Predictive coding

Magic bullet will soon be standard ammunition

Technology Assisted Review is gaining ground fast, and it will pay lawyers to be early adopters so they can understand how to maximise its benefits.

The legal market is largely comprised of traditionalists, and technological sea-changes take time. However, with exponential data growth e-discovery now almost always involves hundreds of thousands of documents; if not, millions. In terms of time and cost, a manual, linear review process no longer seems like the only viable option.

Many law firms have already gone down the path of outsourcing first-level reviews, which certainly helps, but as Technology Assisted Review (TAR) becomes more accepted by both courts and regulators, it makes sense to consider it as the most efficient option. It is time for the dog to start wagging the tail again.

TAR, also known as predictive coding, uses the expertise of human reviewers while leveraging the power of data analytics, enabling the user to flag relevant documents early and quickly.

It uses an algorithm to create reusable knowledge stores with linguistic rules allowing for continuous and ongoing improvement. By combining continuous learning and continuous ranking, prioritisation happens automatically within the system, ensuring reviewers are looking at the most relevant documents first. This saves review time, makes the process more fluid, and cheaper.

Not only does TAR manage the increasingly burdensome task of data review, it typically reduces review costs significantly – by up to 90 per cent – and is auditable in a way that manual review is not.

Cost-effective

So let’s put this in context; last month Thomson Reuters reported that FTSE 100 legal provisions had increased by over a fifth compared with 2015 (from £25.6bn to £31.3bn). While some of this money is set aside to cover legal fees, fines and compensation, a significant amount of the cost is associated with the production of electronic documents.

The increasing volume of digital records makes TAR “not only a cost-effective option to help conduct review but the only reasonable way to handle large-scale production”, according to the RAND Institute for Civil Justice’s report in 2012. A study the institute conducted found that, from half of the cases evaluated, “review consumed at least 70 per cent of the total costs of document production” and further that it is an “obvious target for reducing e-discovery expenditures”. Since review is the most costly part of the production exercise, reducing expenditure in this area is the most effective way to reduce production costs overall.

TAR has gained support from government regulators and courts in both the UK and the US. The Sedona Conference TAR Case Law Primer, published earlier this year, states that courts have “been required to opine on the efficacy of TAR in a variety of circumstances”. The court acknowledges that there are a number of advantages of TAR over human review, stating that there is “on average, a 50-fold saving in the number of documents requiring review”.

The Hon. Andrew J. Peck, US Magistrate Judge, has said TAR is generally “cheaper, more efficient and superior to keyword searching” and the “best and most efficient tool” for review. Further, US government agencies such as, the Federal Trade Commission and the counsel for the Antitrust Division of the Department of Justice have accepted TAR as a search and review methodology for document production in regulatory investigations.

Disclosure

Recently, in the UK, Taylor Wessing secured judicial approval in a High Court case for the use of predictive coding in electronic disclosure. The judge noted that it was not less accurate than a manual review process and would likely be more consistent.

It seems we are close to a tipping point and in a few years it will be the norm to consider the use of TAR in larger, more complex, matters. Technology is evolving at a rapid pace and it will certainly pay to be an early adopter and understand how best to maximise the benefits of TAR. This will allow law firms and their e-discovery partners to bed down critical institutional knowledge and gain or maintain competitive advantage.

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