Speakers

Paul Karlsgodt
Partner – Denver
pkarlsgodt@bakerlaw.com
303.764.4013

Melinda L. McLellan
Partner – New York
mmclyellan@bakerlaw.com
212.589.4679

Melissa A. Siebert
Partner – Chicago
msiebert@bakerlaw.com
312.416.6212
Agenda

• Overview of Biometrics
  – Definitions and applications
  – Existing laws
  – Biometrics in the news

• Consumer Litigation

• Illinois’ BIPA Litigation Surge
Terminology

• **Biometric information vs. biometric identifiers**
  – Information can be almost any physiological data, but it does not necessarily identify an individual (e.g., height, weight, blood pressure)
  – Identifiers are a subset: unique biological characteristics that can be used to distinguish individuals (e.g., fingerprints, retinal scans, genetic data)
  – May be stored in other formats

• Definitions vary by law and context, and are evolving

• Increasingly sophisticated technology blurs the lines – what was once merely “information” may soon be an “identifier”
Example: BIPA Definitions

“Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening. (emphasis added)

“Biometric information” means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.
Biometric Tech in Action

• Law enforcement and security purposes
• Commercial applications
  – Authentication
  – Marketing
  – Enhanced user experience
  – Athletic tracking
• Personal use (the “quantified self”)
• Recently: Google’s Arts & Culture App
State Laws

- **Illinois** 740 ILCS 14 – Biometric Information Privacy Act (2008)
- **Texas** BUS & COM § 503.001 – Capture or Use of Biometric Identifier (2009)
- **Washington** RCW 19.375 – Biometric Identifiers (2017)
- Some states have limited laws applicable to certain types of entities or identifiers
- Multiple states have proposed laws
Why Google’s New App Won’t Match Your Face to Art in Some States

Popular selfie tool in Arts & Culture app is blocked in Illinois and Texas because of privacy laws

Russian Hackers Could Potentially Be Stealing Your Biometric Data

A French company secretly included Russian code in biometric analysis software used by the FBI, other U.S. agencies and thousands of other U.S. law enforcement agencies.

Experts sound alarm as biometric data from drivers’ licences added to government database

Breach of India’s Biometric Database Puts 1 Billion Users at Risk

The Tribune reports that hackers gained access to users’ names, addresses, phone numbers, and other PII.
Consumer Litigation

Key issues, generally:

Can a plaintiff recover statutory damages for pure procedural violation?

- State courts – question hinges on whether “liquidated” damages are available and whether plaintiff is “aggrieved” when alleged injury is purely procedural.

Is there a privacy interest in biometric data such that the mere appropriation is damage in and of itself?

- Is there a market for the information?

Is an encrypted, mathematical representation of biometric data really biometric data itself?

- Illinois statute includes information “derived” from biometric data.
Consumer Litigation

Facial recognition cases (Illinois BIPA):

Is facial recognition data “biometric” information even if it comes from a photograph?

- *In re Facebook Biometric Information Privacy Litigation*, 185 F. Supp.3d 1155 (2016)

Fingerprint cases (Illinois BIPA)

Can plaintiff recover liquidated damages under the statute for mere procedural violation of the statute?

- *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317 (No relief available for a person who is not “aggrieved”)
Consumer Litigation

Breach of biometric information

- Impact on future injury analysis unclear – Is standing/injury threshold lower when information is something that uniquely identifies a person and can never be changed?

Genetic information (Alaska)

- Alaska Genetic Privacy Act, Ak. St. § 18.13.010 et seq.
- Written notification requirements similar to BIPA
- Huge statutory damages available - $100,000 per violation if the defendant profited from the use of genetic information
  - *Cole v. Gene by Gene, Ltd.*, Case No. 1:14-cv-00004-SLG (D. Ak.)
Illinois’ BIPA Litigation Surge

- Why BIPA is a Hot Topic
  - Statutory damages
  - Attorneys’ fees
  - Key terms undefined/untested
Illinois’ BIPA Litigation Surge

• How Big is BIPA?
  – 60+ BIPA class actions filed
  – Focus on data privacy in workplace
  – Large # of potential plaintiffs
  – Surprise Factor
Illinois’ BIPA Litigation Surge

- The “Face” of BIPA Litigation
  - Few dispositive rulings
  - Actual injury Issues
  - Removal/remand
  - The technology itself
  - Substantial compliance
Illinois’ BIPA Litigation Surge

- Is There a “Quick Fix”
  - Policy implementation issues
  - Class action waiver
  - General waivers
  - Settlement difficulties
Questions & Answers

Paul Karlsgodt
Partner – Denver
pkarlsgodt@bakerlaw.com
303.764.4013

Melinda L. McLellan
Partner – New York
mmclellan@bakerlaw.com
212.589.4679

Melissa A. Siebert
Partner – Chicago
msiebert@bakerlaw.com
312.416.6212