Davis Polk

IP & Tech Transactions Update - June 2021

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Below is our latest report on developments in IP, data privacy and cybersecurity law. In this issue, we discuss, among other things, a variety of recent IP-related court decisions as well as cases that will be decided by the Supreme Court this term and the passage of the Virginia Consumer Data Protection Act.

This periodic update is provided by Davis Polk's IP & Tech Transactions group and IP Litigation group.

Notable Developments

Supreme Court sides with Google in decade-long copyright battle against Oracle

On April 5, 2021, the U.S. Supreme Court issued a long-awaited decision in *Google LLC v. Oracle America, Inc.*, holding that Google's copying of certain portions of Oracle's Java SE API code constituted fair use as a matter of law. While the Court noted that "in reaching this result, the Court does not overturn or modify its earlier cases involving fair use," the Court's decision nonetheless will have significant ramifications for the software industry and, potentially, for copyright holders more broadly.

A copy of Davis Polk's memorandum on this decision can be found here.

Supreme Court preserves *inter partes* review in *United States v. Arthrex, Inc*.

On June 21, 2021, the Supreme Court found the administrative patent judges of the Patent Trial and Appeal Board to be unconstitutionally appointed but fashioned a tailored remedy by making their determinations reviewable by the Director of the Patent and Trademark Office. The decision in the closely watched case keeps the *inter partes* review process largely intact, although it remains to be seen how the Director will use the new review power.

A copy of Davis Polk's memorandum on this decision can be found here.

Supreme Court hears case on future of the assignor estoppel doctrine

On April 21, 2021, the Supreme Court heard oral argument for *Minerva Surgical Inc. v. Hologic Inc.*, in which Minerva Surgical Inc. (Minerva) asked the Court to abolish or narrow the doctrine of assignor estoppel.

The doctrine of assignor estoppel prevents a party who assigned a patent to another party, or who is in privity with an assignor of a patent, from later challenging the validity of the assigned patent in district court. The case centers on Csaba Truckai, who co-founded NovaCept Inc. (NovaCept) and patented certain inventions relating to the treatment of abnormal menstrual bleeding (the Truckai Patents). Mr. Truckai assigned his interest in the Truckai Patents, including all continuation patent applications, to NovaCept, and through a series of mergers, such patents came to be owned by Hologic Inc. (Hologic). Mr. Truckai left NovaCept and in 2008 founded Minerva. In November 2015, Hologic sued Minerva in the U.S. District Court for the District of Delaware alleging that Minerva's Endometrial Ablation System infringed certain claims of two patents that were continuations of the Truckai Patents. In addition to asserting an invalidity defense at the district court, Minerva also filed petitions for *inter partes* review at the PTAB challenging the patentability of the asserted claims.

Hologic moved for summary judgment at the district court, arguing that the doctrine of assignor estoppel bars Minerva from challenging the validity of the patents in district court. The district court granted Hologic's motion with respect to both patents, finding that Truckai is in privity with Minerva. While the case was progressing in the district court, the PTAB ruled in an *inter partes* review proceeding that one of the relevant patents was invalid as obvious, a decision that the Federal Circuit affirmed. The district court case proceeded to a jury trial and Hologic won a damages award of approximately $5 million. Both parties appealed the district court's decision to the Federal Circuit.

In April 2020, the Federal Circuit affirmed the district court's decisions and upheld the doctrine of assignor estoppel. However, relying on the language of the 2011 Leahy-Smith America Invents Act (the AIA), which states that "a person who is not the owner of a patent" may file a petition for an *inter partes* review, the Federal Circuit ruled that the assignor estoppel doctrine only applies in district court, and does not apply to *inter partes* review proceedings at the PTAB.

Minerva and Hologic appealed, and the Supreme Court granted certiorari on the question of whether the doctrine of assignor estoppel should be abrogated. The Supreme Court did not, however, take up Hologic's cross-petition, which asked the Court to overturn the Federal Circuit's holding that the doctrine does not apply to *inter partes* review proceedings at the PTAB.

