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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STEVEN VANCE, et al.,  
  
Plaintiffs,  
  
v.  
  
MICROSOFT CORPORATION,  
  
Defendant.

CASE NO. C20-1082JLR  
  
ORDER GRANTING IN PART  
AND DENYING IN PART  
MICROSOFT’S MOTION TO  
DISMISS

**I. INTRODUCTION**

Before the court is Defendant Microsoft Corporation’s (“Microsoft”) motion to dismiss Plaintiffs Steven Vance and Tim Janecyk’s (collectively, “Plaintiffs”) complaint. (MTD (Dkt. # 25); Reply (Dkt. # 34).) Plaintiffs oppose the motion. (Resp. (Dkt. # 37).)

Having considered the motion, the parties’ submissions regarding the motion, the

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1 relevant portions of the record, and the applicable law,<sup>1</sup> the court GRANTS in part and  
2 DENIES in part the motion to dismiss.

## 3 II. BACKGROUND

4 Facial recognition technology uses computer artificial intelligence and machine  
5 learning algorithms to “detect, recognize, verify and understand characteristics of humans  
6 faces.”<sup>2</sup> (Compl. (Dkt. # 1) ¶ 23 (quoting Michele Merler, *et al.*, *Diversity in Faces*, IBM  
7 Research AI at 1 (Apr. 10, 2019)) (“*Diversity in Faces*”).) However, “significant  
8 technical hurdles” hinder the technology’s accuracy, and improving that accuracy relies  
9 upon “the use of data-driven deep learning to train increasingly accurate models by using  
10 growing amounts of data.” (*Diversity in Faces* at 1.) In other words, practice makes  
11 perfect: for artificial intelligence to more accurately recognize different faces, “vast  
12 quantities of images of a diverse array of faces” must be fed to the underlying  
13 machine-learning algorithms. (Compl. ¶ 24.)

14 Microsoft is one of many companies that have developed and produced facial  
15 recognition products. (*Id.* ¶¶ 3, 52-53.) Among these products are its Cognitive Services  
16 Face Application Program Interface and its Face Artificial Intelligence service that allow  
17 customers to embed facial recognition technology into their applications. (*Id.* ¶ 53.)  
18 Microsoft conducts “extensive business within Illinois” related to facial recognition,

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20 <sup>1</sup> Both parties request oral argument (MTD at 1; Resp. at 1), but the court finds oral  
argument unnecessary to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

21 <sup>2</sup> For the purposes of a motion to dismiss, the court accepts all well-pleaded allegations in  
22 Plaintiffs’ complaint as true and draws all reasonable inferences in favor of Plaintiffs. *See Wyler  
Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998).

1 including selling its facial recognition products through an Illinois-based vendor; working  
2 with an Illinois-based business to build new applications for facial recognition  
3 technology; and working with Illinois entities to build a “digital transformation institute”  
4 that accelerates the use of artificial intelligence throughout society. (*Id.* ¶ 59.)

5 Plaintiffs are Illinois residents who, starting in 2008, uploaded photos of  
6 themselves to the photo-sharing website Flickr. (*Id.* ¶¶ 6-7, 28, 60-61, 69.) Both were in  
7 Illinois when uploading the photos. (*Id.* ¶¶ 60, 69.) Unbeknownst to Plaintiffs, Flickr,  
8 through its parent company Yahoo!, compiled hundreds of millions of photographs  
9 posted on its platform, including those of Plaintiffs and other Illinois residents, into a  
10 dataset (“Flickr dataset”) that it then made publicly available to “help improve the  
11 accuracy and reliability of facial recognition technology.” (*Id.* ¶¶ 29-32.)

