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The unforeseen privacy issues of wearable tech

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The popularity of "personal wearable technology" has exploded, promising to improve user health by tracking user activities and health information. However, users are likely unaware that personal wearables are being used to help spearhead the next generation of consumer behavioral studies by "data brokers."

An example of personal wearables is Fitbit Inc.'s popular "Fitbit Force," which is typically worn around the wrist like a bracelet. The Force partially functions as a pedometer to track a user's physical activity, using different algorithms to calculate activity levels depending on how it is worn.

The Force can be set to automatically track sleep patterns in addition to other health aspects such as weight, heart rate, glucose levels, which a user can either record herself or pull from other personal electronics that can synchronize with the Force. The Force then allows the user to upload or "sync" her information to her mobile phone, to be shared on social media forums like Facebook or Twitter.

The popularity of personal wearables has attracted serious attention from the likes of bigger players like Apple, which recently announced that it would be launching the "HealthKit platform" in iOS8. Set for release later this fall, HealthKit and Apple's "Health" application promises to be a single repository for health care data from a variety of compatible devices, mobile applications, and health providers.

Tagged By Wearables

Although some take pride in sharing their general activities and health, others may consider such information to be a little more sacred. Either way, most users are completely unaware that their wearables are collecting information which may ultimately be sent to data brokers, who use the information to assist their clients in crafting consumer-specific marketing strategies.

For example, one popular wearable is designed to encourage its users to grant the wearable company access to the users' Facebook information. By "logging in" through Facebook or by granting certain permissions, users can compare their activities and statistics with those of Facebook friends (who also gave permissions to share) using the same type of wearable. Activity information the devices collect is then "linked" to specific users' Facebook profiles, and unique wearable device IDs are tied to respective Facebook IDs. The privacy statement provided for the wearable states that the user has provided personally identifiable information to the company, and the company may

Wednesday, June 11, 2014

Litigation

SEC losses raise questions about agency's strategies

Lawyers are questioning the Securities and Exchange Commission's strategies in the wake of high profile trial losses in cases involving allegations of insider trading.

Labor/Employment

Unpaid intern sues Clippers in proposed class action

In what appears to be the first case in the state to claim a group of unpaid interns should have received minimum wage, a former intern for the Los Angeles Clippers sued the team Tuesday.

Criminal

Curbing the natural and probable consequences doctrine

After a series of rulings that stretched the natural and probable consequences doctrine to the breaking point, the state Supreme Court may finally have reached its limit. By **Mai Linh Spencer**

Corporate

Verizon, Netflix parry over slow connections

Netflix Inc. General Counsel David Hyman publicly bolstered his company's position against Verizon Communications Inc. this week as the companies attempt to curry favor with policymakers weighing net neutrality.

California Courts of Appeal

Court: Insurers must cover mental health illnesses like physical ailments

The ruling will affect millions of Californians, given that so many have purchased insurance plans not governed by ERISA.

Obituaries

Retired bankruptcy judge Arthur Greenwald dies at 83

Arthur M. Greenwald, who retired as a Central District bankruptcy judge in 2005, died June 4 at his residence in Tarzana.

Government

Bill to shield some judges from higher pension costs moves forward

A bill to grandfather seven judges into the judiciary's pre-2013 pension contribution rates moved through a state Senate committee.

Obituaries

use the information to "[g]enerate site analytics that improve...our product offerings and services...[and]...Compile user data that is stored in our corporate database and be used for marketing and other purposes." The privacy statement further provides that the company may then "[m]atch personal data collected here with data about you that we collect through other sources." In short, the company may attempt to match additional information available from other sources to the Facebook ID or other personally identifiable information provided by the user.

So, by using the wearable, an unwitting user may be disclosing who she is, information on her social network profiles, and other information associated with the user, in combination with her various recorded fitness and health information. The user could also be allowing the company to use the information for marketing and research purposes, possibly in conjunction with third parties. As the wearable will go wherever the user goes, the wearable potentially provides a veritable goldmine of information for businesses looking to target particular consumers in the case of the Force, individuals keen on physical activity, or potentially those who likely suffer from certain conditions recorded.

Regulation of Wearables and Fitness Applications?

The general physical activities tracked by a pedometer device would unlikely be covered by existing regulations such as the Health Insurance Portability and Accountability Act (HIPAA). HIPAA defines "individually identifiable health information" as information that relates to the "past, present, or future physical or mental health condition of an individual" that is created or received by "a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse." As of the date of this article, there are no similar regulations on wearables or data brokers.

