create it.

## OF RECENT NOTE

### Blog Posts

[California AG Begins CCPA Enforcement](#)

[5 Key Things to Know about the Landmark Schrems II Decision](#)

[Ann O'Brien, Jeewon Serrato, Alyse Stach Author Article Examining Privacy and Antitrust Issues](#)

[CCPA Final Regulations Published in Advance of July 1 Enforcement Date](#)

[Accelerate: Getting to Your North Star Faster](#)

[How to Pivot and Transform Your Digital Assets into Alternate Revenue Streams](#)

[CCPA Compliance Meets Trade Secret Protection: A Peaceful Coexistence?](#)

[Privacy Litigation in the Age of Coronavirus](#)

[Positioning for What's Beyond the Horizon: What Digital Transformation and the Data Economy Mean for You](#)

### Podcasts

[Blurred Lines: Focusing on Antitrust and Privacy](#)

[Does Copyright Literally Protect Source Code Figuratively?](#)

# Emerging Issues

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## AI

[Experts Urge Vigilance Over AI Data Security](#), *Wall Street Journal*, Oct. 9, 2020 (sub)

The integrity and security of the data used to train algorithms is more important than ever. One area of increasing concern is data poisoning. In data-poisoning cases, attackers feed false information to an algorithm to misstrain it, to create future avenues of attack, to reduce its effectiveness or to otherwise disable it.

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## CLOUD

[The CFO holds the key to a successful cloud migration](#): *IT-Online*, Oct. 16, 2020

A recent Forbes survey found that around 70 percent of digital transformation projects failed to reach their goals, largely due to a lack of cross-functional teams and little involvement from the finance department. The root cause of this gap is seeing innovations around the cloud, robotics and artificial intelligence as lying firmly in the CIO's domain. Yet these are all business model innovations as much as IT innovations, and their potential impact on the business should be a key focus for the CFO.

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## DATA ECONOMY

[Filling the Demand for Data Tech Workers](#): *The Lane Report*, Oct. 8, 2020

There's a renewed sense of purpose for those in the Louisville area looking for their next rung on the career ladder this year, and it's due to upskilling for the data economy. In spite of the COVID-19 pandemic, injecting tech talent into the economy via upskilling is trending in Kentucky's largest metro, which has styled itself "Possibility City."

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## INDUSTRY SPOTLIGHTS: HOSPITALITY AND CONSTRUCTION

[Digital Transformation will Enable Growth Opportunities in the Hospitality Industry](#): *Frost & Sullivan*, Oct. 15, 2020

Most hotels and restaurants were digitally transforming their business models and operations for many years prior to the pandemic. Mobile payments and point-of-sale systems, online ordering and eCommerce, digital signage and interactive kiosks are technologies that were deployed to implement growth strategies. Today, using these existing technologies in innovative ways will help businesses implement new growth strategies devised to adapt to the changing dynamic between them and their customers.

[6 ways the Internet of Things \(IoT\) is making construction sites smarter](#), *Washington Business Journal*, Sept. 29, 2020

As technology has advanced in the construction industry, we've watched it migrate from the corporate office to the project site trailer to mobile devices on the job and now to embedded smart devices in the work.

Field staff are now able to have a level of visibility into what is happening on jobsites that was previously not possible, which can alert them to important events that otherwise may have gone unnoticed.

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## INFORMATION GOVERNANCE

[Looking to Strengthen Information Governance? A Dozen Insights From Fortune 500 Leaders and Startups](#): *Corporate Counsel*, Sept. 29, 2020

Now faced with navigating an amplified risk landscape due to the shift to work from home and an influx of newly onboarded applications, information governance (IG) teams are reevaluating their approaches. Many are realizing that dealing with the new normal may require an adjustment of priorities or retooling of projects already underway.

In a recent roundtable discussion, a group of IG leaders from Fortune 500 corporations and startups share their success stories, biggest challenges and tips for strengthening IG.

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## INTERNET OF THINGS

[The 5 Biggest Internet Of Things \(IoT\) Trends In 2021 Everyone Must Get Ready For Now](#), *Forbes*, Oct. 26, 2020

The pandemic has undoubtedly affected the way the IoT trend is impacting our lives. When contact between humans is more limited, contact between devices, tools and toys helps us to remain connected. Here, Forbes looks ahead to 2021 and some of the ways we can expect to see this megatrend playing an increasingly large role in how we live, work and play.

[Cornell Works on Public Internet of Things Network in New York](#), *State Tech Magazine*, Oct. 21, 2020

Cornell University researchers are aiming to bridge the digital divide in New York state with a program that will set up an IoT network throughout the state.

[When 'code rot' becomes a matter of life or death, especially in the Internet of Things](#), *ZDNet*, Oct. 17, 2020

IoT devices are increasingly sophisticated and intelligent, housing significant amounts of local code. This increases the demand for code maintenance. Gartner estimates that right now, 10 percent of enterprise-generated data is created and processed at the edge, and within five years, that figure will reach 75 percent.

The functionality to maintain IoT devices lags behind the proliferation of IoT devices. This can be a daunting challenge, since there are an estimated 30 billion IoT devices now in the world, and every second, 127 new IoT devices are connected to the Internet.