Balancing biometric privacy and consumer litigation

By Kamran Salour

Biometrics — measurements or calculations related to human characteristics — have a seemingly infinite number of applications. One popular application is customer authentication. Companies rely increasingly on face scans, voice prints, and fingerprints to verify the identities of their customers.

The rise in biometrics-based-authentication is mutually beneficial to customers and companies alike. Customers appreciate the convenience of biometrics; using biometrics to authenticate their identities means that they no longer have to remember passwords or answer a series of security questions. Companies, in turn, value the increased protection biometric-based-authentication provides over passwords. It should come as no surprise then that biometrics are expected to become a $32.73 billion industry by 2022.

What is surprising, however, is that only three states — Illinois, Texas and Washington — have statutes dedicated to protecting consumers' biometric information. Perhaps even more surprising is that California is not one of them. In 2015, the California Legislature introduced an amendment to Civil Code Section 1798.81.5, an existing statute directed to the protection of personal information of Californians. The proposed amendment expanded that statute's definition of "personal information" to include "biometric information." The proposed amendment never passed.

The California Legislature should look to the Illinois statute, the Biometric Information Privacy Act to draft a biometric privacy statute that strikes an appropriate balance between protecting consumers' biometric information and protecting the companies that collect that information from consumer class actions intended only to exact large monetary settlements.

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One popular application is customer authentication. Companies rely increasingly on face scans, voice prints, and fingerprints to verify the identities of their customers.

BIPA has not yet accomplished this balance. Enacted in 2008, BIPA is the only one of the three existing biometric privacy statutes that allows for a private right of action, and it imposes a $1,000 minimum penalty for each violation. BIPA also contains certain ambiguities, including what biometric information is protected and when an individual has standing. Some class action attorneys have filed multi-million dollar class actions asserting repeated BIPA violations, seeking to capitalize off of these ambiguities.

BIPA defines a "biometric identifier" as a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. The act expressly excludes photographs from this definition. But it also defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." Importantly, "biometric information" does not include information derived from items excluded under the definition of biometric identifiers (i.e., photographs). BIPA's definitions of "biometric identifiers" and "biometric information" therefore create ambiguity whether "biometric information" includes information derived from digital photographs (i.e., scan of face geometry) notwithstanding BIPA's express exclusion of "photographs" from its definition of "biometric identifier."

Class action attorneys quickly sought to exploit this ambiguity and began asserting BIPA violations against companies such as Shutterfly, Facebook and Google. These lawsuits followed a similar framework: (1) BIPA requires, among other things, that a company provide notice before it collects and stores biometric information; but (2) Shutterfly, Facebook and Google captured and stored biometric information by conducting face scans of the respective plaintiffs from digital photographs without providing the requisite prior notice.

Each company moved to dismiss the respective class actions, arguing that BIPA does not protect information derived from photographs. All three were unsuccessful. *See Norberg v. Shutterfly*, 1:15-cv-05351 (N.D. Ill. June 23, 2015) (by alleging that Shutterfly used the plaintiff's personal face pattern to identify him in a photograph, the plaintiff stated a claim under BIPA); *In re Facebook Biometric Information Privacy Litigation*, 15-cv-03747-JD (N.D. Cal. May 5, 2016) (reasoning that "photographs" are better understood to mean paper photographs, as opposed to digital ones); *Rivera v. Google, Inc.*, 1:16-cv-02714 (N.D. Ill. Feb. 27, 2017) (reasoning that Google creates a set of biology-based measurements ("biometric") used to identify a person ("identifier") and a face template is a "scan of … face geometry," as defined under BIPA).

The California's Legislature's definition of "biometric information" in the failed amendment to Civil Code Section 1798.81.5, suffers from similar ambiguities. The amendment defined broadly "biometric information" as "data generated by automatic measurements of an individual's fingerprint, voice print, eye retinas or irises, identifying DNA information, or unique facial characteristics, which are used by the owner or licensee to uniquely authenticate an individual's identity." The phrase "automatic measurements" leaves open whether information derived from photographs is protected. The phrase "unique facial characteristics" can be interpreted to include non-sensitive information, thereby exposing unsuspecting companies that do not collect or store biometric information to class actions.