In May, the Federal Trade Commission (FTC) issued comments after studying 12 undisclosed mobile health and fitness applications, and concluded that these applications disseminated user data to 76 third parties. The transmitted data included information on exercise and diet habits, medical symptom searches, zip codes, geo-location, and gender.

The FTC also noted that the mobile applications transmitted information that included device identification, and at least one of the third parties actually received the same device identification information from different applications. Therefore, the health, fitness, and personal information gathered by these mobile applications potentially would allow third parties to build rich profiles of individual consumers. Although the FTC did not indicate that any of the data was improperly compiled or shared, the FTC did comment that it is considering how to regulate data sharing for such applications.

It is unclear whether the FTC's study included the mobile applications that work alongside popular personal wearables such as the Force. However, the FTC's comments came on the heel of reports from both the White House and Senate on data collection and informational privacy, and increasing concern over the activities of data brokers. Not only did the FTC echo the concerns over personal privacy of the White House and Senate, the FTC expressed concerns that personal health information would be used to discriminate against individuals on the basis of their health.

In response to similar concerns, it appears that the California Attorney General Kamala Harris has taken the position that it is not so much whether consumers are having their activities "tracked," but whether consumers are being notified that they are being tracked. In May 2014, Harris' office released a guide entitled "Making Your Privacy Practices Public." The guide does not prohibit businesses from tracking consumer activity per se, but requires that those tracking activity "conspicuously post" their privacy policy, and disclose how such businesses respond to "Do Not Track" requests. Notably, the guide does not require that companies honor requests to "not track" consumer activities.

What Is The Future Of Wearables?

The regulation of data-brokers is currently hotly debated, and the future of wearables will inevitably be affected. However, American regulators have thus far refused to follow the regulations of Europe, which have begun to increasingly hinder data tracking and require businesses to honor "Do Not Track" requests. Instead, Americans have preferred the approach of notice and disclosure, coupled with enforcement actions where collected consumer information is lost through data breaches. We believe that future promulgated regulations will continue to follow such an approach to lessen

Alicemarie Stotler, a former Central District chief judge, dies

Senior U.S. District Judge Alicemarie Huber Stotler, a trailblazing woman in the California legal community, died at home Monday after a three-year battle with cancer. She was 72.

Intellectual Property

Warner Bros. wants Greenberg attorneys kicked off Tolkien case

Movie studios and its partner filed a motion Tuesday to have the estate of The Lord of the Rings' author J.R.R. Tolkien's lawyers kicked off the copyright lawsuit.

Government

Scammers targeting people for allegedly missing jury duty

Courts around the state are warning of scams victimizing people who pay hundreds of dollars in bogus fines after being told a warrant will be issued for their arrest for supposedly missing jury duty.

Perspective

The unforeseen privacy issues of wearable tech

Users are likely unaware that personal wearables are being used to help spearhead the next generation of consumer behavioral studies by "data brokers." By **Hsiao (Mark) C. Mao and Jonathan H. Yee**

Constitutional Law

Are judicial elections a fraud on voters?

Can judicial campaigns play a role in educating voters about our judicial system, or will they remain a pretext to defraud the public of their right be fully informed on today's critical legal and political issues? By **Aram James**

Labor/Employment

High court ensures continued split on ERISA remedies

Nothing about remedies under the Employee Retirement Income Security Act is well-settled and the U.S. Supreme Court recently declined to further muddy the waters. By **Michelle L. Roberts**

Judicial Profile

Julie Fox Blackshaw

Superior Court Judge Los Angeles County (Edmund D. Edelman Children's Court)

Litigation

Judge strikes down statutes governing teacher job protections

In a landmark victory in a closely watched education suit, a Los Angeles County Superior Court judge on Tuesday struck down as unconstitutional five statutes governing layoffs, tenure and dismissal of public school teachers.

unnecessary restriction of trade.

Nonetheless, users of wearables would do well to review pertinent privacy statements, to understand how their activity information may be used and to possibly limit their use. Organizations are often keen on mitigating privacy invasion allegations, and often provide means for users to "opt out" or not grant "permissions" to various aspects of personally identifiable information. In addition, with the advent of regulations on how personally identifiable information should be protected, and significant penalties for the lack of reasonable physical, technological, and administrative barriers, organizations are also sensitive about how unnecessary aggregation of consumer information may create risks for themselves.

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