

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 camera
- Sleep Duration and Quality
- Basic imaging with device cameras
- 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”
Gigabit Internet for
Extra \$29/mo



The Joy of Tech™ by Nitrozac & Snaggy

Currently...

Two stacks of Nest products are shown on the left. The top stack consists of three white boxes, each labeled 'nest' and featuring a circular logo. The bottom stack consists of three black boxes, each labeled 'nest' and featuring a circular logo with the number '70'. To the right of the stacks are two red packages of 'Smoke Detector' and one blue package of 'THERMOSTAT'. The smoke detector packages are labeled 'BUDGET!' and 'WITH EAR-PIERCING ALARM!'. The thermostat package is labeled 'All-manual functions for most heating and cooling systems. Built in thermometer.' Below the products are four price tags: '\$130.00', '\$250.00', 'Clearance!', and '\$9.95 each!'.

\$130.00 \$250.00 Clearance! \$9.95 each!

Other providers
offer no such option

Coming soon...

Two stacks of Nest products are shown on the left. The top stack consists of three white boxes, each labeled 'nest' and featuring a circular logo. The bottom stack consists of three black boxes, each labeled 'nest' and featuring a circular logo with the number '70'. To the right of the stacks are two red packages of 'Smoke Detector' and one blue package of 'THERMOSTAT'. The smoke detector packages are labeled 'BUDGET!' and 'WITH EAR-PIERCING ALARM!'. The thermostat package is labeled 'All-manual functions for most heating and cooling systems. Built in thermometer.' Below the products are four price tags: 'BOTH for \$9.99!', 'or FREE with G+ commitment!', 'Old school! NOT-connected to Google! TOTAL PRIVACY!', and '\$299.00 each! Get 'em while you can!'.

BOTH for \$9.99! or FREE with G+ commitment! Old school! NOT-connected to Google! TOTAL PRIVACY! \$299.00 each! Get 'em while you can!



"It's free, but they sell your information."

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 consumer-protective terms?
 - Privacy promises; promises not to share data; promises to deidentify?
- To what extent do the providers take advantage of self-protective 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.