Minerva argued in its petition that the effect of the doctrine is to let "bad patents stand and frustrate legitimate competition." In its briefs and oral argument, Minerva also argued that even if complete abandonment of assignor estoppel is infeasible, the doctrine should not apply when (i) the patent was issued after assignment, (ii) the defense of invalidity depends on an analysis of the fit between the patent specification and the asserted claims, rather than on facts uniquely available to the inventor, or (iii) the assignor made no affirmative representation about validity. Hologic, on the other hand, argued that the assignor estoppel doctrine can be neither abolished nor narrowed without contradicting judicial precedent on the matter. It further argued that the doctrine serves the objectives of patent law because it "increases the value" of inventions, "supports good faith and fair dealing in every commercial transaction" and "encourages innovation" by forcing an inventor to continue "creating new products that do not infringe his original invention" instead of trying to "persuade courts that what he sold was actually worthless." Oral argument on April 21 largely focused on how assignor estoppel might continue to apply in a narrower set of circumstances, rather than on completely abolishing or maintaining the doctrine.

Ultimately, even if the Supreme Court upholds the assignor estoppel doctrine for district court proceedings, given the Court's decision to not grant certiorari on the question, assignors would still have an avenue for challenging the validity of patents they have assigned through *inter partes* review proceedings at the PTAB, limiting the impact of the decision. Alternatively, should the Supreme Court abolish the doctrine, such an outcome could increase validity challenges and affect the structure of asset purchase agreements, patent assignment agreements, and invention assignment agreements with employees and contractors. The Supreme Court is expected to rule on this case in the coming weeks.

The Federal Circuit's opinion can be found here. The transcript of the oral argument before the Supreme Court can be found here.

Supreme Court asks acting U.S. Solicitor General to submit brief on dispute over patentability of natural phenomena

On December 28, 2020, American Axle & Manufacturing, Inc. (American Axle) petitioned the Supreme Court to review the Federal Circuit's decision in American Axle's patent infringement case against NeapCo Holdings LLC (NeapCo). In a split 6-6 decision, the Federal Circuit declined to review a panel decision affirming a decision of the U.S. District Court of the District of Delaware that American Axle's vehicle driveshaft patent was invalid because it was based on a natural phenomenon. The Federal Circuit panel and District Court's decisions were both grounded in the Supreme Court's precedent from *Mayo v. Prometheus* (2012) and in *Alice v. CLS Bank* (2014), in which the Court held that patents related to natural phenomena must exhibit an "inventive concept" to be eligible.

In this case, American Axle's patent, U.S. No. 7,774,911 (the '911 Patent), involves a method of reducing driveline vibrations through a vehicle's shaft assembly, the purpose of which is to reduce noise heard by drivers and passengers. The '911 Patent claims to improve the method of dampening these driveline vibrations. Specifically, American Axle argues its patent exhibits an inventive concept by tuning the mass and stiffness of liners inserted into shaft assemblies so that they match the frequencies of driveline vibrations.

However, U.S. District Court Judge Leonard P. Stark's decision, which was affirmed by the Federal Circuit, applied the Supreme Court's framework from *Mayo* and *Alice* to find American Axle's driveshaft patent did not exhibit an inventive concept. The panel reasoned that the '911 Patent "simply requires the application of Hooke's law [— a natural law of physics describing the relationship between an object's mass, stiffness, and frequency of vibration —] to tune a propshaft liner to dampen certain vibrations." Judge Kimberly A. Moore, who dissented from the panel's majority decision, argued the majority applied a stricter version of the Supreme Court's eligibility framework and that its decision was inconsistent with the Supreme Court's precedent.

The dissenting judges in the Federal Circuit's decision not to review *en banc* argued that the panel's decision was based on an overbroad understanding of ineligibility and that it could call into question the validity of other patents that involve natural phenomena. American Axle's petition to the Supreme Court, and numerous amicus briefs in support of its petition, argue the patent system requires guidance from the Court, with the twelve judges of the nation's patent court, the Federal Circuit, split evenly on the issue. On May 3, 2021, having already received ten amicus briefs, the Court invited the Acting U.S. Solicitor General to submit a brief stating the view of the United States on the matter. The Supreme Court has not yet granted American Axle's petition.

The Federal Circuit's split 6-6 decision denying a rehearing *en banc* can be found here.

Ninth Circuit provides guidance on particularity requirement in trade secret misappropriation cases

In trade secret misappropriation cases, before a court can rule on the issue of whether trade secrets have been misappropriated, the court must first identify the alleged trade secrets and determine if they are protectable. Courts typically place the burden on the plaintiff to establish that it is the owner of a valid trade secret, and the plaintiff is generally required to identify an allegedly misappropriated trade secret with sufficient particularity to overcome a motion for summary judgment. In October 2020, the Ninth Circuit addressed the "requisite particularity" standard in *InteliClear, LLC v. ETC Global Holdings, Inc.*, where the court found that the plaintiff alleging trade secret misappropriation could survive a motion for summary judgment and proceed to discovery because it had identified at least one trade secret with sufficient particularity to create a triable issue, even if additional or more specific trade secret identifications could be determined as discovery progressed.

