

# GAMING LAW—NO LONGER CHILD’S PLAY

## THE NEW FRONTIERS

SERIES - 1 / ARTICLE - 9  
NOVEMBER 10, 2022

By **Jeffrey Brochin, Esq.**

**GreenPoint**>  
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**EXECUTIVE SEARCH AND RECRUITMENT**

[william.anderson@greenpointglobal.com](mailto:william.anderson@greenpointglobal.com) | [pranav.menon@greenpointglobal.com](mailto:pranav.menon@greenpointglobal.com)  
International Corporate Center, 555 Theodore Fremd Avenue, Suite A102 Rye, NY 10580  
[www.gpesr.com](http://www.gpesr.com)

**For over 100 years, the entertainment world's box office records were set by the latest Hollywood movie releases. Movie-goers anxiously awaited the latest in the Rocky franchise when Rocky IV grossed \$300 million at the box office.**

The James Bond series is another eagerly awaited movie series, with Spectre grossing \$880 million. However, by 2013 Hollywood releases paled in comparison to online gaming releases when Grand Theft Auto V earned a whopping \$800 million in its first day—and \$1 billion within its first three days. In 2018 Red Dead Redemption 2 wasn't far behind, with an opening weekend of \$725 million in sales. As with any successful entertainment venture, online gaming has presented enormous opportunities for lawyers.

## Protecting Producers

In 1965 Sega's video game Periscope was released as a 25¢ arcade game, thereby launching the terminal-based video game entertainment craze, along with legal precedents as to the protection of video games. Atari's *Breakout* was recognized as a copyrighted work in 1992 (*Atari Games Corp. v. Oman*, 979 F. (2d) 242), after a U.S. appeals court had ruled in 1982 that video game manufacturers could copyright images and sounds in a game but not the source code that produced them (*Stern Electronics Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982)).

However, similar to the IP protection hurdles pertaining to any software, U.S. copyright laws protect some elements of video games but not others. One issue is the integration of 'common assets' in video game software by which producers make use of someone else's components to produce game—components, or 'assets' that are widely available. Although this is not an issue with commercial, internal developers and distributors such as Sony, independent game developers end up having to pay huge fees in order to access existing assets or to create viable assets in-house from scratch. Often times such assets are deemed 'Creative Commons'

assets, to which the concept of '*some rights reserved*' applies.

## Protecting the Player

In 2011, the U.S. Supreme Court struck down a California law banning the sale of certain violent video games to children without parental supervision. The court cited protected free speech as the Constitutional basis for their ruling. (*Brown v. Entertainment Merchants Association*, 564 U.S. 08-1448 (2011)).

Conversely, the importance of protecting children in the course of their video game playing has been recognized in Europe with the passage of the Swiss Youth and Media Act, which provides a regulatory framework for video game use. The law holds game providers accountable by taking measures to protect minors from harm presumably caused by the improper use of video games. However, crafting a one-law-fits-all regulation is challenging, given the rapidly evolving features and content of video games aimed at minors.

## Transparency of Transactions

The Europeans are also 'ahead of the game' in drafting laws related to the consumer transaction aspect of video game purchases. The offering of a 'free trial' is a

## Executive Summary

### › The Issue

What are the opportunities for lawyers in the field of Gaming Law?

### › The Gravamen

This segment of the entertainment industry is surpassing that of the movie industry and music industry combined and offers opportunities for lawyers across a wide field of practice areas.

### › The Path Forward

Technological and creative content developments are changing rapidly, and both case law and regulatory enforcement are rapidly evolving.

common practice by most providers, and a watchdog group, the German Federal Association of Consumer Organizations, challenged the 'paid subscription after free month' promotion, arguing that this could mislead consumers as to the conditions triggering an obligation to pay. They also objected to terms and conditions that gave the provider the right to change the subscription offer and prices at any time. After a provider refused to comply with the demands of a cease-and-desist letter, the Court of Appeals in Berlin ruled in favor of the watchdog group.

