

February 2021

VIDEO GAMING / E-GAMING LAW UPDATE

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Main Quest

Next-Gen: The Biggest Legal Issues Facing the Video Game Industry in 2021

The end of 2020 marked a major turning point for the video game industry on numerous fronts: The precipitous rise in popularity of — and participation in — esports (bolstered, in part, by stay-at-home orders due to the COVID-19 pandemic and the vacuum left behind by the loss of more traditional entertainment options); the overall increase in numbers in the industry’s player base, including from first-time players; the growth of downloadable games; and the dawn of the next generation of gaming, with the introduction of the PlayStation 5 and Xbox Series X and S. However, growth, success and innovation often introduce new problems, concerns and issues, and it appears as though the video game industry will be no exception in 2021.

To kick off this new year, below we briefly discuss the major legal issues that are most likely to impact that video game industry in 2021 and beyond. As the year progresses, we will address each of these topics in more detail, while discussing the relevant developments impacting each area.

Data Privacy and Security

As noted in a previous Update, the California Consumer Protection Act (CCPA) went into effect in 2020 and contained a number of provisions that were likely to have an impact on the video game industry, particularly for companies operating in the mobile and free-to-play spaces. On November 3, 2020, California voters approved Proposition 24, also known as the California Privacy Rights Act (CPRA), which expanded the scope of the CCPA. The relevant provisions of the CPRA include, among others, the creation of a new subcategory of personal information (dubbed “sensitive personal information”) that must be treated differently from other personal information; a requirement that businesses disclose the retention period for each category of personal information retained; the creation of a new right for consumers to request that inaccurate personal information be corrected; and the establishment of a Privacy Enforcement Agency tasked with enforcing both the CCPA and CPRA, as well as issuing related regulations.

While the CPRA itself does not come become effective until January 1, 2023, the legislation is just the latest example of an increased focus on consumer data privacy and security. The trend is likely to continue — or accelerate — this year, meaning video game companies should be prepared for the possibility of the introduction of additional, and possibly more onerous, data privacy laws and regulations in the months to come.

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Increased Role of Social Influencers

The video game industry is no stranger to the value that social influencers can provide in marketing a game or building a fan base, nor to the controversies and legal issues that can arise in connection with such influencers. These concerns include, among others, the issues relating to labor laws, intellectual property ownership, endorsement and disclosure regulations, and codes of conduct of various social media platforms.

Given the increasing popularity of both mainstream social media platforms (like Twitter and Instagram) and more game-focused platforms (like Twitch), we believe that the importance and role of social influencers in the gaming sector is only likely to grow. Accordingly, not only are more industry players likely to utilize social influencers, but regulatory bodies, such as the U.S. Federal Trade Commission (FTC), are likely to take an increased interest in such activities.¹ Nonetheless, given the growing importance of this type of marketing, users of paid influencers should always be mindful of the FTC Guidelines on the use of endorsers and ensure that their practices comply, regardless of the enforcement landscape.²

Renewed Attempts at Video Game Regulation

The new year also marked the beginning of a new U.S. presidential administration. While neither President Joe Biden nor Vice President Kamala Harris indicated during the 2020 campaign that video games were a particular concern, both made statements in the past year suggesting their support for increased regulation of “violent” video games.³ Indeed, Vice President Harris, in her role as California’s attorney general prior to becoming one of the state’s senators, was a named plaintiff arguing in favor of the California legislation — which imposed a partial ban on the sale of violent video games in the state — that was struck down in the landmark *Brown v. Entertainment Merchants Association* decision.⁴

In addition to content regulation more generally, we are likely to see increased efforts in 2021 to regulate or ban specific aspects of video games, such as “loot boxes” or the use of in-game/native advertising. As we have discussed in previous

¹ Indeed, 2020 saw an increased focus on social media activity from the FTC, and we anticipate that investigations and enforcement actions related to influencer endorsements are likely to increase in the coming months.

² See FTC “Guidelines Concerning the Use of Endorsements and Testimonials in Advertising,” 16 C.F.R Part 255; and FTC “.com Disclosures,” (March 2013).

³ See, e.g., “Interview with Joe Biden,” *The New York Times* (January 17, 2020); and, “Kamala Harris Proposed Executive Actions to Curb Gun Violence,” *ABC News* (April 22, 2019).

⁴ 564 U.S. 786 (2011)

updates, 2020 was marked by numerous efforts worldwide to regulate the use of loot boxes and similar surprise mechanics in video games, with varying levels of success.⁵

Thus, while the Biden administration will certainly have its hands full with other concerns in the coming months, it is possible that there will be increased attempts at regulating video games in 2021. In particular, industry participants should pay particular attention to actions taken by regulatory bodies such as the FTC and the Federal Communications Commission, and take full advantage of any notice and comment period to ensure that their concerns are heard prior to the enactment of any regulation that may impact their business.