Plaintiff InteliClear, LLC (InteliClear) developed a securities tracking database, which it licensed to defendant ETC Global Holdings, Inc.'s (ETC) predecessor and later subsidiary in 2008 pursuant to a software license agreement that was assigned to ETC in 2012. In 2017, ETC sent InteliClear a notice of termination of the software license agreement and certified in March 2018 that the InteliClear system had been removed from all ETC servers. Before terminating the software license agreement, ETC had begun building its own securities clearing software and later deployed its own electronic trading system. The architect of the InteliClear system noticed a number of similarities between InteliClear's system and ETC's new system and, following a forensic analysis that identified "abundant evidence" that elements of the ETC system were identical to those in the InteliClear system, InteliClear filed suit against ETC in the U.S. District Court for the Central District of California alleging, among other things, misappropriation of trade secrets under the Defend Trade Secrets Act and California Uniform Trade Secrets Act. The day after discovery began, ETC moved for summary judgment on InteliClear's trade secret misappropriation claims. The motion argued that InteliClear had not identified its trade secrets with sufficient particularly, and the district court granted it.

On appeal, the Ninth Circuit reversed the district court's ruling, finding that there existed a genuine issue of material fact as to whether InteliClear identified its trade secrets with sufficient particularity. The Ninth Circuit found that "a reasonable jury could conclude that the uniquely designed tables, columns, account number structures, methods of populating table data, and combination or interrelation thereof" InteliClear had identified were protectable trade secrets. Notably, the court found that, prior to discovery, it was not fatal that InteliClear left open the possibility of expanding its trade secret identifications later.

This decision suggests that a plaintiff can survive a motion for summary judgment if it can identify at least one trade secret at issue with reasonable particularity, even if more specific identification of that secret, and identification of other secrets, may yet be obtained through discovery. Accordingly, defendants moving for summary judgment should consider when during the course of the litigation to assert such a motion, as plaintiffs may be given more leeway to meet the particularity standard if discovery has not yet commenced.

The Ninth Circuit opinion can be found here.

Federal courts poised to clarify copyright reversion rights

A number of pending cases in various federal courts may soon further clarify the scope of authors' reversion rights under U.S. copyright law. Under certain conditions, the author of a copyrightable work may elect to terminate prior transfers or licenses of their copyright to others and regain control of such rights. For works made on or after January 1, 1978, an author may exercise such reversion rights within a five-year time frame from 35 to 40 years after transferring or licensing the applicable copyright, subject to certain advance notice requirements. Works made before January 1, 1978 are subject to equivalent rights with slightly different timelines and mechanics.

Although such reversion rights cannot be contracted away, in practice, authors often choose to renegotiate, rather than terminate, their agreements with transferees or licensees because of the various limitations on reversion under U.S. copyright law.

One such limitation is that derivative works may continue to be utilized by the grantee under the terms of the original transfer or license grant, even after the reversion of the underlying copyright. A case currently pending in the Southern District of New York, *The Phillies v. Harrison/Erickson, Inc.*, has brought attention to this derivative works exception. In 2019, the Philadelphia Phillies baseball team sued consultants commissioned by the Philadelphia Phillies to create the team's "Phillie Phanatic" mascot, who are seeking to exercise their reversion rights to terminate their grant of copyright in the mascot, in an attempt to prevent the consultants from exercising their termination right. In early 2020, when this dispute was already pending, the Philadelphia Phillies released a new Phillie Phanatic costume featuring several updated design elements. The consultants have argued that this redesign was a bad-faith attempt to allow the Philadelphia Phillies to continue to use the same mascot as part of the derivative works exception to reversion rights, even if the copyright reverts to the consultants. Both parties have filed motions for summary judgment, opening the door for a decision addressing the boundaries of the derivative works exception.