The recently adopted Fair Consumer Contracts Act (FCCA) mandates that video games have a 'cancellation button' with which consumers can more easily cancel online subscriptions, and this is expected to have far-reaching financial consequences for subscription-based business models that producers and distributors of gaming, streaming and other digital content depend on. The FCCA is considered much stronger than the EU consumer protection law known as the European New Deal for Consumers, and critics charge that it will undermine efforts to maintain European consensus regulation.

Also, in Germany, the online youth protection regulator, KJM, published ratings as to AI applications for age verification using biometric features to determine whether a user is of a certain age, thereby obviating the need for more convoluted ID checks.

## Then There Is the Licensing...

Last October, the Illinois legislature passed legislation radically changing the state's regulatory landscape for video gaming. Among other things, the law codified state supremacy over all video gaming activity, curtailing the ability of municipalities to tax and license establishments, video gaming terminals (VGTs), and terminal operators. Whereas non-home rule municipalities could only charge fees of \$25.00 per VGT, the new law raised the fee to \$250 per VGT.

Under a provision regarding a 'push tax' (as in pushing the button), a one-cent per-play tax is assessed on anyone playing a video game from a VGT. The push tax is currently being challenged by terminal operators who argue that there are legal as well as technological obstacles to enforcing that tax.

## Litigation Rising

The online video gaming industry has now surpassed that of both the movie and music segments of the entertainment markets, realizing a 27% increase last year in consumer spending on gaming, hardware, and accessories. Home confinement during the pandemic certainly fueled this growth as movie theaters remained shuttered and live indoor concerts were canceled. Along with that growth has come an increase in litigation. From IP challenges to licensing and distribution agreement controversies, as well as regulatory intervention, the field is wide open for lawyers who may wish to build a career in this fast-growing industry.

## Action

### 1 Domestic Regulation

State legislatures are promulgating laws affecting licensing as well as minor-player protections; know what risks exist for distributors and bars, restaurants, and fraternal organization lodges.

### 2 Cross-border Concerns

Before advising a video game developer or producer, understand where the game will be marketed and what regulations will apply in that jurisdiction.

### 3 IP Infringement

Become well-versed as to what constitutes Creative Commons assets versus those that are proprietary to such big-name developers as Sony.

