Skadden

June 2020

VIDEO GAMING / E-GAMING LAW UPDATE

Also in this issue:

Main Quest: Does My Video Game Violate Consumers' Privacy Rights?

The California Consumer Privacy Act (CCPA) is the first broad-based state statute aimed at enhancing personal privacy rights for consumers. Following the example set by the European Union's General Data Protection Regulation (GDPR), the CCPA expands the rights of California residents to know about the collection, sale and sharing of their personal data, and enables them to object to the retention or sale of such data. Although the CCPA was enacted on June 28, 2018, it only took effect on January 1, 2020, and enforcement by the state's attorney general began on July 1, 2020. Although the statute applies only to California residents, the law is not limited to California companies; rather, any company that does business in California may fall under its scope. Accordingly, companies that may be impacted by the CCPA — which includes many companies in the video game industry — are well advised to understand the requirements of the CCPA and evaluate their internal procedures to ensure compliance.

Relevant Provisions of the CCPA

The CCPA applies to any business that (a) collects consumers' personal data, (b) does business in California (even if situated outside the state), and (c) satisfies one of the following conditions: (i) has annual gross revenues exceeding $25 million; (ii) buys, receives or sells personal information of 50,000 or more consumers or households; or (iii) earns more than half of its annual revenue from selling consumers' personal information.

The CCPA allows California residents to request that businesses meeting these criteria identify the "personal information" that those businesses collect, as well as to demand that those businesses delete and/or not sell such personal information.

"Personal information" is defined very broadly in the statute to include not only traditional forms of personal information (*e.g.*, names, email and physical addresses, etc.) but also a broader set of data, including IP addresses, browsing histories, geolocation data, physical data, professional or employment-related data, education information and even biometric data, provided that such data can be used to identify an individual, household or particular device. Moreover, the CCPA's definition of "personal information" encompasses inferences that can be drawn from any other information collected by the businesses (such as brand preferences, viewing habits, etc.) and used to create profiles about a consumer's behavior, trends, characteristics, preferences and more.

© Skadden, Arps, Slate, Meagher & Flom LLP. All rights reserved.

The CCPA also requires businesses to (a) provide notice of data sharing/sale opt-out rights to consumers, and (b) obtain affirmative consent to the sale of information from users under 16 years of age (and consent from a parent/guardian for users under 13). In other words, while the default scheme is implied consent with users affirmatively opting out of data sharing, for users under 16 the default is that sale and sharing are not permitted unless the user (or his or her parent/guardian, if the user is under 13) opts in.

In the event a company fails to comply with these requirements, the CCPA provides for both government enforcement as well as a limited private right of action in the case of data breaches. The California attorney general may seek civil penalties of up to $2,500 for each CCPA violation (measured by each instance of any specific provision or requirement being violated), or up to $7,500 for intentional violations.[1] Additionally, California consumers may bring a private right of action for data breaches involving nonencrypted and nonredacted personal information, where the company failed to implement reasonable security procedures. Under such private actions, impacted consumers may seek either their actual damages or statutory damages of between $100 and $750, whichever is greater. Thus, because of the availability of statutory damages, consumers who have been impacted by a data breach may recover from noncompliant companies even without a showing of harm.

CCPA's Impact on the Video Game Industry

Beyond the general impact of the CCPA — requiring all companies to ensure that their data collection, retention and sale/sharing policies meet the CCPA's requirements — companies involved in the video game industry are likely to experience more specific consequences in at least three ways.

First, the CCPA's requirement of obtaining affirmative consent for the sale of data from any user under 16 will likely have a disproportionate impact on the video game industry, given the popularity of video games with younger audiences. And while many companies already take steps to limit their data collection practices for users under 13 (as required under the Children's Online Privacy Protection Act, or COPPA), the strategies employed to do so may not be feasible or desirable for users in the 13-16 age bracket. For example, an online game may age-gate its service so only users who are 13 years of age or older can play; doing so restricts the player base to some degree, but the company is able to collect the same data from all players, without concern of violating COPPA. However, this same strategy of age-gating may not be feasible with respect to players 13-16, as such players may (depending on the game) represent a large percentage of the player base. While companies may be able to avoid the need to age-gate by segregating the data collected from users ages 13 to 16 — thus ensuring that such data is not mistakenly sold without consent — these additional steps may not be feasible or cost-effective.

