

ByteDance, TikTok Get Editing App Privacy Suit Trimmed

By **Dorothy Atkins**

Law360 (March 3, 2025, 10:58 PM EST) -- An Illinois federal judge trimmed Monday a proposed class action alleging TikTok owner ByteDance secretly collects and profits from biometric data gathered from users of its CapCut video-editing tool, dismissing for good a Video Privacy Protection Act claim, while keeping alive other privacy allegations and tossing a few with leave to amend.

In a 49-page order, U.S. District Judge Georgia N. Alexakis found that the consumers sufficiently alleged violations of their privacy rights under the California Constitution, as well as claims of intrusion upon seclusion, larceny and conversion under California law.

The judge rejected ByteDance's argument that she can determine on a motion to dismiss that the consumers agreed to the social media giant's data collection practices by voluntarily downloading the app and agreeing to its terms.

"Although defendants attach to their motion an undated screenshot purporting to show that all users must click 'Agree and continue' to CapCut's Terms of Service and Privacy Policy, this evidence is insufficient to establish that the named plaintiffs here in fact agreed to any terms during the period relevant to this suit," the order says. "This is especially true where the complaint alleges (and the court must accept as true) that each named plaintiff never read any privacy policy or terms of use."

The ruling is the latest development in a lawsuit that was initially filed by California resident Evelia Rodriguez, Illinois resident Erikka Wilson and Wilson's 14-year-old daughter in **July 2023**, alleging the Chinese-owned ByteDance has aggressively promoted its CapCut video-editing app to secretly harvest and profit from millions of users' private data and potentially exposing that data to the Chinese government.

In February 2024, the consumers amended their suit, adding four additional individuals — Aiden Gundlach, a minor referred to as J.V., Zachary Buckus and Raymon Marines — as named plaintiffs.

The latest rendition of the 14-count complaint alleges that the CapCut app, which is the fourth-most downloaded app in the world and has more than 200 million monthly users, has largely avoided the scrutiny focused on ByteDance's other popular social media app TikTok.

The consumers allege CapCut allows ByteDance to surreptitiously collect and profit from users' unique identifying information — known as biometric data — as well as their geolocation, telephone numbers and other private information in violation of numerous state and federal consumer protection laws.

The consumers claim that they never received notice that ByteDance and TikTok would collect and use their biometric data, including face geometry scans and voiceprints, nor did they sign a written release authorizing the companies to collect and use that information.

The suit seeks to certify a nationwide class of CapCut users, or in the alternative, a multistate consumer protection class for users in California, Illinois or any state with similar consumer protection laws, as well as an Illinois subclass of users who created at least one video using CapCut.

But in March 2024, TikTok and its parent asked the court to throw out the case, arguing that the plaintiffs voluntarily downloaded the app and granted it permission to access certain types of data. According to the company, CapCut's policy informs users that it gathers their usage data, photos, videos and other user-generated content, along with their date of birth, gender and other personal information.

The policy also purportedly tells users that CapCut might gather information about images or audio that are part of the users' video or photo, including objects and scenery, the location within an image of a user's face, body features and attributes, the company argued, although ByteDance disputed outright claims that CapCut collects biometric face scans and voice prints.

The company additionally argued that the lawsuit is "no more than a bad copycat of a prior lawsuit long-since resolved," involving defendant TikTok Inc.'s app that allegedly had nothing to do with CapCut and no resemblance to how CapCut functions.

"After this defect was called out, plaintiffs filed an amended complaint that only compounds, rather than cures, this problem," the company argued.

In her ruling Monday, Judge Alexakis refused to decide on a motion to dismiss whether the consumers consented to the company's data practices.

However, she agreed to toss multiple claims, finding that many of the allegations were too conclusory to proceed, while letting the consumers another shot at amendment.

The claims that were tossed with leave to amend include allegations under the Illinois Biometric Information Privacy Act, the Consumer Fraud and Abuse Act claims and other similar allegations under the Computer Data Access and Fraud Act.

The judge reasoned that in its current rendition, the complaint does not adequately allege the consumers' devices were accessed without authorization and the suit does not allege a cognizable "loss" under the CFAA.

The judge also found that allegations that the company violated California's Unfair Competition Law and violated the false advertising law are insufficient, because the complaint does not assert a viable theory of loss and injury, or state viable forms of potential restitution. However, she allowed the consumers a chance to amend those claims as well.

She similarly dismissed with leave to amend claims under the Electronic Communications Privacy Act and the California Invasion of Privacy Act. In reaching her conclusion, the judge held that it is not clear whether any of the consumers' communications were intercepted while in transit, "as opposed to

merely shared with third parties after the fact," and the consumers' allegations that they were intercepted are "purely conclusory" at this juncture.

"Beyond a conclusory statement that 'defendants intercepted and recorded videos' without 'the consent of either the sender or recipient,' plaintiffs do not allege that defendants used (1) an electronic amplifying device or (2) a recording device to eavesdrop on plaintiffs' conversations," the order says. "Plaintiffs' conclusory allegations of 'eavesdropping' and 'recording' thus lack sufficient detail."

Judge Alexakis additionally dismissed with leave to amend a claim under the Stored Communications Act, noting that the claim was based on allegations reported in a news article that alleged ByteDance shared TikTok's user data with third-parties, but not CapCut's user data.

However, for all of those claims, the consumers are allowed to beef up their allegations in another complaint, and Judge Alexakis gave the consumers until April 2 to file an amended complaint.

However, the judge tossed for good a single claim under the federal Video Privacy Protection Act, finding that the app is not a "video tape service provider" within the meaning of the statute, and therefore allowing the consumers another chance to amend their VPPA claims would be futile.

Counsel and representatives for TikTok and counsel for the consumers did not immediately respond to requests for comment on Monday.

The litigation proceeds as the future of Beijing-based ByteDance and TikTok in the U.S. is at a crossroads.

In April 2024, Congress passed and then-President Joe Biden signed into law an act requiring ByteDance to divest TikTok or face a ban in the U.S. The law took effect on Jan.19, but moments after his inauguration on Jan. 20, President Donald Trump issued an executive order that put it on hold for 75 days, allowing TikTok to reopen shop and buying ByteDance more time to make a deal.

Trump has said in recent weeks that any deal would require U.S. entities to hold at least a 50% stake in the platform. During a Jan. 21 press conference, the president said the platform is "worthless" without a deal, but with a deal and U.S. approval, he estimated it would be "worth like a trillion dollars."

The consumers are represented by Steve W. Berman and Jeannie Evans of Hagens Berman Sobol Shapiro LLP, and Douglas G. Smith of Aurelius Law Group LLC.

TikTok and its parent are represented by Anthony J. Weibell, J. Gregory Deis, Lucia Nale and Matthew D. Provance of Mayer Brown LLP.

The case is Evelia Rodriguez et al. v. ByteDance Inc. et al., case number 1:23-cv-04953, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Gina Kim, Lauren Berg, Katie Buehler and Al Barbarino. Editing by Vaqas Asghar.