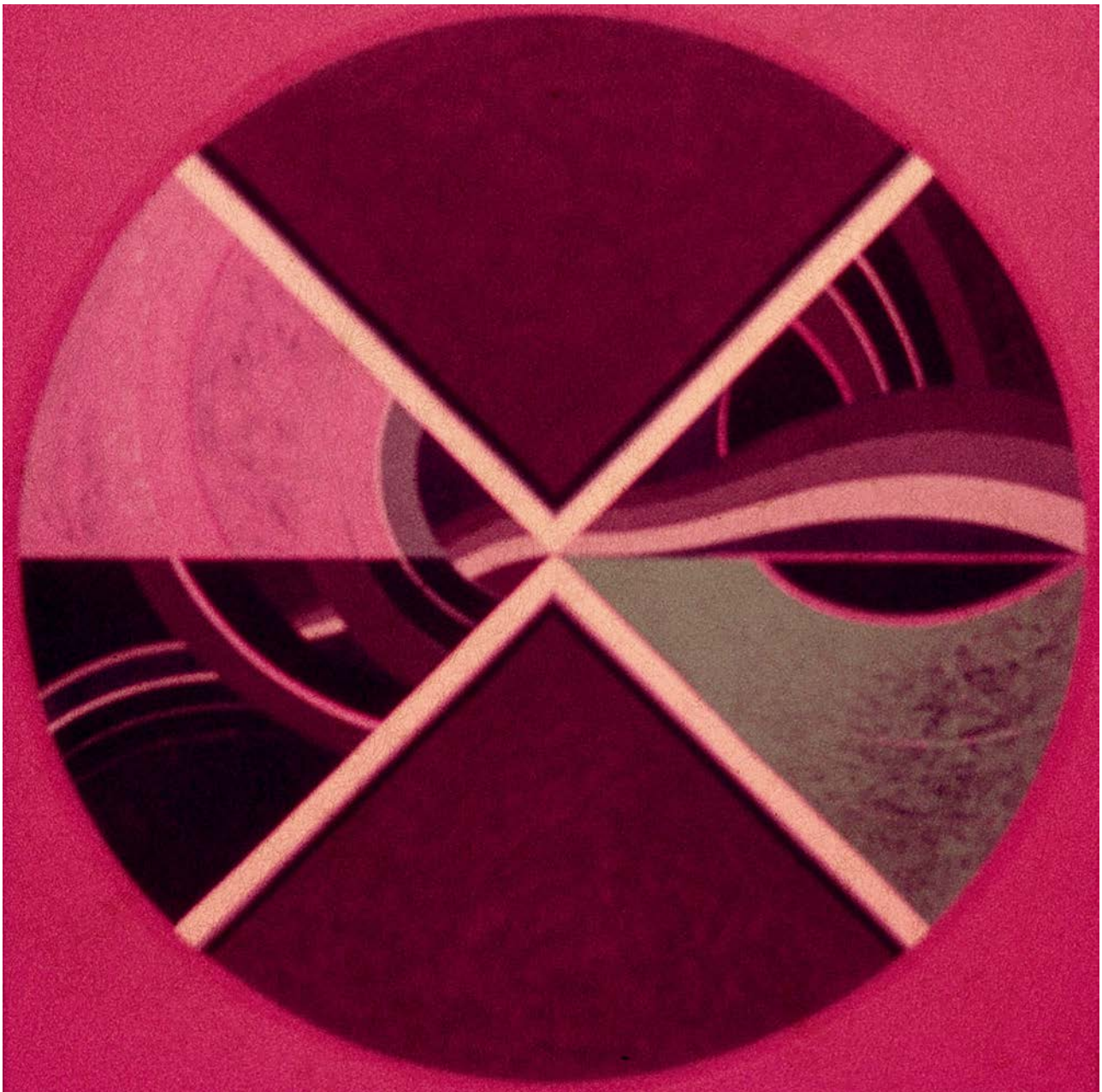
### 4 Is It Gambling?

Be aware that not all video games constitute games of skill and might be defined as gambling devices, thereby invoking both regulations as well as possible criminal sanctions.



An example of where litigation comes into play is the case of a fine line between gaming versus a game of chance and gambling. Gaming is supposed to be dependent upon well-honed mental and physical skills in order to accomplish a certain level of competency, while games of chance depend more on 'luck'.

With that distinction in mind, a class action lawsuit has been filed against Sega claiming that its Key Master game is 'rigged', allowing a player to win only after a certain number of losses. The game, according to the lawsuit, is therefore not a game of skill at all but more a game of chance. Either way, you pay your money...and take your chances.



## Further Reading

1. <https://www.jdsupra.com/legalnews/video-gaming-e-gaming-law-update-8310040/>
2. <https://gameslaw.org/>
3. <https://ugaminggroup.com/update-changes-to-illinois-video-gaming-law/>
4. <https://www.law.com/corpcounsel/2022/03/30/is-the-video-gaming-industry-facing-increased-litigation/?slreturn=20220906023103>
5. <https://www.businessinsider.com/lawsuit-says-sega-key-master-arcade-game-is-intentionally-rigged-2021-7>
6. <https://www.npd.com/news/press-releases/2022/the-npd-group-consumer-spend-on-pc-gaming-hardware-and-accessories-in-us-increased-25-in-2021/#:~:text=28%2C%202022%20%E2%80%93%20According%20to%20The,2019.>





### **Jeffrey Brochin, Esq.**

GREENPOINT STAFF COUNSEL AND  
CONTENT EDITOR

After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



### **William H. Anderson, Esq.**

MANAGING DIRECTOR

William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years of experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



**Sanjay Sharma, PhD**  
FOUNDER AND CHAIRMAN



**Pranav Menon, Esq.**  
LEGAL RECRUITMENT MANAGER  
AND DATA PRIVACY SPECIALIST –  
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