# CONTRACT AS REGULATION OF HEALTH DATA TRACKERS

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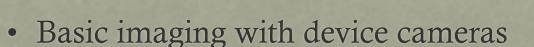


# HEALTH (FITNESS) DATA TRACKING

- Includes emerging market of wearables, "connected" fitness devices, apps.
- Health & Fitness App use up almost 50% in 2013.
- 25% of smartphone users, 20% of tablet users estimated to use devices to track health or fitness.
- 156,000,000 health app downloads in 2012 projected to grow to to 248,000,000 by 2017
- This is something that people want.

# WHAT IS BEING COLLECTED?

- Activity Tracking
- Nutritional Information
- Basic Vital Signs
  - Heartrate / Pulse with phone carr
- Sleep Duration and Quality



• The list will grow and the data will improve in quality and automation.



## WHAT CAN THE DATA TELL US?

- Baseline assessment of fitness data
- Tracking changes over time
- Incentives to improve health outcomes
  - Pairing with other social media (Facebook, etc.)
  - Goal-setting, either by individuals, across social media groups, or by the app or service itself

## WHAT CAN THE DATA TELL US?

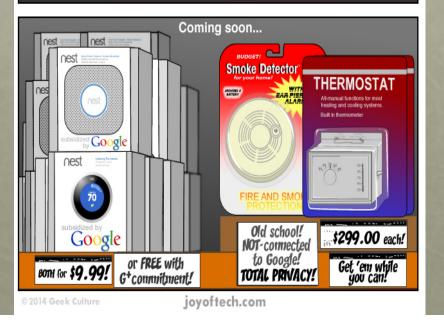
- Aggregated ("Big Data")
- In many ways, this is the promise of health data tracking
- Sheer size of the data sets may enable "data mining" of basic health data that would be impossible or impracticable in a clinical setting
- Power of Big Data: predictive analytics applied to basic health information in a way it cannot with EMR information.
- Individually- generated data may be combined with other consumer data currently held by data brokers

## VALUING PRIVACY?

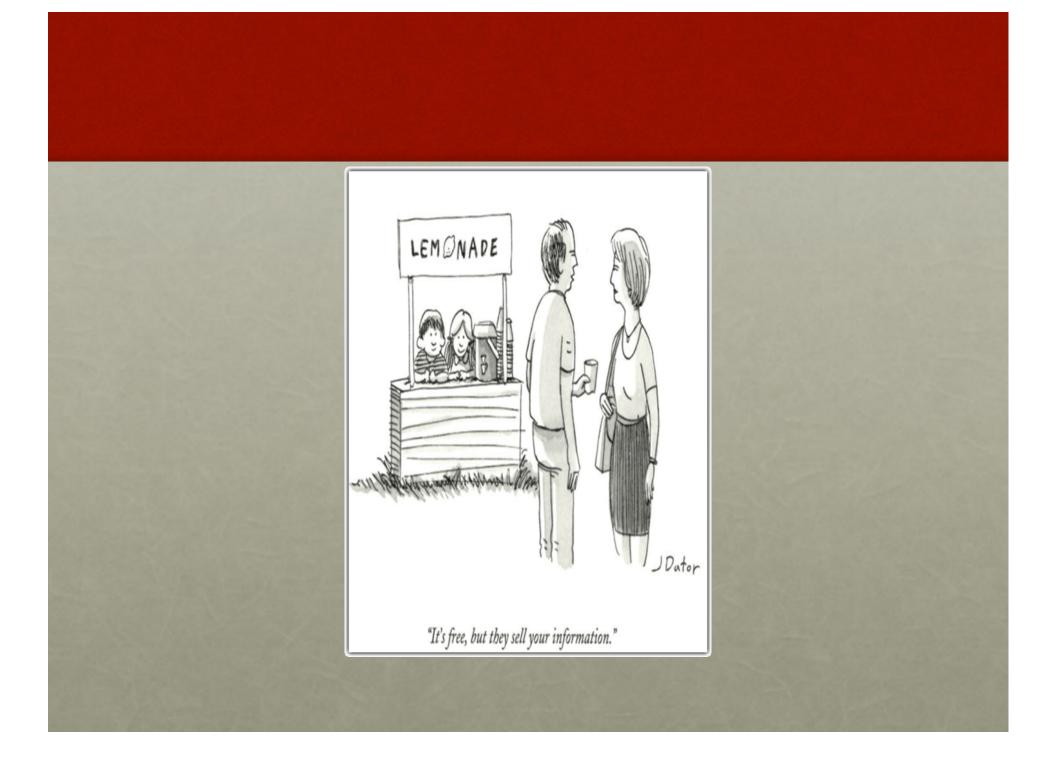
AT&T offers "no-track" Gigbit Internet for Extra \$29/mo







Other providers offer no such option



## CURRENT REGULATION

- Health Insurance Portability and Accountability Act
- FDA Medical Device Regulation
- Electronic Communications Privacy Act
- Private Law (Contract or Tort)
- Fourth Amendment
- New FTC consumer data protections?

