17-303-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VANESSA VIGIL and RICARDO VIGIL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

TAKE-TWO INTERACTIVE SOFTWARE, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of New York
(New York City)

AMICUS CURIAE BRIEF OF THE ENTERTAINMENT SOFTWARE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE TAKE-TWO INTERACTIVE SOFTWARE, INC. AND AFFIRMANCE

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LOCAL RULE 26.1 CORPORATE DISCLOSURE STATEMENT[1]

Amicus Entertainment Software Association has no parent company and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

Amicus Entertainment Software Association ("ESA") is a not-for-profit trade association that represents nearly all of the major U.S. publishers of computer and video games for video game consoles, personal computers, handheld and mobile devices and the internet. ESA provides policy analysis and advocates for the video game industry on issues like global content protection, intellectual property, technology, e-commerce and the First Amendment in support of interactive software publishers. *Essential Facts About the Computer and Video Game Industry*, Entertainment Software Association (2017) at 17 ("2017 Essential Facts").[2] In addition, ESA conducts business and consumer research on issues relevant to the video game industry. *Id.* For example, recent ESA research confirms that users increasingly utilize personalization and social features in games. *See, e.g.*, Annual Report, Entertainment Software Association (2016) at 13

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[1] Pursuant to Rule 29(a)(4)(E) and Local Rule 29.1, no Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *Amicus* ESA, its members, and its counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] *Available at* http://essentialfacts.theesa.com/mobile/.

("2016 Annual Report").[3] This would include video games that use a form of face scanning or photographs to enhance the game for the user.

The Court should affirm the rulings of the District Court. The conclusion requested by the plaintiffs—that a party need not prove any actual damage for alleged minor procedural violations of the Biometric Information Privacy Act ("BIPA")—would impose severe penalties for insignificant defects in notice and consent that would substantially chill innovation with respect to certain personalization features preferred and enjoyed by a vast number of users.

I. BACKGROUND OF THE VIDEO GAME INDUSTRY

A. Overview of the Video Game Industry

In 2016, the video game industry generated $30 billion in revenue in the United States and entertained hundreds of millions of consumers throughout the world. 2016 Annual Report at 5. ESA's members are at the forefront of the ongoing technological revolution in the interactive entertainment field, including video games that make use of virtual reality, augmented reality and mixed reality. *Hearing on Exploring Augmented Reality Before the Senate Committee on Commerce, Science, and Transportation*, 114th Cong. 2 (November 16, 2016) (testimony of Stanley Pierre-Louis, Senior Vice-President and General Counsel of

[3] *Available at* http://www.theesa.com/wp-content/uploads/2017/05/ESA-AnnualReport-Digital-5917.pdf.

the Entertainment Software Association).[4] Indeed, its members employ highly skilled artists, authors, software programmers, engineers and developers who produce a wide array of highly expressive, interactive works that include audiovisual materials, musical compositions, literary works, artistic works and software. *Id.* Technologists and engineers are leading the way to explore and expand what these technologies can achieve in fields beyond the video game arena, including in education, healthcare, business and national defense. *Id.* at 5-9.

In addition to the games at issue in this lawsuit, other games use similar technologies and other possible biometric identifiers as defined under BIPA to create customized avatars. These features enhance the in-game experience for users. SPA10.[5] It is not uncommon for the avatars created from the photographs or face scans to be modified to add other features, to the point where they may bear little, if any, resemblance to the user. (*See, e.g.*, Ans. Br. at 7 (examples of images created from face scan)).

The ubiquity of video games is unquestionable. For example, 65% of U.S. households are home to at least one person who plays three or more hours of video

[4] *Available at* https://www.commerce.senate.gov/public/_cache/files/cf1cc9ea-a601-4ee7-a7a9-e081e8f977c2/61531EC17CD75BD1279E29B108665F3E.stan-pierre-louis-testimony.pdf.

[5] Citations to "SPA" refer to the Special Appendix attached to Appellants' Brief at Docket No. 40.

games a week, and 48% of U.S. households own a dedicated game console. 2017 Essential Facts at 6. Further, 53% of the most frequent gamers play multiplayer games at least once a week, spending an average of six hours playing with others online and five hours playing with others in person. *Id.* at 8.

