

Biometrics and Artificial Intelligence: The New Technological Frontier

5th Edition: Trends in Marketing Communications Law

Biometric Data

In recent years, more companies have adopted the use of biometric data, such as facial recognition software and applications, in their internal business operations and to analyze customer behaviors for marketing purposes. This trend has been met with substantial legal action due to the private right of action and availability of liquidated damages under some state laws. The leading domestic biometric state law, the Illinois Biometric Information Privacy Act (BIPA), triggered a surge of class action lawsuits on the collection, safeguarding or retention of biometric data, including employment-related class actions. A recent Illinois state court decision, however, may change the landscape for biometric lawsuits in 2018.

In *Rosenbach v. Six Flags Entertainment Corp.*, the court held that the plaintiffs must claim actual harm, rather than simply a technical violation, to be considered an “aggrieved person” under BIPA, signaling that courts may be looking to reign in the number of BIPA-related class actions. As the Rosenbach decision is the first of its kind, plaintiffs will likely continue to test what constitutes an “aggrieved person” under BIPA. With the increase of biometric data class action suits and companies adopting this new technology, many other states have begun to consider BIPA-like legislation. Predictably, tech companies are pushing back against these new laws.

Machine Learning and the Downside of AI

Artificial intelligence (AI) has gained popularity across all industries. Auto companies like Tesla, Uber and Waymo are developing self-driving technologies, while brands and media companies are using AI to generate content. It is estimated that over 20 million Amazon smart speakers were sold last year and, as consumers continue to embrace this new technology, usage of smart home devices is expected to grow in the United States at an exponential rate. Even the U.S. government, through the Defense Advance Research Project Agency, is dabbling in disaster relief robots and combat robots.

The increased use of these new technologies, however, has an ominous downside. While AI can help businesses become more efficient and automate work and processes, there are privacy and data security concerns to consider. For example, AI’s ability to strengthen defenses against cyber-attacks can also be used for machine-driven attacks that can locate vulnerabilities much faster than a human hacker can intrude and much quicker than a human patcher can respond.

Although not yet a primary focus of legal scrutiny, companies using AI technologies should be mindful of legal, ethical and societal implications. Major players in science and technology like Elon Musk, Bill Gates and the late Stephen Hawking have already cautioned against an unregulated world of AI, citing the potential harm to society, such as the risk of a global AI arms race. With the popularity of AI, it is only a matter of time until AI laws and regulations will be enacted.

Key Takeaways

- Companies are vying for control of biometrics and AI, the hot new technological frontiers, but like many new technologies, they come with a double-edged sword of existing and developing legal issues.
 - Companies should understand the legal implications and landscape of biometric data and other new data sources before collecting and using such data.
 - AI can help companies manage their businesses and boost their cyber defenses, but its use should be approached with caution and include appropriate data protection precautions.
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Related People

Gary Kibel

Partner

212 468 4918

gkibel@dglaw.com

Oriyan Gitig

Counsel

212 468 4880

ogitig@dglaw.com