Another limitation under the reversion rights doctrine is that reversion rights do not apply to works made for hire. Under U.S. copyright law, authorship of a work vests either in the party who actually creates the work, or in an employer or other party for whom the work was prepared—i.e., a work made for hire. In 2018, the District of Connecticut ruled in *Horror Inc. v. Miller* that Victor Miller, author of the screenplay for "Friday the 13th," did not write the screenplay as a work made for hire, entitling him to exercise his reversion rights. While Horror Inc. argued that writers should be considered employees of studios and production companies, the District of Connecticut followed traditional agency principles set forth in Second Circuit precedents to arrive at its determination that Miller did not create his screenplay as an employee within the scope of his employment. The Second Circuit is expected to rule on an appeal of the district court's decision, potentially leading to significant ramifications for similarly situated parties.

Lastly, the Southern District of New York recently clarified another limitation on reversion rights. In *Waite et al. v. UMG Recordings Inc*., one of two class action suits centered around artists' reversion rights brought by a group of musical artists against major music companies, the district court ruled that reversion rights may be exercised only by individuals. Musical artists commonly assign their copyrights to record labels via distinct corporate entities, or "loan-out companies," for tax purposes, but the court held that reversion rights exist only if authors themselves, rather than corporate entities, execute their original grants. This case is currently paused for mediation and potential settlement discussions. However, if no agreement is reached between the parties, the case will resume proceedings this June.

Reversion rights have not been commonly litigated historically. As such, the outcomes of these pending cases have the potential to impact industry practice.

USPTO argues artificial intelligence systems are not inventors

The proliferation and advancement of systems and machines embodying artificial intelligence (AI) have brought about a challenge to the interpretation of "inventor" under U.S. patent law. The Patent Act, as amended by the AIA, confers patentability to inventions meeting certain statutory requirements, including requirements for inventorship. The Patent Act states that "whoever invents or discovers any new and useful [invention] may obtain a patent therefor" and the AIA, in particular, amended the Patent Act to state that an "inventor" is "the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention." The USPTO has interpreted the term "inventor" as being restricted to natural persons or human beings. However, Dr. Stephen Thaler created an AI system that independently invented the subject matter of two U.S. patent applications, which were rejected by the USPTO, along with numerous corresponding patent applications that remain pending worldwide.

In 2018, Dr. Thaler, a physicist and CEO of Imagination Engines, Inc., developed an AI paradigm named Device for the Autonomous Bootstrapping of Unified Sentience (DABUS), which he programmed to be a "creativity machine." Utilizing a "series of neural networks that were trained with general information," DABUS was able to autonomously create a beverage container and light beacon "for attracting enhanced attention," for which Dr. Thaler filed patent applications naming DABUS as the inventor. While Dr. Thaler was named as the assignee of and applicant, the USPTO identified each application as incomplete and issued procedural notices for Dr. Thaler to identify the inventor. Dr. Thaler filed petitions to vacate the notices. The USPTO denied the petitions on the basis that current statutory language and Federal Circuit jurisprudence only allow for natural persons or human beings to qualify as inventors. The USPTO further noted that "there is no law that confers on an AI system any rights to own property."

In August 2020, Dr. Thaler filed suit challenging the USPTO's decisions, primarily on public policy arguments. Under the Administrative Procedure Act (APA), the District Court may "set aside" an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Dr. Thaler argues that the USPTO violated the APA, and that "allowing machines to be inventors would be consistent with Congress' stated goal in promulgating the Patent Act to encourage innovation." Moreover, Dr. Thaler noted that "Congress had not seriously considered autonomous machine invention before limiting inventorship to individuals," and argued that the USPTO should consider adjusting its definition in order to further the spirit of innovation underlying Congress' intentions. Both Dr. Thaler and the USPTO filed motions for summary judgment in early 2021 in the Eastern District of Virginia. The parties argued their respective motions during a hearing held on April 6, 2021.

The law of intellectual property rights for AI-created inventions remains nascent and will likely continue to develop. The district court's decision may clarify whether, under current law, AI or the owners of the relevant AI may own intellectual property rights in such inventions. If AI-created inventions are found to be unpatentable, applicants may choose to keep them confidential rather than publicly disclose them in patent applications. Alternatively, if AI-created inventions are found to be patentable, there may be an increase in the use of AI for creating inventions, which may require reconsideration of the legal pillars of patent law such as invention conception, nonobviousness, and ordinary skill in the art.

Dr. Thaler's complaint can be found here, and the USPTO's memorandum of law in opposition to Dr. Thaler's motion for summary judgment can be found here.

