

Facial Recognition Suit Against Shutterfly Continues

FEBRUARY 8, 2016

The plaintiff in an ongoing litigation against Shutterfly Inc. recently sought class certification in the action he brought under the Illinois Biometric Information Privacy Act (BIPA). The suit alleges that the photo sharing website used facial recognition software to collect and store the biometric identifiers of individuals in uploaded photos without first obtaining their consent, as required by BIPA. The underlying lawsuit arose when the plaintiff, who is not a Shutterfly customer and does not have a Shutterfly account, discovered that he had been tagged in a picture on the website by a friend. He then brought suit, alleging that, through the process of storing and tagging the picture, Shutterfly recorded his facial geometric identifiers without his consent. Plaintiff's proposed class would potentially include thousands of individuals in Illinois who have been tagged in pictures on Shutterfly.

Plaintiff's recent attempt to certify a class comes on the heels of plaintiff's triumph over Shutterfly's motion to dismiss. In December 2015, a judge in the Northern District of Illinois ruled that plaintiff could proceed with his suit, finding that, although BIPA does not cover photographs and signatures, facial geometry remains within its scope. Because the complaint alleges that Shutterfly never obtained consent to record plaintiff's facial geometric profile, the judge concluded that plaintiff's cause of action could proceed under BIPA.

TIP: Although BIPA was signed into law in 2008, the suit against Shutterfly is one of many that has been filed under the law recently. These suits may be a first wave, suggesting that companies that collect photos online would be well-served to examine their collection and consent processes.

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