How FemTech Converts Reproductive Labor into Corporate IP

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FemTech apps recode the pressure to be an ideal mother as the pressure to be a compliant user: the unpaid labour of tracking a cycle or a feed is converted into data, which becomes proprietary corporate IP, shielded from audit by trade secret and database rights. Using India's unsettled WhatsApp metadata-leveraging doctrine as an analogy, this piece asks whether FemTech apps function as data suppliers to dominant platforms even when the apps are not themselves dominant, a gap current competition law does not yet reach. It argues that treating reproductive data as a public trust rather than an extractable asset is necessary to protect the substantive autonomy of women.

Introduction

The concept of Biopower, as has been given by Michel Foucault, describes how institutions govern the life of the people through norms. This is done through the meaning attributed to common questions like what is healthy or responsible and what constitutes adequate behaviour. This governance when focused in the medical field in India has been advocated by doctors' clinics and state programmes like the Mother's Absolute Affection Scheme. The latter promoted breastfeeding through counsellors and healthcare workers. This norm was therefore enforced face to face, in the language of public health.

At present, the norm has migrated to a screen. Period trackers, fertility apps and smart baby monitors require women to log every cycle, feed and development milestone. Scholars who study the Indian FemTech market have described this regular ritual of data entry as the production of datafied body projects. This essentially means that the reproductive body has been rendered as a stream of metrics that promises self-knowledge while simultaneously disciplining the user towards an idealised standard. The pressure to be an ideal parent (mostly mother) has now been re coded as the pressure to be a compliant user.

Our focus in this piece is on how the data generated by this unpaid tracking labour does not stay with the women who generated it. Rather it becomes the proprietary intellectual property on a corporate balance sheet. Our premise is to analyse the legal doctrine which governs this transfer and assess whether it is able to adequately address the issues centering around the topic.

The IP Architecture

FemTech companies rarely patent their core prediction engine. The mathematical or business methods and algorithms are excluded from patentability. The US Supreme Court reached a functionally similar result for abstract, computer-generated ideas.

A more significant aspect is that patents require public disclosure, which a company seeking a competitive edge for its scoring model sees as a disadvantage. Therefore, the cycle predictions and fertility scoring models are mostly held as trade secrets. They are protected through a contract and breach of

confidence doctrine rather than registered rights. Trade secrecy requires no disclosure; as a result, the algorithm operates as a black box which cannot be audited.

What does this mean for the user?
A user can therefore not interrogate why an app flagged her cycle as irregular or contest the assumptions of the model.

Database and compilation protections add another layer to this. The sui generis database rights of the EU protect the compilation, independent of any originality in the underlying data, thus enabling a platform to lock down the millions of aggregated cycle histories. However, India has no equivalent regime. Indian protection for a database runs through ordinary copyright. Moreover, a modicum of creativity threshold has been set for copyright in compiled works. As a result, an Indian FemTech database is protectable only to the extent its selection or arrangement show some minimal creative judgment.

The Angle of Competition

No case has yet been brought by a regulator against a FemTech platform. We will therefore draw on analogous precedents about data and dominance.

Digital markets tip towards incumbents through network effects. More users generate richer training data, which improves the product and attracts more users. FemTech intensifies this, as a period and fertility dataset carries a biological signal which no generic health app can replicate. This produces a data-driven barrier to entry. The Competition Commission of India (CCI) has increasingly treated data practices as abuse-of-dominance questions in their own right.

In *In re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, the final order of the CCI found that WhatsApp's mandatory 2021 policy update which compelled users to accept expanded data-sharing with Meta as a condition of continued access, violated **Sections 4(2)(a)(i), 4(2)(c), and 4(2)(e)** of the Competition Act, 2002. It held that the update imposed unfair conditions, denied market access to rivals in the online-advertising market and leveraged dominance from one market into another. The CCI imposed a ₹213.14 crore penalty. On appeal, the NCLAT upheld the jurisdiction of the Commission and the penalty itself. But it set aside both the five-year data-sharing ban and the Section 4(2)(e) leveraging finding. It was held that the CCI had not justified the ban's duration once opt-in/opt-out safeguards were in place. That ruling is now before the Supreme Court, with the CCI seeking to restore the ban and Meta contesting the penalty.

How is this relevant to our research?
It shows how the outer limits of India's data leveraging doctrines are unsettled.

While it does not involve a FemTech company, it is relevant to our question of whether data-sharing arrangements between a non-dominant app and a dominant platform reproduce the pattern of leveraging as demonstrated in the above case. This is a question which India's draft Digital Competition Bill (2024), with its proposed ex-ante obligations, is aimed at. But those obligations are designed to bind the dominant platforms themselves and not the smaller apps that supply them with data.

Reclaiming Data Autonomy

If substantive autonomy requires the practical capacity to author one's choices rather than merely the formal absence of prohibition (a claim made by feminist autonomy theorists like Catriona Mackenzie), then a woman whose data is monetised through a non-auditable model has diminished autonomy, notwithstanding the promises made in the app's marketing.

Rawls's account of self-respect points the same way: a system that extracts value from the reproductive labour of a woman without granting them any claim over the resulting asset reproduces unfairness and bias.

Three reforms are therefore recommended to narrow the gap.

Firstly, there should be mandatory algorithmic auditing for health tech applications which make consequential inferences about the users' bodies. We are not asking for the disclosure of the trade secrets themselves, rather the auditable explanation of what a model does and why. This closes the accountability gap.

Secondly, statutory limits should be imposed on cross-context data sharing with insurers, employers and advertisers, of the kind gestured at by India's Digital Personal Data Protection Act, 2023 but have not yet been tested against a FemTech fact pattern.

Treatment of reproductive data as a public trust rather than an extractable IP asset will not by itself undo datafication. But it puts the choice of how that data is used back where it belongs: with the women who generated it, and not the platform that structured the form.

Notes

1. Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (Robert Hurley tr, Pantheon Books 1978).
2. Paro Mishra and Yogita Suresh, 'Datafied Body Projects in India: FemTech and the Rise of Reproductive Surveillance in the Digital Era' (2021) 27(4) *Asian Journal of Women's Studies* 597.
3. *Patents Act 1970* (India) s 3(k). *Thirdly,* there should be mandatory data portability so the cycle history of a user can be moved by her to a competing privacy-respecting app.
4. *Alice Corp Pty Ltd v CLS Bank International* 573 US 208 (2014).
5. *Eastern Book Company v D.B. Modak* (2008) 1 SCC 1.
6. Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016) ch 3; Competition Commission of India, *Report of the Committee on Digital Competition Law* (2024) 45–48.
7. Competition Commission of India, *In re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Motu Case No 1 of 2021 (18 November 2024).
8. *Draft Digital Competition Bill 2024* (India).
9. Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000).
10. John Rawls, *A Theory of Justice* (Harvard University Press 1971) s 82.

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