Second, the CCPA's broad definition of "personal information" implicates certain activities that video game companies might not typically associate with the collection of personal data, particularly in the esports and streaming contexts. For example, biometric information about a game's player, such as keystroke patterns, recognition and click speeds, and logon/logoff times, could all fall under the CCPA definition of "personal information" if they can be uniquely identifiable. Esports companies may be interested in collecting and storing such data for purposes completely separate from their typical data collection practices — for example, as a means to identify and root out cheating. Similarly, streaming services may be interested in collecting information about a user's preferred channels or time spent watching a particular stream to better tailor their service to the user. Indeed, even a company hosting an esports tournament or gaming event may inadvertently collect personal data by recording who is watching the event, or who is interacting with the company's social media posts regarding the event. While the mere collection of this information does not in itself violate the CCPA, the fact that a company is collecting, storing and potentially sharing this information would require that company to comply with the CCPA and be aware that such information is subject to the CCPA's regulations.

Finally, the effects of the CCPA may be particularly acute for companies in the mobile and free-to-play gaming space, which often rely heavily on consumers' data as a source of revenue. It is worth remembering that the CCPA is specifically directed to any company that earns more than half its annual revenue from selling customers' personal data, or collects information from more than 50,000 consumers or household. Thus, a free-to-play or mobile game developer that supports itself with ad revenue tied to consumer data may need to be CCPA-compliant even if its annual revenue is relatively low.

[1] It should be noted that the CCPA provides a 30-day cure period before the attorney general may seek such fines against a company.

Strategy Guide

There are a number of best practices video game companies can employ in order to minimize the risks associated with the CCPA:

- It is vital that companies review their data collection, retention and selling practices, and ensure they are in compliance with the CCPA, most notably by including an appropriate "opt-out" option for all users over 16 years of age and obtaining affirmative consent to sell data from users under 16 (or their parent/guardian, where appropriate).
  - In connection with this review, companies should institute compliance programs so they are able to respond to claims of CCPA violations within the statutory time period and thereby avoid liability.
  - Additionally, companies should review and update their privacy policies as necessary to comply with the CCPA requirements.
  - While ensuring compliance will likely require some upfront investment, such expenditures are likely far less than the penalties a company could incur for noncompliance, particularly given the CCPA's statutory damages provision.
- Companies should examine the types of data they collect and ensure that they are collecting only what is necessary. For example, while it may seem beneficial to ask for a user's phone number as part of a registration process, if the company has no plans to use that information, it may consider forgoing the collection and storage of such data.
- Where feasible, companies should take steps to anonymize and de-identify any information collected and stored in the aggregate. The CCPA covers only personal information that can be linked with an individual; anonymous data does not pose any risks from a CCPA perspective.

Side Quests

Recent judicial decisions and enacted statutes or regulations that are likely to impact the video game industry

Ubisoft Entertainment SA v. Yousician Oy, No. 19-2399 (Fed. Cir. June 11, 2020)

On June 11, 2020, the U.S. Court of Appeals for the Federal Circuit, in a nonprecedential opinion, affirmed the decision of the U.S. District Court for the Eastern District of North Carolina invalidating claims from a Ubisoft patent covering an "interactive game designed for learning to play guitar."

The panel agreed with the district court's analysis that under the Federal Circuit's jurisprudence concerning patentable subject matter, as well as under the U.S. Supreme Court's decision in *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014), the claims in the Ubisoft patent were directed to an abstract idea and did not include an inventive concept, and thus were not eligible for patent protection.

The patent at issue relates to a video game that teaches users how to play the guitar by assessing the user's performance, determining what the user needs to improve by changing the difficulty level of the game and then creating mini-games to improve skills.

The panel found that rather than describing a particular way of programming or designing software, the claims merely recited an abstract process in five steps: (1) presenting notations; (2) receiving input; (3) assessing performance; (4) determining weakness; and (5) changing the difficulty or generating mini-games.

The panel further agreed with the district court that there was no inventive concept in the claims of the patent, as the claims merely applied the abstract process using conventional and well-known techniques.