Until recently, it was ambiguous under what circumstances a consumer had standing to bring a BIPA claim. The act confers standing on any person "aggrieved" by a violation. It was unclear whether an individual was "aggrieved" by a violation of BIPA, or whether that individual had to also allege an injury. The Illinois Court of Appeal only recently held that the "aggrieved" statutory language requires an individual to allege that it was injured or adversely affected by a BIPA violation. *Rosenbach v. Six Flags Entertainment Corp.*, 2-17-0317, 2017 IL App (2d) 170317 (Ill. App. Dec. 21, 2017).

The California Legislature could quickly resolve any ambiguity by not allowing a private right of action, just as Texas and Washington have done. While this limitation undoubtedly precludes an influx of consumer class action attorneys filing suit, it does so at the expense of other meritorious suits. California can strike a better balance by allowing private individuals to file suit, provided however that those individuals allege that they have been "injured" by a violation. California currently requires that an individual allege injury before filing suit for a violation of Civil Code Section 1798.81.5.

Before enacting a biometric privacy statute, the California Legislature should strive to balance the optimal goal of providing comprehensive biometric privacy protection while preventing an influx of consumer class actions intended to exact large monetary settlements. Achieving that balance will require the resolution of obvious statutory ambiguities that resolve when a violations occur and who can seek redress for them.

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After 25 years, courts still wrestling with anti-SLAPP

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the litigation process to chill others' speech and petitioning activities through threats of protracted and costly litigation.

While California's anti-SLAPP statute has been in effect for 25 years, the courts continue to interpret and define its scope and contours. Here are four issues in anti-SLAPP law to keep an eye on in 2018:

What counts as a "matter of public interest" under California's anti-SLAPP statute? For cases not arising from statements connected to legislative, executive, judicial or other official proceedings or deliberations, a defendant must demonstrate that the statement or conduct in furtherance of free speech rights was made "in connection with an issue of public interest." CCP Section 425.16(e)(3) & (4).

California Courts of Appeal have interpreted the phrase "issue of public interest" differently. Many have stressed that the public interest requirement should be "construed broadly so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23 (2007). For example, in *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008), the Court of Appeal held that "'an issue of public interest' within the meaning of [the anti-SLAPP statute] is *any issue in which the public is interested*. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute — it is enough that it is one in which the public takes an interest." (Emphasis in original.)

Other courts have taken a potentially narrower view and asked whether the speech or conduct involves "a person or entity in the public eye" or "a topic of widespread, public interest," or "could directly affect a large number of people beyond the direct participants[.]" *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO*, 105 Cal. App. 4th 913, 924 (2003).

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In 2018, the California Supreme Court is poised to weigh in on what constitutes an "issue of public interest" under the anti-SLAPP statute. The court granted review with respect to that issue in *Rand Resources LLC v. City of Carson*, 247 Cal. App. 4th 1080 (2016), *review granted*, 381 P.3d 229 (Sept. 21, 2016), where the Court of Appeal followed case law taking a narrower view of what constitutes an issue of public interest. Hopefully, the Supreme Court will use this opportunity to make clear that the phrase "issue of public interest" must be interpreted broadly to comply with "[t]he Legislature's 1997 amendment of the statute to mandate that it be broadly construed." *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 (2002). That 1997 amendment came in response to a previous series of judicial decisions that had interpreted the statute too narrowly.

While California's anti-SLAPP statute has been in effect for 25 years, the courts continue to interpret and define its scope and contours. Here are four issues in anti-SLAPP law to keep an eye on in 2018.

The effect of the California Supreme Court's ruling in *Baral v. Schnitt*, 1 Cal. 5th 376 (2016) on "mixed" causes of action. Until recently, it was uncertain whether California's anti-SLAPP statute applied to so-called "mixed causes of action" that included allegations of some activity by a defendant that is covered by the anti-SLAPP statute and also other activity not covered by the anti-SLAPP statute.

For years, different California Courts of Appeal reached differing conclusions. Some courts held that an anti-SLAPP motion could be granted as to a portion of a cause of action, i.e., to strike a portion of a mixed cause of action that is premised on activity protected by the anti-SLAPP statute, while leaving the rest of the cause of action intact. However, other courts held that an anti-SLAPP motion could only be granted if it would result in the striking of an entire cause of action. Under this second line of cases, an artfully-pleaded complaint could combine allegations of both protected and unprotected activity into a single cause of action and thereby insulate the protected activities from an anti-SLAPP motion.

