About Face: Biometrics and the Law
Part Two

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Frank Nolan
franknolan@eversheds-sutherland.com
212 389 5083

Emily Bork
emilybork@eversheds-sutherland.com
202 383 0870
Summer Trivia

Question: The famed mustard belt is given out as the prize at which summer sporting event?

A. US Open (Golf)
B. US Open (Tennis)
C. Nathan’s Hot Dog Eating Contest
D. America’s Cup
Why Biometrics?
The Features that Make You Unique

**Biological**
- Face
- Iris
- DNA
- Hand geometry
- Heartbeat

**Behavioral**
- Finger-print
- Gait
- Handling style
- Key strokes
- Voice
- Signature

**Characteristic**
Why Biometrics?

- Secure
- Unique
- Efficient and convenient
- Customer-friendly
Why are Legislators, Regulators, and the Public Concerned about Biometrics?

Why are Legislators, Regulators, and the Public Concerned about Biometrics?

- “The hearing’s panel of experts . . . called for a moratorium on government use of facial recognition systems until Congress can pass legislation that adequately restricts and regulates the technology and establishes transparency standards.”
- “New research is showing bias in the use of facial technology for health care purposes, and facial recognition is being sold to schools.”
- “Our faces may well be the final frontier of privacy.”

https://www.wired.com/story/facial-recognition-regulation/
Legal Framework
The Biometric Information Privacy Act (BIPA)
BIPA: An Overview

- What does BIPA consider biometric data?

- Who uses biometric data?

- What must an entity wishing to obtain biometric data do to comply with BIPA?
BIPA Penalties

- Private right of action
- Separate violation *each* time
- $1,000 per negligent violation
- $5,000 per reckless or intentional violation
- Attorneys’ fees and costs
Summer Trivia

Question: Which days of summer between July 3 and August 11 are named for the figure Sirius in the Canis constellation?

A. The hot days
B. The dog days
C. The humid days
D. The I wish it were Friday at 5 days
Litigation Defense: Strategies and Tactics
First Line of Defense
Article III Standing and the “Aggrieved Person” Standard

- US Constitutional requirement
- Federal standard → “injury-in-fact”
- Article III standing vs. statutory standing
- Is being “aggrieved” enough?
Class Actions – BIPA


— Collection of fingerprints from season pass holders, without consent

— IL Appellate Court: Class representative did not suffer an actual injury

— IL Supreme Court: No actual harm required to proceed
Class Actions – BIPA

*In re Facebook Biometric Info. Privacy Litig.* (consolidated action)
N.D. Cal. decision: 290 F. Supp. 3d 948 (N.D. Cal. 2018)

- Allegation regarding no prior consent and lack of notice → California federal court held that claim was sufficient to confer Article III standing

- Class certified in April 2018; case is stayed pending appeal
Removal and Geographical Considerations

- Removing state court case to federal court
- Once in federal court, should the case be transferred to another federal district?
- Consider location as a defense tactic
Other Defenses

- **Statutory:**
  - Failure to state a claim
  - Extraterritoriality
  - Claim outside of the statute’s scope
  - Statute of Limitations

- **Constitutional:**
  - Due Process Clause (personal jurisdiction and damages)
  - Dormant Commerce Clause
Class Certification

- Adequacy
- Numerosity
- Commonality/Predominance
- Ascertaintability
- Standing
Settlement Considerations

– Storage, use and disclosure requirement violations often underlie settlements
– Publicly available settlements range from $300K to $1.6 million
– Settlements speak in terms of number of harmed individuals rather than number of BIPA violations
BIPA Blowback

Google takes aim at controversial, stringent Illinois biometric privacy law

By Neil Hughes  April 25, 2018

https://oneworldidentity.com/google-takes-aim-controversial-stringent-illinois-biometric-privacy-law/
Other States
Start of a Trend?

Rev. Code Wash. (ARCW) § 19.375.010(1) – 2017
Requires companies to provide notice of collection for a commercial purpose, but passive consent allowed.

Massachusetts is also considering regulating biometrics through a bill in the state senate. Bill S. 120 (2019)

Tex. Bus. & Com. Code § 503.001(a) et seq. – 2009
Permits collection of biometrics for a commercial purpose based on informed consent of the data subject.

BIPA – 2008
California Consumer Privacy Act (CCPA)
CCPA: An Overview

- Creates private right of action for companies that fail to take reasonable security measures
- Fines can be as high as $7,500 per violation
- Goes into effect in 2020, though enforcement may be delayed
CCPA and Biometrics

— Biometrics are explicitly included in the definition of PI under CCPA
  • The definition of biometrics under CCPA is arguably broader than under BIPA

— Consumer rights under CCPA:
  • Notice
  • Disclosure
  • To be forgotten
  • Access
  • Opt-out of having personal information sold
House Oversight Committee recently held a hearing on the use of biometrics in both the public and private sector (May 22, 2019)

Congress is considering bipartisan legislation requiring private companies that use biometrics to obtain consent (S. 847)
Fair Credit Reporting Act (FCRA) and Biometrics

- FCRA requires companies that use consumer reports to abide by certain rules and procedures
- Consumer reports are defined broadly and include factors such as a person’s character, personal characteristics and mode of living
- Medical information is afforded special protection under FCRA
Summer Trivia

Question: The first modern version of this was held in the summer of 1896.
A. Summer Olympics
B. Baseball games
C. Surfing Championships
D. World Series of Poker
Compliance
Road Map to Compliance - BIPA

Consent

Use

Storage

Collection
CCPA Compliance

— Track your data
  • If you collect biometric information of California residents, have a mechanism to provide rights to those individuals

— Protect your data
  • Failing to utilize reasonable security measures can lead to potential class action liability
FCRA Compliance

Distinctions make all the difference

- Are you collecting information that qualifies as a consumer report?

- Does the information come from a consumer reporting agency?

- Is it medical information?
Summer Trivia

Question: July is national what month?
A. Ice cream
B. Hot dog
C. Blueberry
D. All of the above