## CONTRACT LAW?

- Is disclosure, aggregation or other use of my data a breach of contract?
  - Maybe.
  - Terms of Use are famously one-sided, non-negotiable "contracts of adhesion"
  - User interfaces may not make clear what data are to be kept private and what data are fair game
  - Damages for breach of contract may be limited by traditional "foreseeability" limitations.
- Odd relationship goods? Service? Software? What is the subject matter here?
  - Not about price, but about governance of the relationship.

# CONSUMER PRIVACY BILL OF RIGHTS

- Individual control over collection and use
- Transparency in privacy
- and security
- Respect for context in collection, use and disclosure
- Security in handling of data
- Access and Accuracy
- Focused Collection: reasonable limits on data collection
- Accountability

# CONTRACT AS REGULATION

- What are companies promising in their Terms of Service?
- What would a "best practices" set of contract terms look like?
  - Under what circumstances might "best practices" be attractive to those with market power?
- Are these promises a source of robust regulation of consumers' rights with respect to their data?

## READING THE UNREADABLE

- To what extent do the providers promise consumerprotective terms?
  - Privacy promises; promises not to share data; promises to deidentify?
- To what extent to the providers take advantage of selfprotective contract terms?
  - Disclaimers of warranties; mandatory arbitration; limitations on available remedies?

# POTENTIAL CONTRACT TERMS

#### Preliminary List for discussion purposes

Pro-Consumer Contract Terms	Restrictions on Rights/Usage	
Statement of Consumer ownership of data	Limitation on Liability	
Promise of Confidentiality/ No transfer of data	Mandatory Arbitration of Disputes	
Right to Remove Data	Right to unilaterally modify terms of relationship	

## PRELIMINARY RESULTS

	Fitbit	Pebble	Jawbone
Ownership	Yes	Yes	No
Confidentiality	No	No	No – may sell
Removal	No	No	Yes
Liab. Limit.	Yes - \$100	Yes - \$100	Yes - \$50
Mandatory Arb.	Yes	Yes	Yes
Unilateral Mod.	Yes	Yes	Yes

## DRAFTING DECISIONS

What factors might lead to a more pro-consumer ToS?

- Fear of substantive top-down regulation
- Public perception of harm to public interest
- Competition on terms self-selection by consumers of more pro-consumer
- Leveraging the Internet to produce "ratings" or "rankings" of ToS quality

## DRAFTING DECISIONS

- What factors might lead to a less pro-consumer ToS?
  - Legal Training incentive to protect the "client."
  - Lack of customer sophistication
  - Perceived need to protect from liability
  - Planning to monetize database in future deals

# IS CONTRACT ROBUST PROTECTION

- Radio Shack bankruptcy
- Is consumer data protected?
- Is RS's promise not to sell "enforceable" in the bankruptcy case?
  - Past practice indicates it is not.
- What if, instead of Radio Shack, Fitbit declared bankruptcy?

#### DATA IN BANKRUPTCY

- Data may be among the most valuable assets of a bankrupt e-commerce company
- Liquidation bankruptcy (Chapter 7) is about realizing value of the bankruptcy estate
- Strong incentive to realize value of consumer data owned by the bankrupt company
- Historically, willing to balance this value against the interests of consumers in data privacy (*Toysmart*)

## PII IN BANKRUPTCY

- Current bankruptcy law provides some protection to personally identifiable information
  - 11 USC 101(41(A)))
  - Limited to certain classes of personal info (name, address, SSN, etc)
- However, that protection is not absolute. Promise not to sell data can be avoided in bankruptcy.

## CONCLUSION

- Currently, relationship between fitness/health tracking company and user is largely governed by contract
- Providers have all of the power to design the terms of this relationship.
- Contract remedies are not designed to deal with breaches of promise of this sort.
- Bankruptcy shows that there is at least one significant gap in the protection provided by even the strongest privacy policy/EULA
- Relying on EULA design and "consent" is not enough.