The video game industry is a nationwide industry. There are 2,322 video game developer locations across all 50 states. *Id.* at 16. More than 65,000 workers are directly employed at game software publisher and developer locations in the United States. *Id.* Moreover, the video game industry provides significant economic contributions and technological advances in business, education, sports and other sectors. 2016 Annual Report at 5.

II. ARGUMENT

A. The Consent in NBA 2K Games Was Informed and Consistent with Business Norms for Handling of Important Disclosures in the Online Context.

As noted in the District Court decision, BIPA did not create a substantive right to privacy in biometric identifiers. SPA40. Rather, "BIPA created procedural safeguards so that consumers could enter into transactions using biometric identifiers without having those identifiers misused." *Id.* Indeed, the District Court repeatedly acknowledged that the crux of BIPA was to protect individual's biometric identifiers from being used in a way not contemplated by the underlying use of the MyPlayer feature. SPA23-24. Most importantly, the

Court noted that the plaintiffs ***admitted*** that they had provided consent, but subsequently claimed that their consent was not informed or valid because it did not comply with some of BIPA's technical requirements. SPA12, 41. In fact, the plaintiffs agreed to the following terms and conditions prior to using the MyPlayer feature:

> Your face scan will be visible to you and others you play with and may be recorded or screen captured during gameplay. By proceeding, you agree and consent to such uses and other uses pursuant to the End User License Agreement. www.take2games.com/eula. SPA10.

Additionally, the plaintiffs were required to press "Continue" if they wished to use the MyPlayer photo feature. A26 at ¶ 41. Plaintiffs repeatedly admitted in pleadings and in oral argument that they consented and understood that they had consented to the use of these features. A26 at ¶¶ 41-42; SPA33. This consent mechanism—whether considered a "clickwrap" agreement or some other form of user assent—is a common means by which users agree to applicable terms of the software, including certain types of video games. In the case of the MyPlayer feature, the scanning process took approximately 15 minutes, during which the camera scanned the user's face from multiple angles. SPA9. Based on the plaintiffs' own allegations and admitted conduct, it is clear that they had a full appreciation of the terms and conditions to which they had consented.

Importantly, the consent screen is presented to each person using the scanning feature; however, "there is no requirement that the person creating the avatar be the person who bought or owns that copy of the game, or be the registered account holder." (Ans. Br. at 7). For that reason, it may be impossible for the publisher to verify that a given face scan is linked to a particular user. Indeed, the District Court noted as much: "There is no requirement that a gamer who uses the MyPlayer feature be an actual purchaser or owner of an NBA 2K Game." SPA10.

Further complicating identification, the user can make adjustments to the avatar he or she created such that it does not resemble the user and the avatar cannot be "verifiably linked to any person or account and the output of the feature is not personally identifying." (Ans. Br. at 7). Thus, the identity of the individuals whose photographs or face scans were taken within the game may be impossible to determine, making it difficult to use the scans as a means of identifying a specific person. One of the primary purposes of BIPA is to protect against the further use of biometric data to identify an individual inconsistent with the scope of the original notice and consent. But, as explained above, in many cases it may not be possible to deduce the identity of the user from the face scan.

There can be no doubt that the consent that the plaintiffs executed is valid and enforceable and should not be overridden by the alleged minor procedural

defects. This is especially true where the games are sold nationwide,[6] and Illinois is the only state with a biometric statute that provides for a private right of action and allows for class actions, statutory damages and attorneys' fees.[7] Indeed, as mentioned above, the manner of consent provided by the plaintiffs of clicking a box to indicate assent has been recognized as valid. For example, one type of valid online assent mechanism, known as a clickwrap agreement, "requires the user to take an affirmative action, usually, the clicking of a box that states that he or she has read and agrees to the terms of service." *Corwin v. NYC Bike Share, LLC*, No. 14-cv-1285 (SN), 2017 WL 816314, at *7 (S.D.N.Y. March 1, 2017). Further, "[u]nder a clickwrap arrangement, potential licensees are presented with the proposed license terms and forced to expressly and unambiguously manifest either

