

Patel v. Facebook, Inc.

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932 F.3D 1264 (9TH CIR. 2019)

In *Patel v. Facebook, Inc.*,¹ the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Northern District of California's decision to grant Facebook users' (plaintiffs) motion for class certification and denied Facebook's (defendant) motion to dismiss on the basis of standing.²

I. BACKGROUND

Facebook is a social network platform that allows its users to connect with each other by sending friend requests.³ When users become friends, they can share content such as text and photographs.⁴ Users can also tag their Facebook friends in photos posted to Facebook, which identifies the friend in the photo by name and includes a link to that friend's Facebook profile.⁵

In 2010, Facebook launched a "Tag Suggestions" feature.⁶ If the feature is enabled, Facebook may use facial recognition technology to analyze whether a user's friends are present in photos uploaded by that user.⁷ This technology scans uploaded photos and detects whether they contain images of faces.⁸ Then, it extracts facial geometric data points to create a face map.⁹ The face map is then compared to face templates in Facebook's database, which contains data from users that have been tagged in more than one photo and have not opted out of the Tag Suggestions feature.¹⁰ If there is a match, Facebook may suggest tagging the person in the photos.¹¹ These user face templates are stored on Facebook's servers, and neither the servers nor Facebook's headquarters are located in Illinois.¹²

Users living in Illinois brought a class action against Facebook, claiming that this face recognition technology violated sections 15(a) and 15(b) of the Illinois Biometric Information Privacy Act (BIPA).¹³ The sections require a private entity collecting, using, and storing an individual's

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1. *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019).
 2. *Id.*
 3. *Id.* at 1267.
 4. *Id.*
 5. *Id.*
 6. *Id.* at 1268.
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. *Id.*; *see also id.* n.2.
 11. *Id.*
 12. *Id.*
 13. *Id.*

biometric identifiers to notify the individual in writing and secure a written release prior to taking any action, which, according to the complaint, Facebook failed to do.¹⁴ The users also moved to certify themselves as a class under Rule 23 of the Federal Rules of Civil Procedure.¹⁵

Facebook challenged the users' standing via a motion to dismiss, but the district court denied its motion and certified the class.¹⁶ Facebook timely appealed this decision.¹⁷

II. ANALYSIS

The Ninth Circuit reviewed the district court's decision *de novo*.¹⁸ The appeal involved two main issues: (1) whether the users have standing to sue Facebook, and (2) whether the district court abused its discretion by certifying the class action.¹⁹

As for the first issue, a plaintiff that has standing to sue must have suffered an "injury in fact," which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.²⁰ The Ninth Circuit considered both history and legislative judgement to determine whether the users have suffered a sufficiently concrete injury.²¹

The court adopted a two-step approach to decide whether the users' injury arose from Facebook's failure to comply with BIPA.²² First, the court asked whether the statutory provisions at issue were established to protect concrete interests as opposed to purely procedural rights.²³ The disputed right in this case was the right to privacy, which has been long recognized as a common law basis for suit.²⁴ Moreover, the Supreme Court, in a recent decision, has recognized that advances in technology can increase the potential for unreasonable intrusions into personal privacy.²⁵ Following these precedents, the Ninth Circuit concluded that an invasion of an individual's biometric privacy rights is closely related to the traditional harm to the right to privacy because they both encompass an individual's control of his or her personal information.²⁶

Applying this to the instant case, the court found that the facial biometric data collected by Facebook could be used to identify an individual.²⁷ Such development of a face template without user consent under

14. *Id.* at 1268-69; *see also id.* at 1268 n.3.

15. *Id.* at 1269.

16. *Id.* at 1269-70.

17. *Id.* at 1270.

18. *See id.* at 1270, 1275.

19. *See id.*

20. *Id.* at 1270.

21. *Id.*

22. *Id.* at 1270-71.

23. *Id.* at 1270.

24. *Id.* at 1271.

25. *Id.* at 1272 (citing *Carpenter v. U.S.*, 138 S.Ct. 2206, 2214-15 (2018)).

26. *Id.* at 1273.

27. *Id.*

BIPA's requirement invades an individual's private affairs.²⁸ Thus, BIPA protects an individual's concrete interest in privacy.²⁹

The court then turned to the second inquiry: whether a violation of BIPA actually harms or presents a material risk of harm to the interests in privacy. To address this question, the court aligned with the Illinois Supreme Court on the position that the protections offered by BIPA are crucial in the digital world, because a private entity's failure to comply may result in the loss of an individual's biometric privacy.³⁰ In other words, Facebook's alleged collection, use, and storage of users' face templates was the very same substantive harm targeted by BIPA.³¹ Subsequently, the Ninth Circuit concluded that the users' allegation satisfied the court's two-step inquiry and showed concrete and particularized harm that was sufficient to confer standing.³²

The court then moved on to address the second main issue of this case and to review whether the district court abused its discretion by certifying the class action.

As for this issue, Facebook urged that a Rule 23(b)(3) motion should not be granted because there were no questions of law or fact common to class members predominating over any questions affecting only individual members,³³ and a class action would not be superior to other available methods in terms of fairness and efficiency.³⁴ Facebook contended that BIPA bears no expressive intent to provide a cause of action against conduct that occurred extraterritorially.³⁵ Since Facebook's collection and use of biometric data occurred outside Illinois, the question of whether the cause of action arises "primarily and substantially" from events within Illinois remained undecided for the district court.³⁶ In other words, the common questions did not predominate, thus the district court erred in certifying the class action.³⁷ Additionally, Facebook argued that a class action for this case might pose great difficulties for the court to manage, and that a possibly enormous award of statutory damages defeated superiority.³⁸

The Ninth Circuit disagreed with Facebook's arguments. Recognizing that BIPA, on its face, does not clarify where a violation occurs in the matter of Facebook's collecting facial recognition data, the court described two potential scenarios. If violation of BIPA occurred when individuals used Facebook in Illinois, there was no need to show a "primary and substantial" event due to the domicile of the users. If violation occurred when Facebook created face templates on its servers, the district court could try the issue of

28. *Id.*

29. *Id.*

30. *Id.* at 1274.

31. *Id.* at 1275.

32. *Id.*

33. *Id.*

34. *Id.* at 1276.

35. *Id.* at 1275.

36. *Id.* at 1275-76.

37. *Id.*

38. *Id.* at 1276.

extraterritoriality.³⁹ Nevertheless, neither of the scenarios automatically defeated predominance, and the district court could have come up with a conclusion consistent with this existing decision.⁴⁰

The court also turned down Facebook's argument as to superiority. It looked into the legislative intent of BIPA to determine whether the potential for enormous liability could justify a denial of class certification.⁴¹ However, the court found nothing in the text or legislative history of BIPA intending a cap for statutory damages, and to deny class certification on these grounds would "subvert legislative intent."⁴² Thus, the court held that the district court also did not abuse its discretion in determining that a class action is superior to individual actions.⁴³

III. CONCLUSION

In sum, the Ninth Circuit concluded that the users sufficiently alleged concrete injury-in-fact and thus had standing,⁴⁴ and that the district court did not abuse its discretion in determining that the predominance superiority requirement for class certification was met.⁴⁵ Therefore, the court affirmed the district court's decision.⁴⁶

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1276.

43. *Id.* at 1277.

44. *Id.* at 1275.

45. *Id.* at 1275-76.

46. *Id.* at 1277.