



Facebook's Steps Into Biometric Concrete Injury

In 2019, the United States Court of Appeals for the Ninth Circuit issued a decision in *Patel v Facebook, Inc.*¹ finding that the collection and using of facial images by Facebook was in fact violation of “concrete privacy interests.”² The Supreme Court denied cert on January 21, 2020.³

Shortly after denial of cert, Facebook agreed to a \$550 million class action settlement.⁴ However, United States District Court Judge James Donato rejected the original settlement, finding the settlement amount was insufficient. On August 19, 2020, Donato agreed to a revised settlement amount of \$650 million.⁵ This article reviews the *Patel* matter and the [Illinois Biometric Information Protection Act](#) (“BIPA”).⁶

BIPA

In 2008, the Illinois legislature passed BIPA. The act regulates the “collection, use, safeguarding, handling, storage, retention and destruction of biometric identifiers and information.”⁷

Biometric identifier is defined to include “a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry.”⁸ The law was introduced and became law in response to various stores in Chicago, including Jewel Food Stores, setting up pilot programs in Chicago to test the evolving technology for point of sale fingerprint scanners.

The act provides for the awarding of statutory damages in amounts of the greater of \$1,000 or actual damages for each negligent violation and \$5,000 or actual damages for intentional violations, plus reasonable attorney fees, litigation expenses and costs.

Following the trend of class-action lawyers seeking statutory frameworks that provide for such statutory damages, a large number of putative class actions were filed under the act beginning in 2016. In December 2016, the first settlement under the act was approved, in the case, *Sekura v. L.A. Tan*.⁹

Suits have been filed against Google, Facebook, Apple, and other platforms utilizing facial recognition software.

In addition, a number of class actions have also been filed against employers alleging violations of the act for failure to disclose to employees the storage techniques and obtaining employee consent as required by the statute.

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For example, a lawsuit was filed against Roundy's in May 2017,¹⁰ alleging that the supermarket chain requires employees to utilize a "biometric fingerprint time clock" when checking in and out of work.

The Roundy's system required employees to swipe an identification card and then also use a fingerprint to ensure that the employee logging in or out is the actual employee. The lawsuit alleges that Roundy's failed to follow the act requirements, which include:

- Informing the subject of collection of the specific purpose for which the biometric information is being collected and the period during which it will be collected, and
- Obtaining a written release from the subject of the collection consenting to such collection.

Illinois is the only state that has enacted legislation addressing biometric information that provides a private right of action against alleged offenders. While Texas and Washington have legislation similar to Illinois' act, neither permits a private right of action — only the attorney general of each respective state may initiate action against alleged violators.

Six Flags

In 2019, the Illinois Supreme Court handed down its decision in *Rosenbach v. Six Flags Entm't Corp.*,¹¹ which held that "a person need not have sustained actual damage beyond violation of his or her rights under the Act in order to bring an action under it."¹² The court noted, "Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information"¹³ and that the "violation, in itself, is sufficient to support the individual's or customer's statutory cause of action."¹⁴

Facebook

In August 2015, plaintiffs filed a putative class action in the United State District Court for the Northern District of California.¹⁵ The complaint "alleges that Facebook subjected them to facial-recognition technology without complying with an Illinois statute intended to safeguard their privacy."¹⁶ Facebook had created a new "feature called Tag Suggestions" that permits Facebook "to analyze whether the user's Facebook friends are in photos uploaded by that user."¹⁷ The class consisted of "Facebook users living in Illinois"¹⁸ who alleged violations of BIPA.¹⁹ After analyzing BIPA, the Court noted "BIPA also provides for actual and liquidated damages for violations of the Act's requirements."²⁰



Article III standing requires that a plaintiff “have suffered an ‘injury in fact’” that is “concrete”²¹ but “need not be tangible.”²² The *Patel* panel discussed the *Robins v. Spokeo, Inc.* Supreme Court decision to address statutory provisions and actual harm suffered by those seeking damages.²³ It then considered the establishment of right to privacy actions.²⁴ After doing so, the court concluded “that an invasion of an individual’s biometric privacy rights ‘has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.’”²⁵ The Court held:

“Therefore, we conclude that ‘the statutory provisions at issue’ in BIPA were established to protect an individual’s ‘concrete interests’ in privacy, not merely procedural rights.”²⁶ Citing *Rosenbach*, the court that “the plaintiffs have alleged a concrete injury-in-fact sufficient to confer Article III standing.”²⁷ Finally, with respect to the certification of the class, the court rejected Facebook’s arguments about extraterritoriality, finding that “it is reasonable to infer that the General Assembly contemplated BIPA’s application to individuals who are located in Illinois, even if some relevant activities occur outside the state.”²⁸

The 9th Circuit refused a petition for rehearing *en banc*, and the Supreme Court rejected the petition for certiorari.

