

Profs, 1st Amendment Clinic Side With Facial Data Co. In Suit

By **Diamond Naga Siu**

Law360 (July 27, 2021, 10:22 PM EDT) -- The First Amendment Clinic at Duke Law and two law professors backed Clearview AI in an Illinois federal court suit, arguing that the First Amendment protects the facial recognition company's practice of extracting biometric data from online images of people's faces.

The suit opened by Illinois residents is just one of many against Clearview targeting its use of technology to scour the internet for facial images to extract biometric data from for its facial recognition database, which is marketed to for-profit companies and law enforcement agencies.

Floyd Abrams of Cahill Gordon & Reindel LLP — a veteran of multiple landmark First Amendment trials, including his winning defense of The New York Times in the Pentagon Papers case — has joined as counsel for Clearview, and in a phone interview with Law360 on Tuesday he discussed this case's First Amendment implications.

The Duke Law clinic, Jane Bambauer of the University of Arizona and Eugene Volokh of UCLA wrote in their joint Monday amicus brief that Clearview did not violate the state's Biometric Information Privacy Act because the First Amendment's freedom of speech protections extend to the collection of freedom of speech expressions: researching, gathering information and more.

"Using machine learning, Clearview analyzes the publicly available images it has collected and produces faceprints. The process of analyzing and creating a faceprint is equivalent to the creative processes that unavoidably precede expressive activity," the clinic and law professors wrote.

"BIPA, as applied to the creation of faceprints, is a speech restriction because information gathering, analysis and creation are protected by the First Amendment. ... Protecting the creative process is tantamount to protecting the end product; the speech right is meaningless without protection for the production of that speech," they added.

Bambauer elaborated in an emailed statement to Law360 that the development and utilization of facial recognition technology should be monitored and that legal restrictions should be imposed on harmful uses of the technology, but that BIPA is overstepping.

"It effectively prohibits the creation of faceprints, whether they will be used by police for identifying a criminal suspect, by companies like Facebook for auto-tagging photographs, or even by photo programs that help users organize their own snapshots," Bambauer wrote.

She took aim at the American Civil Liberties Union, which also filed as amicus.

"While the plaintiffs and the ACLU claim that BIPA is only an incidental burden on speech, it's obvious that the design and very goal of the law is to interfere with a person or company's ability to create new information and to organize existing, publicly available information. It is therefore a direct burden on speech, and cannot be justified by fear of the unknown," she added.

Abrams told Law360 that Bambauer and Volokh are two leading First Amendment experts and said they clearly laid out how the guise of privacy should not eclipse the expansive reach of First Amendment rights.

"One of the most important themes is that the First Amendment is not a narrow document and that it ought not to be interpreted narrowly, and it's easy for some of our opponents to simply dismiss First Amendment arguments — and they try to do that," Abrams said. He noted, however, that the U.S. Supreme Court has held that creating and disseminating information is protected under the First Amendment.

"Their joint view of what Clearview does — the comparison of photographs from the public internet to photos provided by law enforcement — is fully protected by the First Amendment," he added.

This case is a consolidation of six New York federal court suits and three Illinois federal court suits that all targeted Clearview's data-scraping practices — the Judicial Panel on Multidistrict Litigation centralized the cases in December.

The residents are currently trying to get a court to block Clearview from continuing with its practices, but the artificial intelligence company **argued in May** that the residents lack standing to sue them without proof that its business practices have harmed them or threatened to harm them.

Later in May, the plaintiffs **added an emergency request** for the judge to change its preliminary injunction request to a temporary restraining order after they learned through the Clearview general counsel's deposition that it had formed subsidiaries in Panama and Singapore positioned to provide its software to other countries, including the United States.

The request was jointly dropped late that month, after Clearview promised not to transfer any biometric data related to Illinois residents until the judge ruled on the preliminary injunction request.

U.S. District Judge Sharon Johnson Coleman rejected the motion for a preliminary injunction in June, finding for Clearview's arguments that the possibility of harm does not meet the bar for the residents' request.

Counsel for the plaintiffs did not respond to requests for comment by time of publication Tuesday.

Scott Drury of Loevy & Loevy serves as interim lead counsel for the Illinois residents.

Clearview is represented by Jenner & Block LLP.

The case is In re: Clearview AI Inc. Consumer Privacy Litigation, case number 1:21-cv-

00135, in the U.S. District Court for the Northern District of Illinois.

--Editing by Rich Mills.

All Content © 2003-2021, Portfolio Media, Inc.