Esports

It should not come as a shock to anyone with even a passing familiarity with the video game industry that the legal issues facing the esports community are likely to be at the forefront of many in the industry in 2021. Esports experienced a meteoric rise in popularity throughout 2020, fueled in part — but certainly not completely — by the pandemic and its consequences, with 2021 likely to see a continuation, if not growth, of that trend.

While the esports segment of the video game industry will certainly be impacted by all of the issues discussed above, there are several concerns particular to the sector’s practitioners, industry players and gamers that are likely to arise over the coming year. First and foremost, due to the massive growth in the esports sector, many leagues, teams and individual players (and their representatives) are grappling for the first time with labor and employment issues — such as unionization, fair wages and sponsorship/endorsement rights — that remain not fully resolved even in more traditional sports leagues. The legal challenges posed by these issues likely will play a large role in the esports sector throughout 2021, and industry participants should be prepared to address such matters.⁶

Second, the esports segment is likely to be confronted with both new and familiar legal concerns related to gambling. As more U.S. states move to legalize sports betting, it is reasonable to expect that esports betting (both legal and illegal) will increase as well. Further, regardless of whether betting is officially sanctioned, there are a host of issues that come

⁵ See the Patch Notes section below for an update on the U.K.’s efforts in this respect.

⁶ This is not to suggest that labor issues are not likely to be a concern of the video game industry as a whole in 2021. On the contrary, rising concerns about purportedly “toxic” work environments and unionization are likely to play a large role across the entire video game industry in the coming year.

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along with sports betting that the esports sector will no doubt need to address (e.g., ethics codes, identifying and preventing cheating, concerns involving preventing minors from gambling, etc.). While many of these issues are not new, they are likely to increase in the coming year, and esports companies and participants should be prepared to address them.

Finally, contractual and business concerns are likely to play a large role in the esports sector moving forward, particularly with respect to content ownership and league structure. Over the past several years, the esports sector has largely been built

on a contractual patchwork involving various organizations, game publishers, tournament organizers and teams. As more money flows into and through the sector, and more advertisers and sponsors become involved, it is likely that sector participants and those supporting the it (including its fans) will demand a more formalized system for esports games, leagues and tournaments. Thus, we expect that issues related to the formation and enforcement of such systems will likely play a large part in esports in 2021.

Strategy Guide

Even with an understanding of the types of issues most likely facing the video game industry in 2021, as well as a sense of the risks likely posed by those issues, it is impossible to fully predict, and thus, fully prepare for, the consequences of legal developments in the industry until they occur. Accordingly, in addition to becoming generally familiar with the concerns discussed above,

industry participants should ensure that they stay abreast of any developments in real time — and seek advice and assistance from those who are doing the same — to help ensure that they are able to address any unforeseen issues as they arise.

Save Files

As noted in our Main Quest article above, we have already discussed a number of the legal issues that are most likely to make the greatest impact in the video game industry in 2021 in prior editions of this Update. Accordingly, in addition to the above discussion, we encourage our readers to “reload” prior editions that touched on those topics most likely to impact their particular businesses in 2021. Please see here for links to previous versions of this Update:

- [June 2020 Video Gaming/E-Gaming Law Update](#)
- [March 2020 Video Gaming/E-Gaming Law Update](#)
- [November 2019 Video Gaming/E-Gaming Law Update](#)
- [Video Gaming: Is My Loot Box Legal?](#)
- [August/September 2019 Video Gaming/E-Gaming Law Update](#)

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Patch Notes

This section highlights new litigation filings and proposed legislation and regulations that may lead to important legal developments in the video game industry.

Investor Suit Filed Against CD Projekt Over “Cyberpunk 2077” Launch (*River Hain v. CD Projekt S.A.*, 2:21-cv-00354 (C.D. Cal. Jan. 14, 2021))

- In a putative class action filed on January 14, 2020, shareholders of CD Projekt, the developer of Cyberpunk 2077, allege that the company misled investors regarding the progress and status of the game, while knowing that the game was, in reality, “virtually unplayable.”
- Cyberpunk 2077 was released for PlayStation 4, Stadia, Windows and Xbox One on December 10, 2020, with a next-generation update slated for release sometime this year.
- The named plaintiff seeks to represent a class of investors who purchased stock in CD Projekt between January 16, 2020, and December 17, 2020, alleging that the statements made by the company regarding the development of Cyberpunk 2077 during that time were fraudulent and that the company omitted material information about the true status of the game during its development.
- In particular, the complaint alleges that company executives knew that the game was “bug-ridden,” and that statements made throughout 2020 about the game’s release date (which was originally slated for April 2020 but was pushed back multiple times) were misleading and intended to obfuscate the real reason for the delay.
- CD Projekt has not yet responded to the complaint.
- While investor and class action suits alleging that a game overpromised or underdelivered are certainly not new, video game companies should be aware of the possibility that disappointed fans may turn litigious in the wake of an unsuccessful game launch, while remaining mindful of these risks during any marketing or promotional campaign.

