Shutterfly User Must Arbitrate Ill. Biometric Privacy Claim

By **Lauraann Wood**

Law360 (May 15, 2020, 8:03 PM EDT) -- An Illinois federal judge said Friday that a Shutterfly user must arbitrate her accusations that the photo publishing service unlawfully stored biometric data from its facial-recognition technology, even though the company unilaterally amended its arbitration clause after she sued.

U.S. District Judge Mary Rowland said Vernita Miracle-Pond's proposed class biometric privacy claims should be held to Shutterfly's 2015 arbitration clause because the terms she initially accepted in 2014 included a provision allowing it to post revisions on its website "from time to time." That change-in-terms provision was valid, and Miracle-Pond's continued use of its service after the update constitutes her acceptance of it, the judge said.

Miracle-Pond argued that she couldn't agree to a new arbitration provision for which she hadn't received notice, but Judge Rowland said Illinois Supreme Court authority rejects that assertion.

"On the contrary, when parties agree in advance to allow unilateral modifications to the terms of their contract, subsequent modifications are binding regardless of whether the other party later 'accepts' the change," she said.

Shutterfly added an arbitration clause to its terms of use in 2015 and has included one in every update since. Three months after Miracle-Pond and Samantha Paraf launched their suit under the Illinois Biometric Information Privacy Act, Shutterfly sent an email alerting users to its latest terms update and notified them that they'd be required to individually arbitrate claims against the company unless they closed their accounts within a month.

Miracle-Pond blasted the email as an improper attempt to apply its arbitration clause to her claims retroactively. But Shutterfly urged Judge Rowland to reject that stance in March, saying the company had simply updated an existing arbitration clause that already covered Miracle-Pond's claims.

Judge Rowland sided with Shutterfly on the issue. The court already rejected Miracle-Pond's argument that she hadn't agreed to the company's arbitration clause before filing suit in June, finding she's bound by the 2015 addition to Shutterfly's use terms, the judge said.

"She accordingly agreed to arbitrate her claims in 2015 — well before she filed this lawsuit," the judge held. "The Court declines to address this argument any further."

Miracle-Pond, who holds a Shutterfly account, and Paraf, who does not, claim in their suit that the company uses its facial recognition technology on "each and every face appearing in each and every photo" uploaded to its site and stores the biometric data it collects, regardless of whether that person is a registered user on its site.

They say the company made no effort to obtain consent to start collecting information through the technology, which was introduced in 2013. It works by scanning the unique contours of people's faces, "all without ever informing anyone of this practice," and either suggests a user tag for a recognized individual or asks whether the user would like to name an unrecognized one, according to the suit.

Shutterfly launched its bid to force Miracle-Pond to arbitrate her claims the same day it asked Judge Rowland to toss both plaintiffs' claims, arguing the statute excludes liability over information derived from online photographs. Judge Rowland's Friday order pressed pause on Shutterfly's dismissal bid pending the outcome of arbitration.

Representatives for Shutterfly declined to comment Friday, and representatives for Miracle-Pond and Paraf did not immediately respond to a request for comment.

Miracle-Pond and Paraf are represented by Henry Kelston and Tina Wolfson of Adhoot & Wolfson PC, Katrina Carroll and Kyle Shamberg of Carlson Lynch LLP, and David Milian of Carey Rodriguez Milian and Gonya LLP.

Shutterfly is represented by Lauren Goldman and Matthew Provance of Mayer Brown LLP.

The case is Vernita Miracle-Pond et al. v. Shutterfly Inc., case number 1:19-cv-04722, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Rachel Stone. Editing by Breda Lund.

Correction: An earlier story misstated when Shutterfly introduced its arbitration clause. The error has been corrected.