Passage of the Trademark Modernization Act amends the Lanham Act

The Trademark Modernization Act (the TMA), which was signed into law on December 27, 2020 through the Consolidated Appropriations Act, amends the Lanham Act in a number of ways, including (i) clarifying the evidentiary burden to obtain injunctive relief in trademark infringement litigation, (ii) establishing new procedures for cancelling fraudulent trademark registrations and (iii) changing certain procedures in trademark prosecution before the USPTO.

As a result of the Supreme Court's decision in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006), U.S. appellate courts were divided on whether harm could be presumed or if the strict four equitable factors needed to be weighed every time injunctive relief was requested. The TMA clarifies this ambiguity by explicitly allowing a presumption of irreparable harm in trademark infringement actions. But the presumption is rebuttable: although the court may presume irreparable harm, the accused party may still submit evidence to overcome that presumption.

The TMA also created two new *ex parte* post-registration procedures to cancel unused trademark registrations: (1) expungement, which allows a trademark registration to be challenged on the basis that the trademark was never properly used in commerce under the new Section 16A of the Lanham Act, and (2) *ex parte* reexamination of trademark registrations that were not in use in commerce prior to the relevant registration date under the new Section 16B of the Lanham Act. Petitions under the expungement procedure must be brought between three and ten years after the applicable registration date. Petitions under the reexamination procedure must be brought within the first five years after the applicable trademark registration date; such petitions are generally directed at registrations where a questionable specimen showing use in commerce of the trademark was submitted during examination of the underlying application.

Finally, the TMA (a) provides guidelines for third parties challenging pending trademark applications at the USPTO with the submission of evidence supporting a registration refusal and (b) grants examining USPTO attorneys the authority to set response times to USPTO office actions to a period of less than six months, provided that any requested extensions will be granted up to six months in the aggregate.

On May 18, 2021, the USPTO published a notice of proposed rulemaking concerning the TMA. The USPTO proposed to amend the rules to implement certain provisions of the TMA, including (A) to establish procedures and fees for *ex parte* expungement and reexamination proceedings, (B) to provide nonuse grounds for cancellation before the Trademark Trial and Appeal Board (TTAB), (C) to establish flexible office action response periods, and (D) to amend the existing letter-of-protest rule to indicate that letter-of-protest determinations are final and non-reviewable. Amendments have also been proposed concerning the suspension of USPTO proceedings and rules governing attorney recognition in trademark matters. Finally, a new rule is proposed to address procedures regarding court orders cancelling or affecting registrations. The USPTO must receive written comments regarding these proposed rules on or before July 19, 2021.

The bill can be found here, and the USPTO's proposed rules to implement the TMA can be found here.

Changes to IP personnel in the federal government

Two of the most important federal bodies in charge of intellectual property oversight and policy are undergoing a change in leadership that could impact intellectual property practices in the United States.

On February 14, 2021, Senator Patrick Leahy (D-VT) was appointed as the Chair of the Subcommittee on Intellectual Property of the U.S. Senate Judiciary Committee. Senator Leahy was one of the co-authors of the America Invents Act (AIA), one of the largest legislative changes to U.S. patent law in decades. In addition to updating laws on invention patentability, the AIA also updated the system of *inter partes* review for challenging patent validity at the PTAB. It remains to be seen whether Senator Leahy will push for a change in focus or policy direction at the subcommittee. However, Senator Leahy's appointment may reduce the likelihood of additional legislative reform to U.S. patent law in the near term. Proposed legislation known as the STRONGER Patents Act has been submitted during each of the last three congressional terms and proposes significant reforms to the PTAB. Given Senator Leahy's role in crafting the legislation that created the current PTAB system, it is uncertain whether Senator Leahy would support the STRONGER Patents Act moving forward in the Intellectual Property subcommittee.

President Biden will also likely announce a nomination for the Under Secretary of Commerce for Intellectual Property and Director of the USPTO in the coming months. There is currently no expected time frame for President Biden to announce his nominee. Based on recent history, it is possible that a nominee will not be announced for several months. In the interim, Commissioner for Patents Drew Hirschfeld has been vested with the authority to act with the powers of the position, although he has not been given the title of Acting Director.

Virginia passes the Virginia Consumer Data Protection Act

On March 2, 2021, Virginia passed the Virginia Consumer Data Protection Act (the VCDPA), which establishes a framework for the processing of certain personal data of Virginia residents. Virginia is the second major U.S. state to pass a comprehensive data privacy law, following California's passage of the California Consumer Privacy Act of 2018 (the CCPA) and the recently enacted California Privacy Rights Act (the CPRA).