Fortnite Emote Lawsuits

As we have reported in this newsletter, Epic Games, Inc. (Epic), the makers of the popular battle royale game Fortnite, have been hit with a slew of lawsuits in recent years related to various dance moves as depicted in emotes that Fortnite characters can perform. Many of these lawsuits were dismissed following the U.S. Supreme Court's decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. ____ 2019), which requires plaintiffs to obtain a copyright registration before bringing a lawsuit for copyright infringement. However, plaintiffs have recently switched tactics to allege noncopyright claims, and in the past three months, two courts have weighed in on the viability of these alternate theories:

- ***Brantley v. Epic Games, Inc.***, No. 8:19-cv-594-PWG (D. Md. May 29, 2020)

  On May 29, 2020, the U.S. District Court for the District of Maryland granted Epic's motion to dismiss with prejudice eight counts alleging various violations of the Lanham Act and plaintiffs' common law trademark and publicity rights.

  Plaintiffs Jaylen Brantley and Jared Nickens were two University of Maryland basketball players who alleged that they created, named and popularized a dance move they dubbed the "Running Man," which they accused Epic of copying for one of its emotes.

  In addition to a copyright claim (which was dropped following the *Fourth Estate* decision), the plaintiffs asserted claims alleging violation of their rights of publicity, trademark infringement under both the common law and the Lanham Act, unfair competition, unjust enrichment and trademark dilution.

  The court sided with Epic, finding that claims alleging violation of the right of publicity, common law unfair competition, Lanham Act unfair competition, unjust enrichment and false designation of origin were all preempted by the Copyright Act, and that the claims alleging trademark infringement and dilution were insufficiently pled, as the plaintiffs could not establish their ownership of a valid trademark.

  Further, because the plaintiffs had already amended once, the court dismissed all claims with prejudice.

- ***Pellegrino v. Epic Games, Inc.***, No. 19-cv-1806 (E.D.P.A. Mar. 31, 2020)

  On March 31, 2020, the U.S. District Court for the Eastern District of Pennsylvania partially granted a motion to dismiss right of publicity and trademark claims alleging that Epic unlawfully copied the plaintiff's dance moves in the game.

  As with the plaintiffs above, in this suit, Leo Pellegrino — a saxophone player known as "Leo P" — alleged that Epic misappropriated his right of publicity, and infringed and diluted his trademarks by copying his signature move into an emote.

  The court dismissed the majority of Pellegrino's claims, including his right of publicity, unjust enrichment, unfair competition and trademark dilution claims.

  The court also dismissed Pellegrino's Lanham Act false designation of origin claims as preempted by copyright law under *Dastar Corporation v. Twentieth Century Fox Film Corporation*, 539 U.S. 23 (2003).

  - In *Dastar*, the U.S. Supreme Court found that the term "origin" for purposes of Lanham Act claims covers the producer of commercial goods but does not extend to the author of any idea or concept embodied in those goods. The latter is exclusively covered by the Copyright Act.
  - In the instant case, the court found that Pellegrino's allegations establish that his signature move is the creative idea underlying Epic's emote. Thus, Pellegrino's false designation of origin claim is governed by copyright law, not the Lanham Act.

However, the court sided with Pellegrino and did not dismiss his Lanham Act false endorsement claims, noting that the Supreme Court did not consider false endorsement in *Dastar*.

The court found that Pellegrino's false endorsement claims are related to Epic's use of his likeness to create the false impression that Pellegrino endorses Fortnite, which are distinct from his claims relating to the origin of Fortnite's emote.

AM General v. Activision Blizzard, No. 17-cv-08644 (S.D.N.Y. Mar. 31, 2020)

On March 31, 2020, the U.S. District Court for the Southern District of New York granted a motion for summary judgment filed by Activision Blizzard — the developer of the Call of Duty video game franchise — to dismiss a trademark infringement suit filed by AM General, the maker of Humvees.

The lawsuit alleged that Activision infringed AM General's trademarks by depicting Humvees in Call of Duty games. Activision argued that its use was protected by the First Amendment.

The court applied the two-part analysis for use of trademarks in artistic works, drawn from the U.S. Court of Appeals for the Second Circuit's decision in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

- Under the *Grimaldi* test, the court must determine: (1) if the use of the trademark has any artistic value to the underlying work, and if so, (2) whether the trademark use "explicitly misleads" as to the source of the work.

The court agreed with Activision and found that the use of Humvees had artistic relevance because it increased the realism of Call of Duty's depiction of war, and that Activision's use was not explicitly misleading.

The court further noted that having some commercial motivation for using a trademark does not preclude a defendant's First Amendment interest. Rather, a plaintiff must present evidence that the defendant's interests were "solely" commercial, and that its First Amendment defense was purely pretextual.