12 Utilizing the Flickr dataset, International Business Machines Corporation (“IBM”)  
13 selected one million images to create a new dataset called Diversity in Faces in an effort  
14 to reduce bias in facial recognition. (*Id.* ¶ 40.) IBM scanned the “facial geometry” of the  
15 images and created a “comprehensive set of annotations of intrinsic facial features,”  
16 including craniofacial distances, areas and ratios, facial symmetry and contrast, skin  
17 color, age and gender predictions, subjective annotations, and pose and resolution. (*Id.*  
18 ¶ 41 (citing *Diversity in Faces* at 2).) Ultimately, IBM utilized “19 facial landmark  
19 points” to determine “68 key points for each face” and to extract “craniofacial features”  
20 for each image in the dataset. (*Id.* ¶¶ 42-43 (citing *Diversity in Faces* at 9).) Again, the  
21 Diversity in Faces dataset included the facial scans of Plaintiffs and other Illinois

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1 residents, but like Flickr and Yahoo!, IBM did not seek or receive permission from  
2 individuals whose faces were analyzed. (*Id.* ¶¶ 44-45.)

3 IBM made the Diversity in Faces dataset available to other companies seeking to  
4 improve their facial recognition technology. (*Id.* ¶ 47.) To obtain the dataset, companies  
5 applied for permission via an online questionnaire, and if IBM granted access, IBM  
6 would send a link for companies to download the dataset. (*Id.* ¶ 48.) Those with the  
7 dataset, and the corresponding information, could “identify the Flickr user who uploaded  
8 the photograph,” “view the Flickr user’s homepage,” and “view each photograph’s  
9 metadata, including any available [information] relating to where the photograph was  
10 taken or uploaded.” (*Id.* ¶ 51.) Microsoft applied for and downloaded the dataset from  
11 IBM. (*Id.* ¶ 55.) Microsoft used the dataset to improve “the fairness and accuracy of its  
12 facial recognition products,” which “improve[d] the effectiveness” of those products and  
13 made them “more valuable in the commercial marketplace.” (*Id.* ¶¶ 57-58.) Once again,  
14 the dataset downloaded by Microsoft contained Plaintiffs’ information, but Microsoft did  
15 not inform or obtain permission from Plaintiffs. (*Id.* ¶¶ 56, 65-66, 73-74.)

16 Plaintiffs bring a class action suit against Microsoft for violating Illinois’s  
17 Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), which regulates the  
18 collection, storage and use of biometric identifiers and biometric information  
19 (collectively, “biometric data”). (*Id.* ¶¶ 4, 17.) Specifically, they allege violations of two  
20 BIPA provisions: (1) Microsoft violated § 15(b) by collecting and obtaining biometric  
21 data without providing the requisite information or obtaining written releases; and (2)  
22 Microsoft violated § 15(c) by unlawfully profiting from individuals’ biometric data. (*Id.*

1 ¶¶ 93-106.) Plaintiffs additionally bring an unjust enrichment claim (*id.* ¶¶ 107-16) and a  
2 separate count for injunctive relief (*id.* ¶¶ 117-22).

### 3 III. ANALYSIS

4 When considering a motion to dismiss under Rule 12(b)(6), the court construes the  
5 complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v.*  
6 *Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept  
7 all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.  
8 *Wyler Summit P'ship*, 135 F.3d at 661. The court, however, is not required “to accept as  
9 true allegations that are merely conclusory, unwarranted deductions of fact, or  
10 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
11 Cir. 2001). “To survive a motion to dismiss, a complaint must contain sufficient factual  
12 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
13 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
14 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.  
15 2010). “A claim has facial plausibility when the plaintiff pleads factual content that  
16 allows the court to draw the reasonable inference that the defendant is liable for the  
17 misconduct alleged.” *Iqbal*, 556 U.S. at 677-78. Dismissal under Rule 12(b)(6) can be  
18 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
19 under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
20 (9th Cir. 1990).

21 Microsoft moves to dismiss all of Plaintiffs’ claims in its instant motion. (*See*  
22 MTD.) The court addresses the arguments pertaining to each claim in turn.

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