Ownership of athlete biometric data in Canadian sports

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What you need to know

- Biometric data obtained from an athlete's use of wearable technology may be valuable.
- Organizations and athletes must be aware of the privacy laws surrounding the use, storage, and transfer of biometric data obtained from wearable technology.
- Subject to contracts or collective bargaining agreements, athletes retain significant ownership rights over their biometric data.

Introduction

Biometric data derived from wearable technology (wearables) has not only become an essential tool in athlete training and injury prevention, but also a highly sought-after and lucrative commodity for the sports betting industry. However, when teams or organizations ask athletes to use wearables, interesting and unresolved legal questions arise about who has the right to use, transfer, and sell that data.

In Canada, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and a 1992 decision from the Supreme Court of Canada suggest that athletes hold ownership rights over their biometric data. As the law struggles to keep pace with rapidly evolving technology, athletes, teams, institutions, and sport organizations should be aware of their rights and responsibilities with respect to the use, storage, and transfer of biometric data.

What is biometric data?

Biometric data refers to biological information that can be obtained from an athlete's use of wearable technology and includes everything from pulse rate and blood glucose to oxygen levels, sweat rate and sleep rhythms. Biometric information assists athletes and teams in optimizing performance and injury prevention by measuring work load on joints, muscles and ligaments, as well as providing important athlete development data derived from training and competition.

Why is biometric data so valuable?

Leverage points between athlete and team

Biometric data may serve as a heavy leverage point working for, or against, amateur athletes who are trying to make a team, or professional athletes trying to negotiate their next contract. With access to an athlete's biometric data, team management can observe wear and tear on an athlete's body and make decisions based on future risk of injury, rather than simply focusing on in-game results.

The use of player health information in player personnel decisions by professional teams is well-documented. One example occurred in 2013, where college standout defensive tackle Star Lotulelei was projected to be a top-3 pick in the NFL draft. However, Lotulelei dropped to the 14th selection in the draft after an irregular electrocardiogram raised concerns about potential heart problems.

Conversely, when team management decisions are made, an athlete may want to use biometric data to prove that a previous injury has fully healed or that their performance in a specific area is better than the eye-test dictates. As a result, teams and athletes alike have a strong interest in controlling how biometric data is used and leveraged.

Athlete revenues

The value of biometric data extends beyond athletes, teams, and leagues. A variety of stakeholders on the periphery of the sports industry, now more than ever, seek greater insight into athlete health and performance statistics. In particular, while player health information has always been valuable to the sports betting industry, the demand for that information will surely rise with the recent legalization of single-event sports betting across most of North America. Selling that data may become an important source of income for an amateur athlete, or a major revenue stream for teams and leagues.

Predictably, the sale of biometric data to sports betting companies and other industry stakeholders is becoming one of the more lucrative aspects of the sports industry. For example, MGM Grand signed a $25 million data sharing deal with the NBA. As well, in 2018, the NFL entered into an agreement with broadcasters to share data from a chip planted in players' shoulder pads which can track a player's location up to 12 times per second. The new MLB collective bargaining agreement (CBA) also reportedly authorizes players to enter into commercial arrangements with sports betting companies.

The rapid growth in the commercialization of athlete biometric data raises interesting considerations for amateur athletes. With control over their biometric data, amateur athletes can access new income sources as they train and enhance their training results through leveraging the data available from wearables. The commercialization of biometric data also adds another wrinkle to the long-standing debate about athlete income in varsity sports where, unlike professional athletes, varsity athletes do not have a CBA to provide a right to monetize their data.

Privacy

The growing prevalence of biometric data in the sports industry creates a number of privacy concerns for athletes and sports organizations, namely with respect to the collection, storage, and use of that data. Teams may ask players to use wearables around the clock for the purpose of tracking sleeping patterns and cortisol levels. However, such data also provides an intensely personal view into the athlete's intimate life and social habits away from the field which may be perceived by some athletes as being overly intrusive on their personal lives.

Teams may also want to determine their players' workloads while on loan or while playing for their national team. Conversely, players may find such levels of oversight intrusive while they are representing their country in international sporting events.

Legislative background and applicable law

The right to use, transfer and sell professional athletes' biometric data may be governed by the CBAs of major professional sports leagues; however, for amateur athletes or professional athletes without a CBA that addresses the issue, applicable Canadian privacy laws will govern the team's use of their biometric data in Canada.

Canadian legislation and case law suggest that there are very limited instances where an organization can use and disclose biometric data without the consent of an athlete. Sports organizations are required to comply with Canadian legislation to the extent that biometric data is collected, used, and/or stored in Canada, or if there is a real and substantial connection to a Canadian jurisdiction. In many Canadian jurisdictions, the collection of biometric data requires the consent of athletes, and organizations can be sanctioned for failing to obtain consent. PIPEDA, specifically, is federal legislation that prohibits the use or disclosure of an individual's personal health information without their knowledge and consent.

Organizations that collect biometric data must ensure its safe storage and can face penalties for breach of that data. The past decade has seen a significant increase in the penalties faced by Canadian organizations following data breaches. For example, in 2018, a private healthcare provider in Ontario settled a class action lawsuit for $3.44 million for a data breach that resulted in the exposure of the health information of hundreds of thousands of patients to hackers: *Redublo v. CarePartners*, 2022 ONSC 1398. As well, recent changes to privacy legislation in Quebec now allow for the privacy commissioner to impose hefty fines on organizations of up to $25 million or 4 per cent of annual global revenues, whichever amount is higher.

Further, in the landmark Supreme Court of Canada case of *McInerney v. MacDonald,* [1992] 2 S.C.R. 138, the Court stated that while a physical medical record belongs to the person or organization responsible for its creation, the biometric information in an individual's medical record belongs to the patient. Though *McInerney* preceded the advent of modern-day wearable technology, the implication from the decision is that athletes likely maintain a large degree of control over how a team uses and transfers their biometric data.

While Canadian law appears to be structured in favour of granting athletes a greater degree of control over their biometric data, the law is undoubtedly in flux. The issue of who can sell the data derived from wearable technology if a team or league has obtained that data with the consent of the athlete, has yet to be litigated in Canadian or

American courts. As the desire to sell biometric data becomes increasingly tantalizing for athletes and teams alike, court cases and new pieces of legislation are likely imminent. As the law continues to evolve in response to developments in wearable technology, athletes, teams, and sports organizations should remain up-to-date on their respective rights and legal responsibilities over athletes' biometric data.

For more information, reach out to any of the key contacts listed below.

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