Contractual Regulation of Personal Fitness and Health Data Tracking: An Empirical Survey

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Abstract

A burgeoning market in health and fitness data trackers is developing as of this writing. Health and fitness tracking has been a major driver of both hardware and software development in mobile computing platforms, and the number of health and fitness tracking wearables and mobile applications available to the consumer market is growing by leaps and bounds. In addition, the technical capabilities of these devices are expanding, enabling the collection, aggregation and mining of vast amounts of individual, identifiable health data. As usual, the law is not keeping pace with this technological innovation. Because these data are being collected outside of a traditional physician/patient relationship, they are not governed by HIPAA privacy regulations. As others have discussed, however, data collected outside of HIPAA-regulated relationships may significantly overlap data from regulated sources, creating serious risks of disclosure or discovery of sensitive personal health information.

This project builds on work I presented at the Governing Emerging Technologies conference last year and published in the Akron Intellectual Property Journal. (7 Akron Intell. Prop. J. 27 (2014)). In the absence of effective administrative regulation of personal collection, aggregation and sharing of fitness and health data, the primary source of regulation of these data may be contractual. Consumers using personal health data trackers enter into contracts with the manufacturers of the devices and the producers of various mobile applications which collect, aggregate and analyze the data collected. Courts have generally upheld so-called "clickwrap" contracts as enforceable against consumers who assent to them as part of a purchase.

This project will analyze the terms of these "Terms of Service" agreements offered to consumers by the manufacturers of wearable devices and mobile applications. These contracts will be analyzed for their likely enforceability under judicial standards currently prevailing for such "clickwrap" contracting; for the terms under which the personal data collected by the users of the devices and apps are used by the application developers and/or device manufacturers, and finally for the privacy protections offered to the users of such devices and apps and the contractual remedies, if any, for breach of such terms of use and protections.

This is a work in progress, and the eventual outcomes will be dependent on the particular findings of the survey of end user agreements. I anticipate that the outcomes of this research may include, among other things, a better understanding

of the role and potential limits of private contract law as a channel for regulation of personal health and fitness data; development of a set of “best practices” recommendations for contracts governing the relationship between device and app manufacturers and users; and/or recommendations for legislative or administrative action to replace or set limits on the scope of such private contracts.