[6] Further, the issue of the extraterritorial application of the statute could also implicate the Dormant Commerce Clause. For example, a gamer can consent per the terms and conditions in Indiana, create his avatar and play the game with this avatar in Illinois in a multiplayer mode. Because some data of his gaming history may be kept by the publisher, under the plaintiffs' theory, the publisher would be liable under BIPA for the technical violations occurring in Illinois. "A state statute violates the commerce clause when a statute directly regulates or discriminates against interstate commerce or when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (internal quotations omitted). Additionally, the Commerce Clause prohibits the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

[7] The statutory damages range from $1,000 to $5,000 per violation. 740 ILCS 14/20.

assent or rejection prior to being given access to the product." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004). This was done here, and it would be an odd result to find a violation where the publisher has unquestionably provided notice and obtained consent. This is particularly true where the consent is followed by affirmative steps the user must take to implement the feature.

B. Considering the "Aggrieved Party" Language as Not Requiring an Actual Injury to State a Claim Could Chill Innovation in the Industry

In apparent recognition of the fact that technical violations of the consent and disclosure provisions, without more, should not expose the alleged violators to ruinous liability in the absence of any harm, the Illinois legislature limited the private right of action to people who have been "aggrieved" by a violation of the statute and provides for liquidated damages of $1,000 (if negligent) to $5,000 (if willful) or actual damages, whichever is greater, per violation. 740 ILCS 14/20. In this case, there are no allegations regarding any data breach, identity theft or any other harm suffered by plaintiffs for the alleged procedural violations of the statute. Nonetheless, plaintiffs claim that *any* violation of the statute renders the individual an "aggrieved party" entitled to sue and entitled to the statutory damages. In the class action context, this likely would result in millions or tens of millions in statutory damages—even where no party has been actually harmed or aggrieved.

The plaintiffs argue that BIPA "is plainly concerned not only with preventing misuse of data once collected but, above all, with ensuring informed consent as a prerequisite to collection—all in the overarching purpose of protecting individual's rights to biometric privacy." (App. Br. at 26). The fallacy with this argument as applied in this context is that, as noted above, the individual who is providing consent or playing the game may be a friend or family member who did not provide *any* identifying information along with the consent. Thus, the primary purpose of the statute as identified by the plaintiffs—"protecting individual's rights to biometric privacy" (App. Br. at 28-29) —is irrelevant where the individual has not provided any identifying information associated with the alleged biometric data.

Here, it is difficult to see how the individual would be an "aggrieved party" such that he or she would have a cause of action against the game developer or publisher. The District Court correctly held that the "aggrieved party" language in the statute "limits a private right of action to a party that can link an injury to a statutory violation." SPA47.

This District Court's interpretation is consistent with the reality of how users interact with face-scanning features; they receive notice and affirmatively consent to the use of that feature subject to the applicable legal terms that govern use of the game. Harmless procedural violations ought not to result in a violation of BIPA

that triggers class action liability where the publisher has otherwise complied with the substance of the law. To find otherwise would result in a rigid, nonsensical application of the law that would do little to advance protection for users while chilling the efficient use of electronic notice and consent in games and other software. Given that a large number of users play video games with friends (41%) and that the most frequent gamers who play multiplayer games spend 5 hours a week playing with others in person, *see* 2017 Essential Facts at 8, many of the individuals who use the technology may be unknown to the publisher. Thus, linking those face scans to the actual user may not be possible in all cases. These games do not collect identifying information from users with whom the registrant of the game may play. Thus, not only is there no "aggrieved party" due to the plaintiffs' voluntary conduct, but it is impossible to determine who such "aggrieved" parties would be.

Exposing game publishers to class action damages regardless of any actual damage to the user would have a severe impact on the broader industry. Further industry experimentation with these novel technologies within video games may be halted and limited if the consequent legal risks for non-substantive violations of BIPA are exceedingly high.

III. CONCLUSION

Therefore, *Amicus Curiae* Entertainment Software Association respectfully asks that this Court affirm the District Court's order.

DATED: May 23, 2017

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RULE 32 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 29 and 32:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) and Fed. R. App. P. 29(a)(5) because this brief contains 11 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, I caused the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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