Settlement Progress

Shortly after denial of cert, the parties attempted to settle the lawsuit, with Facebook offering the class \$550 million.²⁹ However, Judge Donato rejected the proposed settlement:

“[T]he Court denied plaintiffs’ initial motion for preliminary approval of the class action settlement over serious concerns about the fairness of several terms to class members and the overall adequacy of proposed relief, including the amount of damages to be paid to the victims of Facebook’s conduct.”³⁰ Facebook upped the settlement amount to \$650 million and made other changes, and Judge Donato approved the preliminary settlement.³¹ Speaking of the revised settlement amount, Judge Donato deemed it fair, finding:

“Facebook has increased the settlement fund by \$100 million, which substantially allays the Court’s concern about the potential inadequacy of payments to class members in light of BIPA’s statutory penalties. The \$650 million that will be awarded to the Illinois class is an impressive result both as an absolute number and relative to other class action settlements in privacy



cases. This is all the more true in light of the risks for plaintiffs in going to trial. As the Court has noted, if the case were to proceed to trial, it would be ‘entirely possible that Facebook will prevail and that plaintiffs will take nothing, or win a damages award far smaller than Facebook fears.’³²

The settlement also required Facebook to enhance its BIPA protections, and it gave assurances to the court that it had implemented such measures.

Conclusion

With the Facebook settlement and findings, plaintiffs likely will continue to aggressively seek relief from large defendants such as Facebook. For example, in November, a federal court in Illinois rejected efforts by defendant Apple to dismiss a class action complaint filed against it.³³ The *Patel* decision at the 9th Circuit, and subsequent settlement of the class action, find Facebook falling flat on concrete injury. Other privacy laws such as the California Consumer Privacy Act, and the recently approved Proposition 24, Consumer Personal Information Law, with robust statutory damages, will be visited for potentially large payoffs against such large tech companies. ➤

Endnotes

- 1 *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1267 (9th Cir. 2019), cert. denied, 140 S. Ct. 937, 205 L. Ed. 2d 524 (2020), available at <https://epic.org/amicus/bipa/patel-v-facebook/Patel-v-FB-9th-Cir-Opinion.pdf>.
- 2 *Patel*, p. 2.
- 3 The docket at the Supreme Court can be found at <https://www.scotusblog.com/case-files/cases/facebook-inc-v-patel/>, including the denial. The Petition for Certiorari can be found at https://www.supremecourt.gov/DocketPDF/19/19-706/124149/20191202180045158_19-%20BIPA%20Cert%20Petition%2012.2%20Final.pdf.
- 4 <https://www.blankrome.com/publications/impact-facebook-650-million-patel-bipa-settlement#:~:text=In%20early%202020%2C%20Facebook%20made.recognition%20%E2%80%9Ctag%20suggestions%E2%80%9D%20feature>.
- 5 Decision available at <https://www.courthousenews.com/wp-content/uploads/2020/08/FacebookBiometric-PrelimSETTLEMENT.pdf>.
- 6 The Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (2008).
- 7 740 ILCS 14/5 (g).
- 8 740 ILCS 14/10.
- 9 Docket can be found at https://www.bloomberglaw.com/public/desktop/document/SEKURA_KLAUDIA_v_L_A_TAN_ENTERPRISES_INC_Docket_No_2015CH16694_II?1481123411.
- 10 *Norman Baron v. Roundy's Supermarkets Inc.*, 2017CH03821.
- 11 *Rosenbach v. Six Flags Entm't Corp.*, — N.E.3d —, 2019 IL 123186 (Ill. 2019), available at <https://courts.illinois.gov/Opinions/SupremeCourt/2019/123186.pdf>.
- 12 *Id.* at ¶ 28.
- 13 *Id.* at ¶ 33.
- 14 *Id.*
- 15 Original complaint available at <https://epic.org/amicus/bipa/patel-v-facebook/Patel-v-FB-Consolidated-Class-Action-Complaint.pdf>.
- 16 *Patel*, p. 4.
- 17 *Id.* at 5.
- 18 *Id.* at 6.
- 19 *Patel*, p. 6-7.



20 *Id* at 9.

21 *Id* at 10.

22 *Patel*, p. 11.

23 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016), (*Spokeo I*) and *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (*Spokeo II*).

24 *Patel*, pgs. 13-16.

25 *Id* at 16.

26 *Id* at 18.

27 *Patel*, p. 19.

28 *Id* at 22.

29 <https://www.blankrome.com/publications/impact-facebook-650-million-patel-bipa-settlement#:~:text=In%20early%202020%2C%20Facebook%20made.recognition%20%E2%80%9Ctag%20suggestions%E2%80%9D%20feature>.

30 <https://www.courthousenews.com/wp-content/uploads/2020/08/FacebookBiometric-PrelimSETTLEMENT.pdf>.

31 *Id*.

32 *Id*.

33 See <https://www.natlawreview.com/article/bipa-lawsuit-proceeds-against-apple-federal-court>.

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