Solid Oak Sketches, LLC v. 2K Games, Inc. et al., No. 16-cv-724 (S.D.N.Y. Mar. 26, 2020)

On March 26, 2020, the Southern District of New York granted the motion for summary judgment of Take-Two Interactive — the developer of the NBA 2K video game series — to dismiss a copyright infringement suit filed by Solid Oak Sketches.

The lawsuit alleged that Take-Two infringed Solid Oak's copyrights by displaying tattoos that are depicted on several NBA players, including LeBron James, in NBA 2K video games. Solid Oak acquired the copyrights to the tattoos from the artists who tattooed the players. Take-Two counterclaimed, arguing that its uses were fair and *de minimis*.

Take-Two filed a motion for summary judgment to dismiss the copyright claims and for an entry of declaratory judgment on its counterclaims.

The court granted Take-Two's motion for summary judgment for three separate reasons:

1. Take-Two's use of the tattoos was *de minimis*;
2. The tattoo artists had given the NBA players implied, nonexclusive licenses to use the works in connection with their own likenesses when the artists tattooed the players; and
3. Take-Two's use of the tattoos to identify and depict the NBA players was transformative and thus constituted fair use. Take-Two's display of the tattoos added new meaning to the works by enhancing the realism of the video game experience.

Patch Notes

New litigation filings and proposed legislation and regulations that may lead to important legal developments in the video game industry

FTC Levies $4 Million Penalty Against App Developer for Kids' Privacy Violation

On June 4, 2020, the Federal Trade Commission (FTC) announced that, in connection with a settlement with mobile app developer HyperBeard, Inc., it was authorizing the Department of Justice (DOJ) to file a complaint and stipulated final order in the U.S. District Court for the Northern District of California, seeking a $4 million penalty against HyperBeard for violations of the Children's Online Privacy Protection Act (COPPA).

The FTC alleges that HyperBeard allowed advertisers to collect personal information from children under 13 without notifying parents or obtaining verifiable consent. Specifically, the FTC alleges that users of HyperBeard's apps are subject to third-party app networks gathering persistent identifiers to track and serve targeted ads, and that HyperBeard was aware that a large number of its app users were children under 13.

Although HyperBeard disagreed with the FTC's position that its apps were directed at children under the age of 13, the complaint highlights a number of factors the FTC and DOJ allege demonstrate that HyperBeard knew (or should have known) its apps were appealing to children, including:

- The use of words like "cute," "adorable" and "silly" in marketing the apps;
- The use of brightly colored cartoon characters, and in particular animals, as the playable characters in the apps;
- The focus on kid-friendly activities, such as baking, coin collecting, shopping and science experiments as the subject matter of the apps; and
- The fact that HyperBeard had licensed the characters from some of the apps to be included in children's books, stuffed animals and toys.

While the settlement includes a $4 million penalty, the FTC stated in a press release that HyperBeard will be required to pay only $150,000 due to its "inability to pay the full amount." However, the full penalty will be due if the FTC determines that HyperBeard or its CEO misrepresented their finances.

FTC Commissioner Noah Phillips disagreed with the amount of the penalty, describing it as disproportionate to the harm caused by HyperBeard's violation of COPPA. In particular, Commissioner Phillips noted that unlike in other recent high-profile FTC actions, HyperBeard has not been accused of sharing or publicizing the information it obtained from children, or exposing children to unauthorized contact from strangers.

FTC Chairman Joseph Simons responded to Commissioner Phillips, emphasizing that while harm is an important consideration, penalties under COPPA are primarily intended to deter harmful and dangerous practices directed toward children.

The FTC is currently conducting an in-depth review of its COPPA rule, and several commissioners are pushing for more oversight and scrutiny of potential offenders. For example, Commissioner Rohit Chopra recently expressed concerns about third-party privacy policing programs that are designed to shield their participants from COPPA liability, after the FTC announced a settlement with another app developer, Miniclip SA, that allegedly misrepresented its membership in one of these programs.

Given the string of high-profile — and high-penalty — FTC actions, Chairman Simons' statements regarding deterrence and the ongoing FTC COPPA review, any company with consumers who likely include children under 13 would be well-advised to ensure they remain COPPA-compliant.