In *Baral*, the Supreme Court resolved this split by ruling that an anti-SLAPP motion could be granted as to a portion of a cause of action. The court cautioned, however, that anti-SLAPP motions cannot be used to strike allegations that are "merely incidental," "collateral," or "merely provide context, without supporting a claim for recovery." Going forward, trial and appellate courts will have to decide what types of allegations are so "incidental" or "collateral" as to be beyond the reach of the anti-SLAPP statute, as well as additional procedural issues related to anti-SLAPP motions targeting portions of causes of action.

Will federal courts across the country follow the 9th Circuit and apply state anti-SLAPP statutes to state law claims brought in federal court? Federal courts across the country disagree whether state anti-SLAPP statutes should apply to state law claims asserted in federal court, e.g., in diversity cases. The 9th U.S. Circuit Court of Appeals has consistently held that California's anti-SLAPP statute applies to state law claims in federal court. *See, e.g., Makaeff v. Trump Univ. LLC*, 715 F.3d 254, 261 (9th Cir. 2013). Some federal courts in other jurisdictions, including the 1st and 5th Circuits, have reached similar conclusions with regard to other states' anti-SLAPP statutes.

However, a number of 9th Circuit judges led by former Circuit Judge Alex Kozinski have criticized this rule and repeatedly urged — without success — that the 9th Circuit reverse course. In 2015, the D.C. Circuit cited Kozinski in ruling that a District of Columbia anti-SLAPP statute did not apply to state law claims in federal court because it conflicted with the Federal Rules of Civil Procedure. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015). Some litigants are now challenging *Abbas* based on a subsequent decision from the District of Columbia Court of Appeals, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), which calls into question the continued viability of *Abbas*. But, for now, *Abbas* apparently remains in effect, and some courts around the country, including a recent decision in the Northern District of Georgia, have agreed with *Abbas* and held that state anti-SLAPP statutes do not apply in federal court. While most circuits have not yet addressed the issue, many will likely need to do so, as a majority of states have enacted anti-SLAPP laws.

In 2016, the U.S. Supreme Court denied a petition for certiorari seeking review of the 9th Circuit's rule that state anti-SLAPP statutes apply to state law claims in federal court. Sooner or later, the Court may find it necessary to resolve the growing split in authority. Alternatively, the issue could be largely mooted if Congress were to pass a much-needed federal anti-SLAPP bill. In 2015, the "SPEAK FREE Act" was introduced in the House, although its passage is not imminent, at least at this time.

The effect of amendment of a complaint on defendants' anti-SLAPP motions. The anti-SLAPP statute provides that a defendant must bring its anti-SLAPP motion within 60 days of service of the complaint, unless the court finds good cause permitting the defendant to file later.

But what happens when, after 60 days have passed, the plaintiff amends its complaint? Does that reset the 60-day clock? California Courts of Appeal have split on the issue.

In *Yu v. Signet Bank*, 103 Cal. App. 4th 298, 315 (2002), the court held that it *did* reset the defendant's 60-day time limit, even as to claims included in the original complaint that the defendant did not move to strike. However, the Court of Appeal reached the opposite conclusion in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 6 Cal. App. 5th 1207, 1219 (2016). There, the court held that the filing of an amended complaint gave the defendant 60 days to move to strike *only* the new causes of action that were not alleged in the prior complaint. The California Supreme Court granted review of Newport Harbor Ventures and hopefully will resolve that split by ruling that *Newport Harbor Ventures* erred and *Yu* was correctly decided.

Another interesting 2017 decision addressed a different issue involving amendment and the anti-SLAPP statute. In *Dickinson v. Cosby*, 17 Cal. App. 5th 655, 679 (2017), the Court of Appeal held that defendant Bill Cosby's filing of an anti-SLAPP motion did not preclude plaintiff Janice Dickinson from amending her complaint to add an additional defendant: Cosby's attorney, Martin Singer. While Dickinson should not have been able to use amendment to evade Cosby's anti-SLAPP motion, the court held the anti-SLAPP statute did not prevent her from amending with respect to another defendant. Singer has filed a petition for review with the California Supreme Court, citing *Dickinson*'s conflict with prior case law limiting plaintiffs' ability to amend in the face of an anti-SLAPP motion.

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