Effective January 1, 2023, the VCDPA imposes on covered businesses new data privacy compliance obligations and provides Virginia residents with certain rights similar to the rights provided under the EU General Data Protection Regulation 2016/679 (GDPR) and the CCPA, including (i) the right to confirm whether or not a data controller is processing the Virginia resident's personal data and to access such personal data, (ii) the right to correct inaccuracies in their personal data, (iii) the right to delete personal data provided by or obtained about them, (iv) the right to obtain a copy of their personal data that they previously provided to the data controller, (v) the right to opt out of the sale of their personal data, and (vi) the right to appeal a covered business's denial to act on their request within a reasonable amount of time. In addition, the VCDPA requires covered businesses to (1) limit their collection of personal data to that which is adequate, relevant, and reasonably necessary in relation to the purposes for which the data is processed, (2) limit their use of such personal data to use that is reasonably necessary to or compatible with the purposes disclosed to the Virginia resident for processing the personal data, unless their consent is obtained, (3) establish and maintain reasonable administrative, technical and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data, (4) conduct data protection assessments and, upon request, disclose such assessments to the Virginia Attorney General, and (5) provide Virginia residents with a privacy policy that explains, among other things, how they may exercise their rights described above.

The VCDPA applies to all "persons that conduct business in the Commonwealth [of Virginia] or produce products or services that are targeted to residents of the Commonwealth [of Virginia] and that (a) during a calendar year, control or process personal data of at least 100,000 [Virginia residents] or (b) control or process personal data of at least 25,000 [Virginia residents] and derive over 50% of gross revenue from the sale of personal data." Similar to the CCPA and the CPRA, the VCDPA does not define what constitutes "conduct[ing] business" in the Commonwealth of Virginia.

Unlike the CCPA and the CPRA, the VCDPA (A) expressly excludes, through a permanent exception, the processing of personal data of Virginia residents in an employment or business-to-business context and (B) does not create a private right of action for Virginia residents. Instead, the Virginia Attorney General has exclusive authority to enforce the VCDPA, subject to a 30-day cure period for any alleged violations. The VCDPA permits the Virginia Attorney General to seek injunctive relief and damages of up to $7,500 for each violation, as well as "reasonable expenses incurred in investigating and preparing the case, including attorney fees." Damages collected for violators would be placed in the newly created Virginia Consumer Privacy Fund, which fund would be used to support the Virginia Attorney General's future enforcement and investigations into alleged VCDPA violations.

The bill can be found here.

FTC enters into settlement with photo app to delete biometric data

On January 11, 2021, the Federal Trade Commission (the FTC) entered into a settlement with California-based photo storage app, Everalbum, Inc. (Ever), ordering Ever to permanently delete (i) photos and videos of users who deactivated their accounts with Ever, (ii) biometric data derived from photos of Ever users who did not give their express consent to derive such data, and (iii) any models and algorithms developed with such photos or videos.

The FTC's original complaint against Ever alleged that Ever deceived consumers about its use of facial recognition technology on users' photos and videos, stating that Ever provided assurances to its users that it would not apply facial recognition technology to user content unless a user affirmatively chose to activate the feature. According to the complaint, contrary to Ever's assurances, up until April 2019, Ever's facial recognition technology feature was active by default for all users except those in three states and the European Union, and could not be turned off. The complaint further alleged that Ever promised its users that Ever would delete the photos and videos of users who deactivated their accounts, but that, until at least October 2019, Ever failed to do so.

The FTC voted unanimously to accept the proposed settlement. In reaching the settlement, Andrew Smith, the director of the FTC's Bureau of Consumer Protection, reinforced the FTC's commitment to "ensuring that companies keep their promises to customers about how they use and handle biometric data." FTC Commissioner Rohit Chopra asserted that "today's facial recognition technology is fundamentally flawed," stating that it is "critical that the FTC meaningfully enforce existing law to deprive wrongdoers of technologies they build through unlawful collection of Americans' facial images and likenesses." Notably, and unlike previous FTC settlements regarding biometric data, Ever was required to delete models and algorithms developed with photos and videos allegedly obtained without the consent of Ever's users.

Companies that aim to leverage biometric data can likely expect more scrutiny and regulation surrounding the collection and use of biometric data. For example, New York lawmakers are currently launching a bill that would make New York the fourth state to enact a biometric data privacy law, and the second state to allow consumers to sue companies for improperly handling their biometric data.

The settlement can be found here.