Putative Class Actions Claim Loot Boxes Encourage Gambling — *Coffee v. Google LLC*, 5:20-cv-3901 (N.D. Cal. June 12, 2020); *Taylor v. Apple, Inc.*, 5:20-cv-3906 (N.D. Cal. June 12, 2020)

In a pair of putative class action lawsuits filed on June 12, 2020, parents of children who have spent money on loot boxes in apps downloaded from either the Google Play Store or the Apple App Store allege that the presence of loot boxes in games is akin to "Las Vegas-style slot machine[s]" and entices children to gamble.

The complaints each allege violations of California's Unfair Competition Law and Consumers Legal Remedies Act, and accuse Apple and Google of being unjustly enriched by the practice of marketing and selling loot boxes in games that can be downloaded from their respective platforms.

While neither Apple nor Google develops the games referenced in the complaints, the plaintiffs allege that those companies market and distribute the games, and act as "agents" for the developers, taking a 30% commission in the process, and are thus liable for the deceptive practices alleged.

The complaints also highlight actions that have been taken to either ban or regulate the use of loot boxes in other countries, including Belgium, the Netherlands, Japan and Austria, and recount domestic efforts to address perceived problems with loot boxes in games.

Ubisoft Files Lawsuit Against Alleged 'Carbon Copy' of Rainbow Six Siege — *Ubisoft Entertainment v. Ejoy.com Ltd.*, No. 2:20-cv-4419 (C.D. Cal. May 15, 2020)

Ubisoft Entertainment, publisher of competitive multiplayer close quarters battle game *Tom Clancy's Rainbow Six Siege* (R6S) filed a lawsuit for copyright infringement against game developer Ejoy.com Ltd, which is owned by Alibaba Group, alleging that Ejoy's game Area 52 (Area F2) is a "near carbon copy" of R6S.

In its complaint, Ubisoft highlighted alleged similarities in the games' respective map designs, weapons loadouts, character options, sound effects, user interfaces and scorekeeping elements.

Ubisoft also pointed to numerous consumer comments and reviews comparing the two games, and describing Area F2 as essentially a mobile port of R6S.

In addition to Ejoy, the complaint included claims against Google and Apple related to their continued distribution of Area F2 through the Google Play and Apple App stores, despite Ubisoft's requests to remove the app.

On May 19, 2020, Ejoy announced that it would be terminating the current version of Area F2 in order to "carry out improvements" and "deliver a better experience to players."

On May 22, 2020, Ubisoft voluntarily dismissed its action without prejudice.

Putative Class Action Complaint Alleges Design Defect in Xbox One Controllers — *McFadden v. Microsoft* Corp., 2:20-cv-640 (W.D. Wash. Apr. 28, 2020)

On April 28, 2020, Donald McFadden filed a putative class action alleging that Microsoft Corporation's Xbox One controllers contain a design flaw that can cause the controllers' joysticks to register "phantom inputs" (also known as "stick drift") and thus thwart accurate gameplay.

McFadden alleges that Microsoft has been aware of this design defect since at least 2014, pointing to numerous online reviews and complaints, as well as warranty requests made by consumers to Microsoft. Nevertheless, despite this knowledge, McFadden alleges that Microsoft continued to not only produce the defective controllers but touted the controllers' precision and capabilities in advertising.

In particular, McFadden highlighted Microsoft's advertising for its Elite controllers, which McFadden alleged he purchased in order to improve his ability to play first-person shooters, his favorite type of game.

McFadden also criticized Microsoft's controller warranty, which lasts 90 days (as opposed to a year for the console itself), and alleged that Microsoft inappropriately refused to repair or replace defective controllers.

The complaint contains a single cause of action for violation of Washington's Consumer Protection Act.

Microsoft has yet to appear in the action.

Contacts

Anthony J. Dreyer
Partner / New York
212.735.3097
anthony.dreyer@skadden.com

James Y. Pak
Counsel / Palo Alto
650.470.3197
james.pak@skadden.com

P. Anthony Sammi
Partner / New York
212.735.2307
anthony.sammi@skadden.com

David M. Lamb
Associate / New York
212.735.3421
david.lamb@skadden.com

Jordan Feirman
Counsel / New York
212.735.3067
jordan.feirman@skadden.com

Andrew K. Patrick
Associate / New York
212.735.3291
andrew.patrick@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West / New York, NY 10001 / 212.735.3000
525 University Ave. / Palo Alto, CA 94301 / 650.470.4500