Nintendo Sues Regarding Sale of Hacking Devices (*Nintendo of America Inc. v. Minh*, 2:20-cv-01707 (W.D. Wash. Nov. 18, 2020))

- In November 2020, Nintendo of America filed a lawsuit against Amazon retailer Le Hoang Minh, alleging that Minh’s sale of a device, known as an RCM Loader, violates the Digital Millennium Copyright Act (DMCA).
- According to the complaint, purchasers can use the RCM Loader to “jailbreak” their Nintendo Switch consoles, thereby bypassing security protocols built into the Switch and allowing purchasers to play unauthorized games.
- Nintendo alleges that the RCM Loader violates the DMCA’s prohibitions on the sale and distribution of products that facilitate the circumvention of digital encryption methods intended to prevent privacy and copyright infringement. Thus, by providing consumers with the RCA Loader, Minh is alleged to have assisted those consumers in being able to play pirated or bootleg games on their Switch consoles, thereby facilitating the activities the DMCA was intended to stop.
- In October of 2020, a series of criminal charges were filed against Team Xecuter, an alleged international piracy organization, which purportedly sold similar jailbreaking devices that allowed consumers to hack not only Switch consoles, but PlayStation and Xbox consoles as well.
- The defendant has yet to enter an appearance in the Nintendo case.
- Nintendo is well-known for taking action against hackers and modders of its intellectual property (See, e.g., *Nintendo of America Inc. v. Dilts*, 3:20-cv-01076-JJH (N.D. Ohio, May 15, 2020)), and this lawsuit appears to be the latest step in those efforts. While some in the gaming community have criticized Nintendo for the stance it takes toward such activities, all IP owners would be well-advised to take steps to protect their valuable assets and ensure that unauthorized activities are addressed, lest a future infringer attempt to rely on a laches or acquiescence defense.

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First-Ever Zoom Patent Jury Trial Conducted in Game Controller Case (*Ironburg Inventions Ltd. v. Valve Corp.*, 2:17-cv-01182-TSZ (W.D. Wash.))

- The first-ever jury trial to be held entirely by Zoom began on January 25, 2021, in the U.S. District Court for the Western District of Washington.
- The trial involved allegations that the Steam Controller sold by Valve willfully infringes a patent on video game controllers owned by Ironburg.
- Pursuant to the court's order issued in December 2020, the entire trial was held remotely via the zoomgov.com platform.
- The trial lasted five days, and, on February 2, 2021, the jury returned a verdict in favor of Ironburg, finding Valve had willfully infringed its patent, awarding Ironburg slightly over \$4 million in damages.
- The trial flowed smoothly with only a few minor issues along the way, thus demonstrating the potential for virtual trials in the future, even in complex cases involving difficult and highly technical subject matter.

UK House of Lords Weighs in on Loot Boxes

- In 2020, the House of Lords Select Committee on the Social and Economic Impact of the Gambling Industry published its Report of Session 2019-2021, titled "Gambling Harm – Time for Action."
- Among a broader set of gambling-related proposals in the report, the Select Committee addressed what it characterized as the paucity of regulation with respect to video-game loot boxes. Under current U.K. law, loot boxes are unregulated and generally are not considered to be gambling.
- In the report, the Select Committee proposed that the U.K. government should regulate loot boxes as a form of gambling under Section 6(6) of the Gambling Act 2005. The report also specifically recommended that this be done prior to any more general rethinking of the Gambling Act for the digital age, as has been suggested by the U.K.'s Conservative Party.
- The report builds on the Children's Commissioner's 2019 report "Gaming the System," which looked at the relationship between video games and children, raising concerns about loot boxes specifically.
- Whether the Select Committee's recommendations will be heeded by the government remains an open question. For the time being, the U.K.'s Gambling Commission has stated that it prefers to wait for Parliament to act and is hesitant to bring loot boxes within its remit on the basis that it does not wish to blur the lines between gambling and video gaming.

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